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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint Nos. 2014-218 and 2014-219

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a unanimous vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council's September 29, 2015 Interim Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (April 2015); Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009).

2. **The Custodian shall comply with item No. 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, to the Executive Director.**[1]

3. The GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt

[1] 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.

from disclosure under OPRA. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354-355 (App. Div. 2005); N.J.S.A. 47:1A-1.

4. **The Custodian must deliver[2] to the Council in a sealed envelope nine (9) copies of the unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index[3], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[4] that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

6. 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 26th Day of April, 2016

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 28, 2016

[2] The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
[3] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
[4] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-218 and 2014-219**[2]
Complainant

v.

Franklin Fire District No. 1 (Somerset)[3]
Custodial Agency

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, and/or fax transmittals regarding the Franklin Township Municipal Ethics Board ("Ethics Board") and the State of New Jersey Local Finance Board ("LFB") that was sent to and/or received by the Franklin Fire District No. 1 ("FFD") or its agents (including all its commissioners, legal counsel, and Ms. Dawn Cuddy), including attachments, between June 4, 2013, and April 3, 2014, regarding the Ethics Board and LFB.

OPRA request No. 2: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, legal appeals, and/or fax transmittals, regarding an appeal of the Ethics Board's "Resolution of Violation," issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01, that were sent to and/or received by the FFD and/or its agents (including all its commissioners, legal counsel and Ms. Cuddy) including attachments, between July 2, 2013, and April 3, 2014, regarding the Board and LFB.

Custodian of Record: Tim Szymborski
Request Received by Custodian: April 3, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: June 2, 2014

Background

September 29, 2015 Council Meeting:

During its public meeting on September 29, 2015, the Council considered the September 22, 2015 Findings and Recommendations of the Executive Director and all related

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] The GRC has consolidated the complaints for adjudication because of the commonality of the parties and issues.
[3] Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

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 has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests. Nor does the evidence show that an extraordinary amount of time and effort would be required. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.

2. **The Custodian shall comply with item No. 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, to the Executive Director.**

3. 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.

4. 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 October 1, 2015, the Council distributed its Interim Order to all parties. On October 2, 2015, the Custodian's Counsel sought an extension of five (5) business days to comply with the Council's Order, which extension was granted. On October 19, 2015, the Custodian's Counsel sought an additional extension of five (5) business days, citing unspecified "exceptional circumstances" for the extension. On October 20, 2015, the Complainant's Counsel objected to the additional extension, arguing that the Custodian already had one five (5) day extension and that the initial OPRA request was made eighteen (18) months earlier. However, the GRC did allow for an extension until October 26, 2015. On October 30, 2015, the Custodian provided responsive records to the Complainant, which contained several redactions for attorney-client privileged material. Several e-mails, which were contained in the responsive records, had attachments that were not disclosed. The Custodian offered no explanation for the

nondisclosure, although several records contained a handwritten note that reads: "Complainant already in possession" or some variation thereof.

On November 16, 2015, Complainant's Counsel submitted a brief, arguing that in several respects the Custodian had not complied with the Interim Order. He argued that, regarding the redacted material containing attorney-client privileged material, there was an insufficient basis or description of the material to ensure that all the redacted material was privileged. He also argued that e-mails in which an "effective majority" of the Fire Commissioners was copied are not protected under the privilege, as that would subvert the intent of the Open Public Meeting Act.

Analysis

Compliance

At its meeting on September 29, 2015, the Council ordered the Custodian to provide to the Complainant records responsive to his OPRA requests, identify any records that were redacted and the specific lawful basis for said redactions, and to submit a detailed explanation of the search undertaken to locate all forms of responsive correspondence. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 1, 2015, 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 October 8, 2015.

On October 2, 2015, the Custodian's Counsel sought an extension of five (5) business days to comply with the Council's Order, which was granted. On October 19, 2015, the GRC granted a second requested extension until October 26, 2015. On October 30, 2015, the Custodian provided responsive records to the Complainant, which contained several redactions for attorney-client privileged material. Several e-mails, which were contained in the responsive records, had attachments that were not disclosed. No explanation for the nondisclosure was given by the Custodian, although several contained a handwritten note that read: "Complainant already in possession."

