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

December 13, 2016 Government Records Council Meeting

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

Complaint No. 2014-266 & 2014-267

At the December 13, 2016 public meeting, the Government Records Council ("Council") considered the December 6, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Regarding Complainant Counsel's first point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See* D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); *See* D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. *See* Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Council should amend its conclusion No. 2 to restore 1 hour at a rate of $300.00 to the award. **Accordingly, the Council should amend its fee award, pending Complainant's Counsel's new submission as discussed below, to $6,390.00, representing the adjusted figure of 21.3 hours of service at $300 per hour, or an increase of $300.00.**

4. Because the Complainant's Counsel prevailed on a limited portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Interim Order Rendered by the
Government Records Council
On The 13th Day of December, 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: December 14, 2016

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Reconsideration
Prevailing Party Attorney's Fees
Supplemental Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting

Jeff Carter[1]
Complainant

GRC Complaint Nos. 2014-266 and 2014-267[2]

v.

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

OPRA Request No. 1: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Dawn Cuddy) from April 4, 2014, to July 2, 2014, regarding an appeal of the Franklin Township Municipal Ethics Board's ("Board") "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda and/or fax transmittals) sent or received by the District and/or its agents (including all commissioners, legal counsel, and Ms. Cuddy) from April 4, 2014, through July 2, 2014, regarding the Board and State Local Finance Board ("LFB").

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 2, 2014
Response Made by Custodian: July 14, 2014
GRC Complaint Received: July 24, 2014

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the April 19, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the

[1] Represented by John A. Bermingham, Jr., Esq., (Mount Bethel, PA).
[2] The GRC has consolidated these 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).

parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Council finds that $300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at $300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

2. Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the table attached, the Council finds that the time expended was not reasonable. The Council finds that 20.3 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of $6,090.00 representing 20.3 hours of service at $300 per hour.**

3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Procedural History:

On May 2, 2016, the Council distributed its Final Decision to all parties. On May 3, 2016, the Complainant sought a copy of "Exhibit A" from the Final Decision, which comprised a copy of the GRC's fee application table, because he did not receive same as part of the Final Decision. On May 13, 2016, the Complainant reiterated his request to obtain a copy of "Exhibit A," and requested additional time to weigh his options, either to seek reconsideration or appeal the decision. On the same day, the GRC provided the Complainant with a copy of "Exhibit A" and granted his request for an extension until May 27, 2016.

On May 25, 2016, the Complainant's Counsel filed a request for reconsideration of the Council's April 26, 2016 Final Decision, based on illegality and a mistake.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of the Council's decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's April 26, 2016 Final Decision on May 25, 2016, two (2) business days prior to the

expiration of the extended deadline. Therefore, the request to reconsider the April 26, 2016 Final Decision was timely received.

Applicable case law holds that:

> "A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant's Counsel submitted a twenty (20) page brief as part of his request for reconsideration. However, he only addressed the Council's April 26, 2016 Final Decision awarding prevailing party attorney's fees over the three (3) pages. The remainder of Complainant Counsel's brief either rehashes previously submitted arguments or posits additional arguments from pending complaints currently before the Office of Administrative Law ("OAL").[4]

Non-Prevailing Party Fee Issues

The Complainant's Counsel provided a number of arguments relevant to prior adjudications of this complaint. Of particular note, the Complainant's Counsel raised issues regarding the medium of the records, alleged that the Custodian failed to submit a document index as part of the Statement of Information, and incorrectly alleged that the GRC failed to address the non-disclosure of a letter dated April 21, 2014.[5] However, as noted in its Final Decision, the GRC's regulations simply did not provide for briefs contesting prior decisions beyond the time afforded either to request reconsideration or file an appeal. N.J.A.C. 5:105-2.10; N.J.A.C. 5:105-2.11. Here, the Council ordered the Custodian to disclose certain records on April 28, 2015; Complainant's Counsel received that Order on April 29, 2015. In its subsequent

[4] The Complainant's Counsel submitted as part of his brief an Initial Decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288, *et seq*. However, OAL has not returned that complaint to the GRC in order to determine whether it would accept, reject, or modify said decision.

[5] The GRC notes that it, in fact, addressed the April 21, 2014 letter in its initial adjudication of these complaints. *See* Carter, GRC 2014-266, *et seq.* (Interim Order dated April 28, 2015) at 3. In a footnote, the GRC noted that the Complainant expressly stated that it was unnecessary for the GRC to disclose the record because he was already in possession of it. The GRC also addressed the document index issue in the same decision. Id. at 8.

October 27, 2015 Interim Order, the Council found that the Custodian did not knowingly or willfully violate OPRA; Complainant's Counsel received that Order on October 28, 2015. Had the Complainant's Counsel wanted the Council to reconsider either of those decisions, the applicable regulations required him to file same within ten (10) business days of his receipt of the Orders. N.J.A.C. 5:105-2.10(a) - (e). Also, the Complainant's Counsel did not consider the fact that the Council has the discretion not to consider any attempted new arguments or briefs that are filed out of time and several months following a decision.

The Complainant's Counsel cited to Gilleran v. Rutherford Downtown Partnership Inc., 2014 N.J. Super. Unpub. Lexis 2188 (Law Div. 2014) as legal basis to accept his additional arguments. He contends that a rule permits a motion for rehearing or reconsideration to those seeking to alter or amend a judgment or order. According to the Rule, assuming *arguendo* that it is applicable to OPRA and agency adjudications, a moving party is required to make such a motion within twenty (20) days after judgment or service on the parties. In Gilleran, 2014 N.J. Super. Unpub. Lexis 2188, the Appellate Division held that "in the interest of justice and in the exercise of sound discretion," the courts may consider new or additional information that the moving party "could not have provided on first application." Id. at 10 (*citing* R. 4:49-2). However, the Gilleran Court also denied defendants' motion for reconsideration.

Prevailing Party Fee Issues

The Complainant's Counsel raised only two instances where the Council denied a portion of his fee. First, the Complainant's Council disputed the Council's decision denying fees generated from his various requests that the GRC acknowledge receipt of his initial filings. Second, Counsel disputed the denial of 1 hour for preparation of his fee application, noted on his November 17, 2015 entry in his statement of services

The GRC rejects the first point of Complainant Counsel's request for reconsideration. The standard for determining reasonableness of fees is the New Jersey Rules of Professional Conduct, which require an adjudicator to address, among other factors, "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." R.P.C. 1.5(a). In its Final Decision, the Council denied fees associated with the acknowledgement e-mails because they appeared to constitute unnecessary "make-work." Instead, the Complainant's Counsel requested that the GRC send an acknowledgement of receipt for each of the subject Denial of Access Complaints. The Complainant's Counsel billed 0.3 hours of time to review each e-mail. However, the Complainant's Counsel submitted no proof to support that the "time and labor required" to review and address receipt notifications was necessary. As an example of the unnecessary nature of this task and contrary to his letter brief arguments, Counsel could have utilized an e-mail program (such as Microsoft Outlook®) that generated an automated "received" notification. This would have negated his need to request and subsequently review acknowledgement correspondence.

However, the GRC accepts the second point of Complainant Counsel's request for reconsideration. The Appellate Division determined in Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005), that prevailing party attorneys

may be compensated for their time spent preparing fee applications so long as the amount charged is reasonable. *See also* Tanksley v. Cook, 360 N.J. Super. 63, 67 (App. Div. 2003); H.I.P. (Heightened Independence & Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 163 (Law Div. 1996); Robb v. Ridgewood Bd. of Educ., 269 N.J. Super. 394, 411 (Ch. Div. 1993); Council Enterps., Inc. v. Atlantic City, 200 N.J. Super. 431, 443 (Law Div.1984)). Here, Complainant's Counsel's charge of 1 hour to prepare the prevailing party fee application is reasonable and therefore eligible for reimbursement. Accordingly, the Council shall revise its prior counsel fee award to include an additional $300 as payment for 1 work hour in preparing the fee application.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384.

Regarding Complainant Counsel's first point and remaining issues, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See* D'Atria, 242 N.J. Super. at 401. Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. *See* Courier News, 378 N.J. Super. at 547. Thus, this portion of the request for reconsideration should be accepted. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Accordingly, the Council should amend its conclusion No. 2 to restore 1 hour at a rate of $300.00 to the award. **Accordingly, the Council should amend its fee award, pending Complainant's Counsel's new submission as discussed below, to $6,390.00, representing the adjusted figure of 21.3 hours of service at $300 per hour, or an increase of $300.00.**

Additionally, because the Complainant's Counsel prevailed on a limited portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Regarding Complainant Counsel's first point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See* D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); *See* D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. *See* Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Council should amend its conclusion No. 2 to restore 1 hour at a rate of $300.00 to the award. **Accordingly, the Council should amend its fee award, pending Complainant's Counsel's new submission as discussed below, to $6,390.00, representing the adjusted figure of 21.3 hours of service at $300 per hour, or an increase of $300.00.**

4. Because the Complainant's Counsel prevailed on a limited portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager December 6, 2016

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

FINAL DECISION

April 26, 2016 Government Records Council Meeting

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

Complaint Nos. 2014-266 and 2014-267

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the April 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council finds that $300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at $300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

2. Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the table attached, the Council finds that the time expended was not reasonable. The Council finds that 20.3 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of $6,090.00 representing 20.3 hours of service at $300 per hour.**

3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 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: May 2, 2016

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Prevailing Party Attorney's Fees
Supplemental Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-266 and 2014-267**[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 and attachments (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Dawn Cuddy) from April 4, 2014, to July 2, 2014, regarding an appeal of the Franklin Township Municipal Ethics Board's ("Board") "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda and/or fax transmittals) sent or received by the District and/or its agents (including all commissioners, legal counsel, and Ms. Cuddy) from April 4, 2014, through July 2, 2014, regarding the Board and State Local Finance Board ("LFB").

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 2, 2014
Response Made by Custodian: July 14, 2014
GRC Complaint Received: July 24, 2014

Background

October 27, 2015 Council Meeting

At its October 27, 2015 public meeting, the Council considered the October 20, 2015 Supplemental 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 these 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 complied with the Council's September 29, 2015 Interim Order because he responded in the prescribed time frame by providing the April 14, 2014 e-mail to the Complainant without redactions and simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian did not bear his burden of proving that the proposed special service charge was lawful. The Custodian also failed to comply fully with the Council's April 28, 2015 Interim Order, and ultimately he unlawfully denied access to portions of the April 14, 2014 e-mail. However, the Custodian complied with the Council's June 30 and September 29, 2015 Interim Orders respectively. 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.