Regarding nondisclosed attachments, Complainant's Counsel noted that the Complainant does not seek copies of any attachment that the Complainant provided to the Fire District. However, several of the e-mails with attachments do not have a handwritten notation to indicate that the "Complainant [is] already in possession" of the document. Nor do the descriptions in the headings of the e-mails appear to provide any reason to believe that the documents are in the Complainant's possession.

The Complainant's Counsel argued that the GRC previously addressed the issue of providing attachments to requested e-mails in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint Nos. 2012-284 *et seq.* and 2012-288 *et seq.* (Interim Orders dated March 25, 2014). The Complainant's Counsel contended that the Custodian, who is also the custodian of record in Carter, cannot legitimately claim that he was unaware of his obligation to provide attachments. The Complainant's Counsel thus argued that the Custodian's failure to provide

attachments represents additional proof that he is intentionally withholding responsive records. Moreover, the OPRA request specifically requested all attachments to the e-mails. Finally, the Custodian had an opportunity but failed to claim that the emails were not subject to disclosure.

A review of the e-mails, including those with the handwritten notations, yields multiple e-mails with attachments. The Council's prior decision in Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009), supports Counsel's argument that the Custodian was required to disclose attachments as part of the e-mails. The Council also briefly addressed disclosability of e-mail attachments in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq*. (Interim Order dated March 25, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated March 25, 2014). The Council again addressed attachments to e-mails in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order, dated April 28, 2015). There, the GRC determined, pursuant to Lewin, when the Custodian disclosed the requested e-mail records, but not the attachments, that the Custodian be given a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry, GRC 2013-287 at 5-6.

Therefore, the Custodian did not fully comply with the Council's September 29, 2015 Interim Order. Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry, GRC 2013-287; Lewen, GRC 2008-211.

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.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council[4] that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[4] Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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

Id. at 355.

Further, the Court found that:

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

Id.

Here, the Custodian disclosed several redacted e-mails. The Custodian also provided a document index of redacted material. However, other than stating to whom the e-mails were addressed and the dates of the material, there are no details upon which the Council could validate the asserted privilege. To that end, the GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt from disclosure under OPRA. *See* Paff, 379 N.J. Super. at 354-355; N.J.S.A. 47:1A-1.1.

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 fully comply with the Council's September 29, 2015 Interim Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (April 2015); Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009).

2. **The Custodian shall comply with item No. 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, to the Executive Director.**[5]

3. The GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt from disclosure under OPRA. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354-355 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver**[6] **to the Council in a sealed envelope nine (9) copies of the unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index**[7]**, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,**[8] **that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

---

[5] 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.

[6] The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

[7] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

[8] "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."

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

Prepared By: Ernest Bongiovanni
Staff Attorney

April 19, 2016[9]

[9] This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint Nos. 2014-218 and 2014-219

At the September 29, 2015 public meeting, the Government Records Council ("Council") considered the September 22, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests. Nor does the evidence show that an extraordinary amount of time and effort would be required. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.

2. **The Custodian shall comply with item No. 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,[1] to the Executive Director.[2]**

[1] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
[2] 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

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-218 and 2014-219**[2]
Complainant

v.

Franklin Fire District No. 1 (Somerset)[3]
Custodial Agency

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, and/or fax transmittals regarding the Franklin Township Municipal Ethics Board ("Ethics Board") and the State of New Jersey Local Finance Board ("LFB") that was sent to and/or received by the Franklin Fire District No. 1 ("FFD") or its agents (including all its commissioners, legal counsel, and Ms. Dawn Cuddy), including attachments, between June 4, 2013, and April 3, 2014, regarding the Ethics Board and LFB.

OPRA request No. 2: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, legal appeals, and/or fax transmittals, regarding an appeal of the Ethics Board's "Resolution of Violation," issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01, that were sent to and/or received by the FFD and/or its agents (including all its commissioners, legal counsel and Ms. Cuddy) including attachments, between July 2, 2013, and April 3, 2014, regarding the Board and LFB.