3. Pursuant to the Council's April 28 and September 29, 2015 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all records, to include the April 14, 2014 e-mail. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.1.13(d).**

Procedural History:

On October 28, 2015, the Council distributed its Interim Order to all parties. On November 17, 2015, the Complainant's Counsel, John A. Bermingham, Jr., Esq. ("Counsel"), filed a Certification of services in support his application for fees.

Analysis

Compliance

At its October 27, 2015 meeting, the Council permitted Complainant "to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)." Further, the Council provided that the Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

On November 17, 2015, the thirteenth (13th) business day after receipt of the Council's Order, Counsel filed an application for fees ("Application") in compliance with the Interim Order. Neither the Custodian of Franklin Fire District No. 1 nor Custodian's counsel filed opposition to the Application

Prevailing Party Attorney's Fees

Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections, ("NJDPM") 185 N.J. 137, 152 (2005) (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros.,113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). OPRA provides that:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. *See generally* NJDPM, 185 N.J. 137. "By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." Id. at 153. (quoting Courier News v. Hunterdon Cty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found that the Complainant achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006). Further, the Council found that a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was

a prevailing party entitled to an award of a reasonable attorney's fees and directed the Complainant to file an application for attorney's fees.

A. Standards for Fee Award

The starting "'point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,' a calculation known as the lodestar." NJDPM, 185 N.J. at 153. (quoting Rendine v. Pantzer, 141 N.J. 292, 324 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. *See*, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (Law Div. 1996) (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)). Nor do they contemplate redundancy. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983) (*citations omitted*) (Double dipping, in any form, cannot be condoned). Our cases supply no authority for rewarding non-stop meter running in law offices.

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. *See* Walker, 415 N.J. Super. at 606 (citing Furst v. v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. 292 (1995) to OPRA)). However, "[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course." NJDPM, 185 N.J. at 157.

"[T]he critical factor in adjusting the lodestar is the degree of success obtained." Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If "a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount." NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that "unusual circumstances may occasionally justify an upward adjustment of the lodestar," but cautioned that "[o]rdinarily the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a 'garden variety' OPRA matter . . . enhancement will likely be inappropriate." Id. at 157.

Moreover, in all cases, an attorney's fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying R.P.C. § 1.5(a))).

> To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13(b) sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee. Finally, the Appellate Division has noted that "[i]n fixing fees against a governmental entity, the judge must appreciate the fact that 'the cost is ultimately borne by the public' and that 'the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.'" HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of $11,310, representing 37.7 hours of work at $300 per hour. Counsel supports the hourly rate through a recitation of his experience and years in practice. Certification of John A. Bermingham, Esq. ("Certification"), dated November 17, 2015 at ¶ 7 (Exhibit B).

The Council finds that $300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013) ("The rate of $300 is reasonable for [an OPRA] practitioner . . . in this geographical area"). Accordingly, the Council finds that Counsel's hourly rate should be assessed at $300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. *See* Hensley, 461 U.S. at 434. The New Jersey District Court, in PIRG v. Powell Duffryn Terminals, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff's trial preparation fee request by 50%. The PIRG court, noting that plaintiff's counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

In accordance with N.J.A.C. 105-2.13(b), Counsel's time-sheets provide descriptions of the work performed. N.J.A.C. 105-2.13(b)(5); Certification. Most of Counsel's entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. Id. The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel communicated. Similarly, the notations for reviewing and drafting of pleadings identify the specific document examined or drafted and the time spent on the task.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, a review of a fee application must be conducted on a case-by-case basis. The GRC conducted a review of the fee application submitted. Each time entry was reviewed and considered. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). While the Council does not comment on the strategy of an attorney's representation of his client, the Council indeed recognizes that that any fees awarded will be paid from public funds. *See*, HIP, 291 N.J. Super. at 167. The recommendations of the Executive Director following review of the application are set forth in the attached Table. Although the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the GRC finds the total hours excessive and the total fee not reasonable, as discussed below.

In support of his request for fees, Counsel attached to his Certification of Services, a four (4) page chart itemizing his hours and expenses ("Time log") of his time. For the period from "July 15, 2014 and November 17, 2015," Counsel billed a total of 37.7 hours for work on the file. This time included reviewing the file, conducting legal research, drafting the complaint and accompanying briefs, reviewing e-mail correspondence to and/or from the GRC and/or the client, communicating with the client regarding the action, drafting letter brief(s) in support of his complaint, in rebuttal to the Custodian's SOI, in rebuttal to the Custodian's compliance, drafting a separate brief alleging "new evidence," and drafting a certification for the fee application.

To begin with, Counsel certifies that he has represented the Complainant in "many other matters before the GRC", all of which "arose under OPRA and the Common law right of access." Certification of Services, pg. 3 ¶ 6. Notwithstanding this experience, Counsel expended a considerable amount of time on basic research. For example, Counsel bills for researching OPRA statute and administrative code sections, namely N.J.S.A. §§ 47:1A-5 *et. seq.*; 47:1A-6; 47:1A-11 and N.J.A.C. 5:105-2.1 (h). *See, e.g*. Time Log entries for July 16 and July 17, 2014; These are some of the same statutory sections researched by Counsel in prior matters. *See* Carter v. Franklin Fire Dist. # 2, GRC Complaint No. 2011-228 (March 25, 2014) and Carter v. Franklin Fire Dist. #2, GRC Complaint No. 2011-262 (March 25, 2014). Likewise, he has