Custodian of Record: Tim Szymborski
Request Received by Custodian: April 3, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: June 2, 2014

Background[4]

Request and Response:

On April 3 2014, the Complainant submitted two (2) Open Public Records Act ("OPRA")

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] The GRC has consolidated the complaints for adjudication because of the commonality of the parties and issues.
[3] Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).
[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.

requests to the Custodian seeking the above-mentioned records. On April 8, 2014, the Custodian's Counsel responded in writing to both OPRA requests.

Regarding OPRA request No. 1, Counsel requested a two (2) week extension, owing to the number of parties that would have to be contacted to determine what responsive text messages existed. The Complainant replied by granting the extension upon condition that the Custodian provide the Complainant with the names of those conducting the search, the dates the searches were conducted, and which communication carriers were searched. Later the same day, Custodian's Counsel responded again, stating that the FFD has determined that utilizing its IT vendor, Network Blade, LLC, warrants the imposition of a special service charge. N.J.S.A. 47:1A-5. Counsel stated that Network Blade would spend approximately one (1) to two (2) hours at the FFD hourly rate of $120.00 to retrieve e-mails and that payment for one (1) hour is required to begin the search. Counsel further requested that the Complainant advise the FFD whether he objected to the charge.

Regarding OPRA request No. 2, Counsel similarly stated that Network Blade estimated approximately one (1) to two (2) hours of time at the FFD rate of $120.00 per hour. Counsel similarly noted that payment of one (1) hour would be required to begin the search and that the Complainant must advise the FFD whether he objected to the charge.

On the same day, Complainant responded and objected to both charges, arguing that the FFD was defying precedential GRC case law. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-234 (February 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-284 *et seq.* (Interim Order dated October 29, 2013); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-288 (Interim Order dated October 29, 2013). The Complainant also argued that these denials further evidence the FFD's policy of unlawfully denying him access to e-mails that require a simple search to locate.

Denial of Access Complaint:

On June 2, 2014, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council ("GRC"). The Complainant requested that the GRC take judicial notice of all filings in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated August 28, 2012)[5] to show that the Complainant has used e-mails to provide competent, credible evidence to refute certifications of FFD custodians. The Complainant also noted that he already filed several complaints regarding the FFD's attempts to impose a special service charge. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014).[6] The Complainant alleged that the instant complaints display yet another example of FFD's continued bad faith denials.

[5] The GRC notes that the issue in Carter, GRC 2011-76, was the existence of financial disclosure statements and not a special service charge or disclosability of e-mails.
[6] The Complainant also cited to Carter, GRC 2012-284, and Carter, GRC 2012-288; however, neither case involved the imposition of a special service charge.

Additionally, the Complainant requested that the GRC take judicial notice of all filings in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated August 28, 2012), to show that the Complainant has used e-mails to provide competent, credible evidence to refute certifications of FFD custodians. The Complainant alleged that the FFD's new special service charge policy is nothing more than another means to deny him access because of the potentially negative information that may be contained in the responsive records. The Complainant alleged that the proposed special service charge is nothing more than retaliation against him for previous OPRA requests seeking e-mails, several of which were the subject of complaints filed with the GRC. The Complainant argued that because his requests contained the requisite criteria and because he explicitly noted the Custodian's obligation to search for responsive e-mails in correspondence prior to the filing of these complaints, the imposition of a special service charge here is unreasonable and unwarranted. The Complainant also noted that the Council's decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012), was cited on multiple occasions in decisions the Council rendered against FFD prior to the submission of these requests; thus, the Custodian and Counsel cannot claim that they were unaware of the Council's established precedent.

Additionally, the Complainant argued that the Custodian's denial also extended to other types of correspondence. The Complainant contended that although the Custodian's Counsel stated that no other types of correspondence beyond e-mails exist, the Complainant received from the LFB a letter dated April 21, 2014, regarding Mr. Wickman.[7] The Complainant contended that this letter is clearly responsive to his OPRA requests and that any response sent by an "agent" of the FFD to the LFB would also be responsive and disclosable. The Complainant noted that he attached a letter from the LFB dated April 21, 2014, regarding Mr. Wickman.

The Complainant alleged that the proposed special service charge is nothing more than retaliation against him for previous OPRA requests seeking e-mails, several of which were the subject of complaints filed with the GRC. The Complainant argued that because his requests contained the requisite criteria, and because he explicitly noted the Custodian's obligation to search for responsive e-mails in correspondence prior to the filing of these complaints, the imposition of a special service charge here is unreasonable and unwarranted. The Complainant also noted that the Council's decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012), was cited on multiple occasions in decisions the Council rendered against FFD prior to the submission of these requests; thus, the Custodian and Counsel cannot claim that they were unaware of the Council's established precedent.

Finally, the Complainant requested that the Council: 1) determine that the Custodian violated OPRA by failing to provide the responsive records within seven (7) business days; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive record under the

[7] The Complainant noted that it is unnecessary for the GRC to order disclosure; however, the Complainant holds out the letter as an example of FFD's deliberate attempt to deny the existence of responsive records. The GRC notes that the LFB addressed this letter to both the Complainant and Bruce W. Padula, Esq., Cleary, Giacobbe, Alfieri, Jacobs, LLC. Based on the evidence on record, the relationship between the FFD and Mr. Padula is unclear.

totality of the circumstances; and 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:

On June 12, 2014, the Custodian filed Statements of Information ("SOI") for each complaint. The Custodian certified that he received both OPRA requests on March 19, 2014, and that Custodian's Counsel responded on his behalf on March 20, 2014.

The Custodian certified that in August 2012, the FFD decided that it would utilize its IT vendor to handle the retrieval of e-mail from FFD accounts. The Custodian affirmed that this policy was meant to curtail scrutiny over allegations of withholding e-mails and because the FFD is run by elected officials employing one (1) full time position. Thus, the FFD would provide OPRA requests to the vendor, who would estimate the amount of time necessary to search for and retrieve all response e-mails. The Custodian affirmed that once the IT vendor advised of the amount of time necessary to perform a search, he would utilize the 14-point analysis to determine whether a special service charge was warranted. The Custodian certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. **What records are requested?**

   OPRA request No. 1: E-mail communications between nine (9) individuals.
   OPRA request No. 2: E-mail communication between nine (9) individuals.

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

   OPRA request No. 1: Complainant sought, amongst other correspondence, electronic mail communications regarding the Ethics Board and the LFB.
   OPRA request No. 2: Complainant sought, amongst other correspondence, electronic mail communications regarding the "Appeal of the Ethics Board's Resolution of Violation issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01 (including any other reasonably construed variation thereof)."

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

   OPRA Request No. 1: From June 4, 2013, through April 3, 2014.
   OPRA Request No. 2: From July 2, 2013, through April 3, 2014.

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

   All electronic records would be held electronically on the FFD's server or held privately by the individual if on their own personal computer(s).

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

One (1) employee for the entire agency, who also performs all other administrative office functions for the entre agency.

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

   One (1),which is the only employee. However, this employee is also responsible for performing all other administrative duties of the FFD.

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

   Not sure, as all potentially responsive records would have to be reviewed. The Custodian noted that he could foresee certain records needing redactions for attorney-client privileged information, since the content concerns potential ethics complaint matters which could still be pending.

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?**

   FFD's only employee makes $20.00 an hour. Network Blade, who is definitely qualified to perform the search, charges $120.00 an hour.

   OPRA request No. 1: Network Blade has estimated it will take one (1) to two (2) hours to locate, retrieve, group and convert the records. The estimate is not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.
   OPRA request No. 2: Similarly, Network Blade has estimated one (1) to two (2) hours, not inclusive of review, redaction, preparation, and disclosure. The estimate is not inclusive of review for redactions or preparation of/and disclosure which FFD would not include in the charge.

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?**

   FFD's only employee could monitor inspection at $20.00 an hour, but any examination would need to be conducted by Counsel.[8] Review and potential redaction would not be charged, but monitoring the inspection of the documents, as requested by the Complainant, would have to be absorbed by him.