submitted billing for reviewing these same basic statutory provisions in ending fee applications before this Board. See e.g. Carter v. Franklin Fire District #2, GRC Complaint No. 2013-281 to 283. Similarly, Counsel bills for researching O'Shea v. Paff v. Borough of Emerson, No. 9008-07, slip op. at 11-12 (2008) WL 2328239 (N.J. Super. Law Div., June 3, 2008) which he reviewed in the aforementioned Carter v. Franklin Fire Dist. #2 cases, Complaint Nos. 2001-228 and 2001-262. Certification, pg. 4, ¶ 6, and Time log entry July 16 and July 17, 2014. Exhibit B; Counsel found it necessary to review seminal cases with which even a novice OPRA counsel should be familiar. Finally, Counsel billed to review several cases, involving the same parties and often in almost identical circumstances, some of which he reviewed multiple times in other pending GRC matters. In those cases, the research of same was sometimes within weeks or months of each other. Because of block billing, it is difficult, if not impossible, to know how much time Counsel spent on reviewing which cases; however, the GRC will award attorney's fees for some research in each matters. What is not contemplated by OPRA, however, is awarding attorney's fees to Counsel for reviewing and re-reviewing the same cases over and over, some of which are basic in nature and unaltered by practice. Therefore, it is not recommended that these fees be awarded unless reasonably reduced, as provided for in the attached Table, Exhibit A.

Even if Counsel truly needed to re-review the same cases and research seminal and elementary matters for OPRA practitioners, fee shifting statutes do not contemplate that the losing party be required to pay for the learning curve of the prevailing party's counsel. Planned Parenthood of Central New Jersey, et. al. v. the Attorney General of the State of NJ. et. al., 297 F.3d 253, 271 (3rd Cir. 2001). HIP v. K. Hovnanian, 291 N.J. Super. at 160 (*citations omitted*). "A fee applicant cannot demand a high hourly rate – which is based on his experience, reputation, and a presumed familiarity with the applicable law – and then run up an inordinate amount of time researching that same." Microsoft Corp. v. United Computer Res. of N.J., Inc., 216 F. Supp. 2d 383, 392 (D.N.J. May 23, 2002) (*citations omitted*). "The higher the allowed hourly rate commanded based upon skill and experience, the shorter the time it should require an attorney to perform a particular task." HIP v. K. Hovnanian, 291 N.J. Super. at 160.

The GRC notes pages of identical arguments, including block quotes, in the numerous filings. Despite their length, the briefs do little to advance Plaintiff's cases; the facts contained in the briefs are adequately set forth in the Complaint, and the legal analysis provides little more than well-settled law. The briefs filed in opposition to the Custodian's SOI, provide similar concerns. For example, Counsel seeks a total of six (6) hours to draft Denial of Access Complaints with supporting briefs, which are strikingly similar. Bermingham Letter Briefs for Complaint Nos. 2014-266 and 2014-267, dated July 23, 2014. Essentially, they only differ in three or four edits where the subject matter of the complaint differs. Similarly, Counsel's two separate briefs in rebuttal of the Custodian's identical SOI are also nearly word-for-word identical. *See* comments to Time log entries of 7/16/14-7/17/14 and 8/18/14 in the attached Table. Moreover, the record reveals unnecessary discussions between client and his seemingly well-informed client (who has filed and litigated approximately seventy other GRC Complaints), concerning such matters as informing the client that the GRC sent a request for an SOI to the Custodian. Additional unnecessary billing for matters of slight importance to the client is included in the attached Table. Counsel also billed for "new evidence" briefs when hearings under new evidence are not contemplated by the GRC's regulations and none of which altered

the GRC's initial decision. Finally, Counsel seeks reimbursement for the time spent compiling the justification for the fees. The Counsel finds compensating Counsel for time he spent justifying his fee does not advance the purposes of OPRA and had no effect on the Custodian's behavior.

In sum, the GRC conducted a review of the fee application submitted. In so doing, the GRC found that the time spent on the file exceeds that which an experienced OPRA attorney should ordinarily require. Further, much of what Counsel filed was unnecessary and/or redundant. The recommendations of the Executive Director following that review are set forth in the table attached as Exhibit A. For the reasons set forth therein, the Council finds that the time expended was not reasonable. The Council finds that 20.3 hours at $300.00 per hour is reasonable for the work performed by Counsel in the instant matter. Teeters, 387 N.J. Super. 432; Mason. 196 N.J. 51.. **Accordingly, the Executive Director recommends that the Council awards fees to Mr. Bermingham, Counsel to the Complainant, for the amount of $6,090.00, representing 20.30 hours of service at $300.00 per hour**.

2. **Enhancement Analysis**

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council finds that $300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (May 2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at $300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

2. Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the table attached, the Council finds that the time expended was not reasonable. The Council finds that 20.3 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of $6,090.00 representing 20.3 hours of service at $300 per hour.**

3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Ernest Bongiovanni
Staff Attorney

April 19, 2016

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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 27, 2015 Government Records Council Meeting

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

Complaint Nos. 2014-266 and 2014-267

At the October 27, 2015 public meeting, the Government Records Council ("Council") considered the October 20, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the April 14, 2014 e-mail to the Complainant without redactions and simultaneously providing certified confirmation of compliance to the Executive Director.

2. The Custodian did not bear his burden of proving that the proposed special service charge was lawful. The Custodian also failed to comply fully with the Council's April 28, 2015, Interim Order and ultimately he unlawfully denied access to portions of the April 14, 2014, e-mail. However, the Custodian complied with the Council's June 30 and September 29, 2015, Interim Orders respectively. 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.

3. Pursuant to the Council's April 28 and September 29, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all records, to include the April 14, 2014, e-mail. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).

Interim Order Rendered by the
Government Records Council
On The 27th Day of October, 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 28, 2015

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-266 and 2014-267**[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 and attachments (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Dawn Cuddy) from April 4, 2014, to July 2, 2014, regarding an appeal of the Franklin Township Municipal Ethics Board's ("Board") "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda and/or fax transmittals) sent or received by the District and/or its agents (including all commissioners, legal counsel, and Ms. Cuddy) from April 4, 2014, through July 2, 2014, regarding the Board and State Local Finance Board ("LFB").

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 2, 2014
Response Made by Custodian: July 14, 2014
GRC Complaint Received: July 24, 2014

Background

September 29, 2015 Council Meeting:

At its September 29, 2015, public meeting, the Council considered the September 22, 2015, *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] The GRC has consolidated these 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).

1. The Custodian complied with the Council's June 30, 2015, Interim Order because he responded in the extended time frame by providing nine (9) copies of the subject e-mail for an *in camera* review, certified to the search untaken to locate all responsive correspondence, and simultaneously provided certified confirmation of compliance.

2. The Custodian unlawfully denied access to the redacted material within the April 14, 2014, e-mail because same does not fall within the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must therefore disclose the record without redactions to the Complainant.

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**[4]

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

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

Procedural History:

On October 1, 2015, the Council distributed its Interim Order to all parties. On October 7, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he simultaneously provided to all parties a copy of the unredacted e-mail that was reviewed *in camera* and also certified confirmation of compliance.

Analysis

Compliance

At its September 29, 2015, meeting, the Council ordered the Custodian to disclose the subject e-mail without redactions and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4. 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.

[4] Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, 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.

On October 7, 2015, the fourth (4th) business day after receipt of the Council's Order, the Custodian disclosed the e-mail to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the April 14, 2014, e-mail to the Complainant without redactions and simultaneously providing 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)).

Here, the Custodian did not bear his burden of proving that the proposed special service charge was lawful. The Custodian also failed to comply fully with the Council's April 28, 2015, Interim Order, and ultimately he unlawfully denied access to portions of the April 14, 2014, e-mail. However, the Custodian complied with the Council's June 30, and September 29, 2015, Interim Orders respectively. 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.

Prevailing Party Attorney's Fees

OPRA provides that:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866."

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

> [R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

The Complainant filed the instant complaint disputing the proposed special service charge and requested that the GRC order disclosure of all responsive records. In its April 28, 2015, Interim Order, the Council determined that the charge was unreasonable and ordered disclosure of all records. Subsequent to this Order, the Custodian asserted that one (1) record, an e-mail dated April 14, 2014, contained exempted material. The Council conducted an *in camera* review and determined that the redacted material did not fit the cited exemption; thus, it ordered disclosure of same. The Custodian complied with the order on October 7, 2015. Accordingly, the Complainant is a prevailing party, entitled to an award of attorney's fees.

Therefore, pursuant to the Council's April 28 and September 29, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all records, to include the April 14, 2014, e-mail. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 29, 2015, Interim Order because he responded in the prescribed time frame by providing the April 14, 2014 e-mail to the Complainant without redactions and simultaneously providing certified confirmation of compliance to the Executive Director.

2. The Custodian did not bear his burden of proving that the proposed special service charge was lawful. The Custodian also failed to comply fully with the Council's April 28, 2015, Interim Order and ultimately he unlawfully denied access to portions of the April 14, 2014, e-mail. However, the Custodian complied with the Council's June 30 and September 29, 2015, Interim Orders respectively. 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.

3. Pursuant to the Council's April 28 and September 29, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all records, to include the April 14, 2014, e-mail. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015

State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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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. 2014-266 and 2014-267

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 complied with the Council's June 30, 2015, Interim Order because he responded in the extended time frame by providing nine (9) copies of the subject e-mail for an *in camera* review, certifying to the search untaken to locate all responsive correspondence, and simultaneously providing certified confirmation of compliance.

2. The Custodian unlawfully denied access to the redacted material within the April 14, 2014, e-mail because same does not fall within the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must therefore disclose the record without redactions to the Complainant.

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**[1]

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

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

[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.

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

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Jeff Carter[1] **GRC Complaint Nos. 2014-266 and 2014-267**[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 and attachments (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Dawn Cuddy) from April 4, 2014, to July 2, 2014, regarding an appeal of the Franklin Township Municipal Ethics Board's ("Board") "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda and/or fax transmittals) sent or received by the District and/or its agents (including all commissioners, legal counsel, and Ms. Cuddy) from April 4, 2014, through July 2, 2014, regarding the Board and State Local Finance Board ("LFB").

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 2, 2014
Response Made by Custodian: July 14, 2014
GRC Complaint Received: July 24, 2014

Records Submitted for *In Camera* Examination: E-mail from Bruce Padula, Esq., to the Custodian's Counsel, Ms. Cuddy, and Todd Brown, dated April 14, 2014 (9:55 a.m.).

Background

June 30, 2015 Council Meeting:

At its public meeting on June 30, 2015, the Council considered the June 23, 2015,

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] The GRC has consolidated these 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).

Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council's April 28, 2015, Interim Order. Specifically, the Custodian responded within the extended time frame by providing responsive records to the Complainant, identifying the record containing redactions and the specific lawful basis therefor, and simultaneously providing certified confirmation of compliance to the Executive Director. However, he failed to provide a detailed explanation of his search to locate all forms of responsive correspondence.

2. The GRC must conduct an *in camera* review of the responsive e-mail, which is from Bruce Padula to the Custodian's Counsel, Dawn Cuddy, and Todd Brown and is dated April 14, 2014 (9:55 a.m.), to determine the validity of the Custodian's assertion that the body of same is attorney-client privileged and exempt from disclosure under OPRA. *See* Paff, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver[4] to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index[5], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[6] 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**.

4. Additionally, the Custodian's failure to provide the GRC with a detailed explanation of his search to locate all responsive correspondence did not absolve him from the obligation to provide same to the GRC. Thus, the GRC is providing the Custodian a final chance to submit a detailed explanation of the search conducted to locate all forms of responsive correspondence.

5. **The Custodian shall comply with item No. 4 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.[7]**

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[4] 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.

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

[6] "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."

[7] 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 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.

7. 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 July 1, 2015, the Council distributed its Interim Order to all parties. On July 6, 2015, the Custodian's Counsel e-mailed the GRC, seeking an extension of ten (10) business days to comply with the Council's Order.

On the same day, the Complainant's Counsel objected to any extension of time, arguing that the FFD has consistently sought unwarranted extensions. Additionally, the Complainant's Counsel argued that the FFD has also consistently delayed *in camera* reviews of redacted records in bad faith. Specifically, the Complainant's Counsel asserted that the FFD should have proactively submitted the subject e-mail for an *in camera* review as part of its April 28, 2015, compliance because it should have known by now that GRC would order same.

On July 9, 2015, the GRC responded to all parties, advising that a ten (10) business day extension was unreasonable given the facts of this complaint. However, the GRC did allow for an extension until July 16, 2015.

On the same day, the Complainant's Counsel submitted a letter brief to the GRC in which he asserted new evidence.[8] The Complainant's Counsel argued that OPRA broadly defines a "government record" to include "electronically stored data." N.J.S.A. 47:1A-1.1; Gilleran v. Twp. of Bloomfield, 2015 N.J. Super. Unpub. LEXIS 76, 7 (App. Div. 2015). The Complainant's Counsel asserted that the Council previously held *sua sponte* that he failed to advance a reasonable argument for disclosure of records in their original writable form. *See* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-137 *et seq.* (Interim Order dated April 28, 2015).

The Complainant's Counsel argued that here, although the Complainant sought records in "electronic format," the Custodian's disclosure of same in .pdf format did not satisfy the Complainant's intent to receive records in their original electronic format. The Complainant's Counsel requested that the Council consider his rebuttal letter brief in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complainant No. 2015-166, addressing that exact issue. Gilleran v. The Rutherford Downtown P'ship, 2014 N.J. Super. Unpub. LEXIS 2188, 10-11 (September 5, 2014)(holding that a court should consider new evidence that was not available at the time of the first application per NJ Court Rule R. 4:49-2). The Complainant's Counsel noted that the GRC

[8] The Complainant's Counsel requested that the GRC order the Custodian to confirm whether the document index that is attached to the e-mail at issue here was responsive to the Complainant's request in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint Nos. 2014-218 & 2014-219, because the GRC has not addressed previous requests for same in that case. The GRC notes that Carter is still pending adjudication before the Council. Further, the GRC will not address Counsel's request because it is not relevant to this complaint.

has previously reversed itself in one complaint based on the facts of another. *See* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated December 18, 2012). The Complainant's Counsel argued that the GRC's consideration of Gilleran, and rebuttal brief prior to an appeal is in the public's best interest.

On July 15, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing the GRC with nine (9) copies of the April 14, 2014, e-mail for an *in camera* examination. The Custodian also certified that he was providing all parties with redacted copies of the e-mail.

The Custodian additionally detailed the search he undertook to locate all responsive records. Specifically, the Custodian certified that he contacted all commissioners and Ms. Cuddy to determine if they had any responsive records in their personal e-mail accounts or on their cell phones. The Custodian affirmed that he also asked Ms. Cuddy to search through the FFD's files for any responsive correspondence. The Custodian certified that he forwarded the request to Custodian's Counsel, requesting that he search his own records and contact Mr. Padula. The Custodian certified that, regarding e-mails, the FFD utilized its IT vendor to locate all responsive records. The Custodian affirmed that he forwarded all records deemed to be responsive to the Custodian's Counsel for review. The Custodian certified that Custodian's Counsel provided him all records, including those redacted and a document index, for his review prior to disclosure.

Analysis

Compliance

At its meeting on June 30, 2015, the Council ordered the Custodian to provide to the GRC the subject e-mail for an *in camera* review and to provide a detailed description of his search to locate all responsive records. Additionally, 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 July 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 July 9, 2015.

On July 6, 2015, the second (2nd) business day after receipt of the Council's Order, the Custodian's Counsel sought an extension of ten (10) business days, to which the Complainant's Counsel objected. On July 9, 2015, the GRC notified the parties that ten (10) business days was unreasonable given the facts of this complaint, but that it would allow for an extension until July 16, 2015. On July 15, 2015, the Custodian submitted nine (9) copies of the subject e-mail for an *in camera* review, a detailed explanation of the FFD's search for all responsive records, and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's June 30, 2015, Interim Order because he responded in the extended time frame by providing nine (9) copies of the subject e-mail for an *in camera* review, certifying to the search untaken to locate all responsive correspondence, and simultaneously providing certified confirmation of compliance.