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?**

    N/A.

[8] The GRC notes that the Custodian included arguments for charging a monitoring fee by Counsel. The evidence of record indicates that a monitoring fee was not included.

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

    FFD felt it best to utilize Network Blade to respond to OPRA requests seeking e-mails for several reasons. As noted, the Custodian is an elected official with a full-time job and limited time for requests. Further, all officials are elected to three (3) year terms and job duties for them and the Records Custodian position could face a rapid turnover. Further, given the recent history of OPRA requests and the fact that FFD employs one (1) full time person, FFD felt it best to utilize the IT vendor as "the only experienced personnel" to retrieve the records responsive to these types of OPRA requests.

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

    Network Blade, at an hourly rate of $120.00.

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

    Full availability.

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

    The IT vendor, who is definitely qualified to perform the search, charges $120.00 an hour and has estimated it will take one (1) to two (2) hours per OPRA request to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge for each OPRA request but did not attempt to reach a compromise on the fee. Further, the Custodian asserted that because the Complainant failed to agree to the proposed special service charge, he had no choice but to deny the Complainant access to the responsive records. Additionally, the Custodian rejected the Complainant's novel contention that the GRC somehow has the authority to adjudicate conflicts of interest regarding who should be in charge of collecting records to determine whether they are responsive to a complaint.

The Custodian stated that the actual cost for each request was expected to be 1-2 hours at $120.00 per hour to pay the IT service to perform the search, locate the records, and convert same to the District for review and possible redaction. The Custodian certified that he did not believe was seeking any monitoring of the request.

The Custodian also certified, regarding OPRA Request No. 1, that to obtain the requested text messages, he contacted all persons listed in Complainant's requests to determine if any of those persons were in possession of the requested records and that all those persons responded they had no such records. Accordingly he reported that no responsive text records existed. Regarding other records that were not part of the requested e-mails, such as resolutions, correspondence, and similar documents, he attached to the SOI as EXHIBIT "A" a total of

seventeen (17) pages of responsive documents. He stated his failure to disclose same until the date of the SOI was "inadvertent." He stated that Special Counsel for the FFD possessed all the records and noted that the Complainant had refused to give him an extension of time.

Regarding OPRA Request No. 2, the Custodian certified that to obtain the requested text messages, he contacted all persons listed in Complainant's requests to determine if any of those persons were in possession of the requested records and that all those persons responded they had no such records. Accordingly he reported that no responsive text records existed. Regarding other records that were not part of the requested e-mails, such as resolutions, correspondence, and similar documents, he attached to the SOI as EXHIBIT "A" another seventeen (17) pages of responsive documents. He stated that his failure to disclose same until the date of the SOI was "inadvertent." He stated that a Special Counsel for the FFD possessed all the records and noted that the Complainant had refused to give him an extension of time. Finally, the Custodian certified that these documents were the same as those responsive to OPRA Request No. 1.

Additional Submissions:

On July 1, 2014, the Complainant's Counsel submitted rebuttals to the SOIs. Counsel first noted that the Custodian failed to submit a document index to the GRC in accordance with Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007). Counsel further noted that the Custodian also failed to submit a document index in Carter, GRC 2012-284 *et seq.* and Carter, GRC 2012-288 *et seq.*

Counsel further argued that although the Custodian attempted to paint the FFD as an overburdened agency, it does not fall within the limits provided for in OPRA allowing for limited OPRA hours. N.J.S.A. 47:1A-5(a). Counsel contended that the Custodian, who chose to run for office, is paid a $5,000 stipend and is by no means "virtually volunteer." Counsel also asserted that any inability of FFD to staff the agency appropriately should not affect the Complainant's ability to request and receive records as provided for in OPRA.