Unlawful Denial of Access

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

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC conducted an *in camera* examination of the submitted record. Therein, Mr. Padula advised Custodian's Counsel and Ms. Cuddy of those records in his possession as part of a pending OPRA request. The redacted information does not appear to fall within the attorney-client privilege, as the information is general enough not to reveal any legal advice or strategy. Moreover, the Custodian did not provide any additional arguments as to why such generic information could be considered attorney-client privileged. For these reasons, the GRC is satisfied that the e-mail should be disclosed in its entirety.

Thus, the Custodian unlawfully denied access to the redacted material within the April 14, 2014, e-mail because same does not fall within the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must thus disclose the record without redactions to the Complainant.

Finally, the GRC is not persuaded by Complainant's Counsel's argument that the Custodian somehow failed to provide the Complainant records in electronic format because he provided .pdf documents rather than documents in the original electronic format. The Complainant did not specifically identify that he sought records in their "original electronic format," as is the case in Carter, GRC 2015-166. Also, it is plainly obvious that .pdf files are electronic by their very nature. Thus, the Custodian clearly complied with the Complainant's requested medium. Moreover, as noted in Carter, GRC 2014-137 *et seq.*, neither the Complainant nor Complainant's Counsel advanced a reasonable argument for disclosure in a writable format.

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 complied with the Council's June 30, 2015, Interim Order because he responded in the extended time frame by providing nine (9) copies of the subject e-mail for an *in camera* review, certifying to the search untaken to locate all responsive correspondence, and simultaneously providing certified confirmation of compliance.

2. The Custodian unlawfully denied access to the redacted material within the April 14, 2014, e-mail because same does not fall within the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must therefore disclose the record without redactions to the Complainant.

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**[9]

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

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

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

[9] 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.

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015

State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

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

Complaint Nos. 2014-266 and 2014-267

At the June 30, 2015 public meeting, the Government Records Council ("Council") considered the June 23, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council's April 28, 2015, Interim Order. Specifically, the Custodian responded within the extended time frame by providing responsive records to the Complainant, identifying the record containing redactions and the specific lawful basis therefor, and simultaneously providing certified confirmation of compliance to the Executive Director. However, he failed to provide a detailed explanation of his search to locate all forms of responsive correspondence.

2. The GRC must conduct an *in camera* review of the responsive e-mail, which is from Bruce Padula to the Custodian's Counsel, Dawn Cuddy, and Todd Brown and is dated April 14, 2014 (9:55 a.m.), to determine the validity of the Custodian's assertion that the body of same is attorney-client privileged and exempt from disclosure under OPRA. *See* Paff, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver[1] to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index[2], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[3] 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**.

[1] 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.
[2] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
[3] "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."

4. Additionally, the Custodian's failure to provide the GRC with a detailed explanation of his search to locate all responsive correspondence did not absolve him from the obligation to provide same to the GRC. Thus, the GRC is providing the Custodian a final chance to submit a detailed explanation of the search conducted to locate all forms of responsive correspondence.

5. **The Custodian shall comply with item No. 4 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.**[4]

6. 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.

7. 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 30th Day of June, 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: July 1, 2015

[4] 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.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-266 and 2014-267**[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 and attachments (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddy) from April 4, 2014, to July 2, 2014, regarding an appeal of the Franklin Township Municipal Ethics Board's ("Board") "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda and/or fax transmittals) sent or received by the District and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddy) from April 4, 2014, through July 2, 2014, regarding the Board and State Local Finance Board ("LFB").

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 2, 2014
Response Made by Custodian: July 14, 2014
GRC Complaint Received: July 24, 2014

Background

April 28, 2015 Council Meeting:

During its public meeting on April 28, 2015, the Council considered the April 21, 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, found that:

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] The GRC has consolidated these 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).

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,[4] to the Executive Director.[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.

Procedural History:

On April 29, 2015, the Council distributed its Interim Order to all parties. On May 1, 2015, the Custodian's Counsel sought an extension of thirty (30) days to comply with the Council's Order. On May 2, 2015, the Complainant's Counsel objected to any extension, arguing that the Custodian had an obligation to identify responsive records as part of the Statement of Information ("SOI"). On May 6, 2015, the GRC responded to all parties, advising that a thirty (30) day extension was unreasonable given the facts of this complaint. However, the GRC did allow for an extension until May 15, 2015.

[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."

[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.

On May 15, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing access to the records responsive to the Complainant's OPRA requests. The Custodian noted that only one (1) record was redacted and the attorney-client privilege exemption is annotated thereon.

Analysis

Compliance

During its meeting on April 28, 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 April 29, 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 May 6, 2015.

On May 1, 2015, the Custodian's Counsel sought an extension of thirty (30) days to comply with the Council's Order. On May 6, 2015, the GRC denied a thirty (30) day extension but provided the Custodian's Counsel until May 15, 2015, to respond to the Council's Order. On May 15, 2015, the Custodian provided responsive records to the Complainant, noting that one (1) e-mail was redacted under the attorney-client privilege, and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not include his detailed explanation of the search conducted to locate all forms of responsive correspondence.

Therefore, the Custodian did not fully comply with the Council's April 28, 2015, Interim Order. Specifically, the Custodian responded within the extended time frame providing responsive records to the Complainant, identifying the record containing redactions and the specific lawful basis therefor, and simultaneously providing certified confirmation of compliance to the Executive Director. However, he failed to provide a detailed explanation of his search to locate all forms of responsive correspondence.