Counsel contended that the Custodian's 14-point analysis was flawed and that the subject OPRA requests do no warrant a special service charge. Further, Counsel asserted that there should be no need to "convert" any e-mails because they are, by their very nature, already in the Complainant's preferred medium of electronic format. Counsel further argued that since e-mails are stored electronically, they can and are required to be "provided free of charge" (*citing* N.J.S.A. 47:1A-5 (b)). Moreover, in the present complaints, the Custodian admitted that he asked the individuals involved if they had any responsive text messages in their possession, yet the Custodian could have at the same time inquired of those persons if they had responsive e-mails. The Complainant also argued that the Custodian admitted that in August 2012, the FFD decided it would use the IT Vendor Consultant to handle retrieval of emails, which directly contradicts the individual case by case analysis required by the GRC's 14 point analysis. Counsel reiterated the Complainant's argument that the Custodian continued to seek a special service charge, notwithstanding the Council's decision in Carter, GRC 2012-288, *et seq.*

On July 9, 2015, Complainant's Counsel submitted a Supplemental brief. He argued that in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint Nos. 2014-266 *et seq.* (April 2015), the Custodian's Counsel filed a Vaughn index for dates June 3, 2013, through February

14, 2014. He argued that here the date range for OPRA Request No. 1 is June 4, 2013, through April 3, 2014, and for OPRA Request No 2 the range is July 2, 2013, through April 3, 2014. Therefore, he argued, the Vaughn Index filed in Carter GRC 2014-266 *et seq.*, "may be responsive to either or both" of these instant cases. In the Vaughn Index, the Counsel for the District asserted a privilege for a January 9, 2014, text message. Accordingly, Complainant's Counsel argued that the Custodian certified untruthfully that there were no responsive text messages in the present case.

Analysis

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

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

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

The determination of what constitutes an "extraordinary expenditure of time and effort" under OPRA must be made on a case by case basis and requires an analysis of the variety of factors discussed in The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002).

Regarding this complaint, the Council recently adjudicated a similar issue in Carter, GRC 2013-281 *et seq*., Carter, GRC 2013-328 *et seq*., and Carter, GRC 2014-137 *et seq*. There, the Council consolidated multiple complaints and found that the evidence provided therein did not support the necessity of Network Blade to search for responsive e-mails. *See also* Verry, GRC 2013-287. In coming to their decision, the Council factored in the time frame for the requests, time period over which same were submitted, number of individuals identified, and the estimated amount of time to search and disclose records. Further, the Council noted that the evidence did not support that an IT level of expertise was necessary to complete the search for responsive records.

Notwithstanding the case-by-case nature of complaints involving disputed special service charges, both the facts and holdings in Carter, GRC 2013-281 *et seq*., Carter, GRC 2013-328 *et seq*., and Carter, GRC 2014-137 *et seq*., are on point with these complaints. Specifically, the Custodian provided nearly identical answers to his 14 point-analysis here as were submitted in Carter, GRC 2013-281 *et seq*., Carter, GRC 2013-328 *et seq*., and Carter, GRC 2014-137 *et seq*. Further, the requests at issue here are extremely similar to those in Carter, GRC 2014-266 *et seq*. In the absence of any additional compelling arguments, the GRC is satisfied that the proposed special service charge was unreasonable and unwarranted.

Therefore, the Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests. Nor does the evidence show that an extraordinary amount of time and effort would be required. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199. *See also* Carter, GRC 2013-281 *et seq*.; Carter, GRC 2013-328 *et seq*.; Verry, GRC 2013-287. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.

The GRC notes that the Complainant alleges that the Custodian should have provided a document index, citing Verry, GRC 2013-287. In Carter, GRC 2014-266 *et seq.*, the GRC noted that while a contention of a special service charge could result in a custodian's inability to submit a document index with his SOI, in those cases, the Custodian had already acknowledged receipt of Verry, GRC 2013-287. However here, the Custodian's SOI was submitted June 12, 2014, and preceded his knowledge of Verry.

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 has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests.

Nor does the evidence show that an extraordinary amount of time and effort would be required. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.

2. **The Custodian shall comply with item No. 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,[9] to the Executive Director.[10]**

3. 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.

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

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

September 22, 2015

[9] "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."

[10] 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.

3. 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.

4. 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 29th Day of September, 2015

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: October 1, 2015

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.