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, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council[6] that accepted the custodian's legal conclusion for the denial of access without

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

further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

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

Id. at 355.

Further, the Court found that:

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

Id.

Here, the Custodian submitted compliance to include one (1) redacted e-mail. He asserted the body of same was exempt under the attorney-client privilege exemption. To this end, it is necessary for the GRC to conduct an *in camera* examination of the e-mail.

Therefore, the GRC must conduct an *in camera* review of the responsive e-mail, which is from Bruce Padula to the Custodian's Counsel, Dawn Cuddy, and Todd Brown, and is dated April 14, 2014 (9:55 a.m.), to determine the validity of the Custodian's assertion that the body of same is attorney-client privileged and exempt from disclosure under OPRA. *See* Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Additionally, the Custodian's failure to provide the GRC with a detailed explanation of his search to locate all responsive correspondence does not absolve him from the obligation to provide same to the GRC. Thus, the GRC is providing the Custodian a final chance to submit a detailed explanation of the search conducted to locate all forms of responsive correspondence.

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 April 28, 2015, Interim Order. Specifically, the Custodian responded within the extended time frame by providing responsive records to the Complainant, identifying the record containing redactions and the specific lawful basis therefor, and simultaneously providing certified confirmation of compliance to the Executive Director. However, he failed to provide a detailed explanation of his search to locate all forms of responsive correspondence.

2. The GRC must conduct an *in camera* review of the responsive e-mail, which is from Bruce Padula to the Custodian's Counsel, Dawn Cuddy, and Todd Brown and is dated April 14, 2014 (9:55 a.m.), to determine the validity of the Custodian's assertion that the body of same is attorney-client privileged and exempt from disclosure under OPRA. *See* Paff, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver[7] to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index[8], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[9] 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**.

4. Additionally, the Custodian's failure to provide the GRC with a detailed explanation of his search to locate all responsive correspondence did not absolve him from the obligation to provide same to the GRC. Thus, the GRC is providing the Custodian a

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

final chance to submit a detailed explanation of the search conducted to locate all forms of responsive correspondence.

5. **The Custodian shall comply with item No. 4 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.**[10]

6. 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.

7. 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: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015

[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.

State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

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

Complaint Nos. 2014-266 and 2014-267

At the April 28, 2015 public meeting, the Government Records Council ("Council") considered the April 21, 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

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 28th Day of April, 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: April 29, 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.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-266 and 2014-267**[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 and attachments (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 ("FFD") and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 4, 2014, to July 2, 2014, regarding an appeal of the Franklin Township Municipal Ethics Board's ("Board") "Resolution of Violation" issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: Electronic copies via e-mail of any and all correspondence and attachments (including but not limited to e-mails, text messages, letters, memoranda and/or fax transmittals) sent or received by the District and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 4, 2014, through July 2, 2014, regarding the Board and State Local Finance Board ("LFB").

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 2, 2014
Response Made by Custodian: July 14, 2014
GRC Complaint Received: July 24, 2014

Background[4]

Request and Response:

On July 2, 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 these 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 July 14, 2014, on behalf of the Custodian, the Custodian's Counsel responded in writing to both OPRA requests.

Regarding request No. 1, the Custodian's Counsel advised that the FFD has determined that it must utilize Network Blade, LLC, which is FFD's IT vendor, to locate responsive records, thus warranting the imposition of a special service charge. N.J.S.A. 47:1A-5. The Custodian's Counsel stated that Network Blade would spend approximately one (1) hour at the FFD rate of $120.00 per hour to retrieve e-mails. Further, the Custodian's Counsel noted that no other types of correspondence exist.

Regarding OPRA request No. 2, the Custodian's Counsel stated that Network Blade similarly estimated approximately one (1) hour of time at the FFD rate of $120.00 per hour to search for and retrieve responsive e-mails. Further, the Custodian's Counsel noted that no other types of correspondence exist.

Finally, the Custodian's Counsel requested that the Complainant respond to advise whether he objected to the charge. The Custodian's Counsel stated that the Complainant's failure to respond will not constitute a denial of access on the FFD's part.

On July 15, 2014, the 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 July 24, 2014, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council ("GRC"). The Complainant 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); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-137 *et seq.* (Interim Order dated November 18, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-219. The Complainant alleged that the instant complaints display yet another example of FFD's continued bad faith denials. The Complainant argued that, notwithstanding his adherence to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012)(*citing* Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010)) by submitting appropriately composed OPRA requests, the FFD determined that a special service charge was warranted.

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)[5] 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's ethics violations.[6] 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 this letter to his Denial of Access Complaint in Carter, GRC 2014-218, and Carter, GRC 2014-219, which was filed prior to submission of the subject OPRA requests to the FFD. The Complainant reiterated that the FFD knowingly denied access to other correspondence to prevent him from using the records against them as Mr. Wickman's appeal moves forward.

The Complainant thus 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 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 August 12, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA requests on July 2, 2014, and that the Custodian's Counsel responded on his behalf on July 14, 2014.

[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 noted that it is unnecessary for the GRC to order disclosure; however, the letter is being held out 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 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.

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 communications between nine (9) individuals.

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

   OPRA request No. 1: The subjects of the e-mails and other correspondence regard the Board's "Resolution of Violation," issued on April 12, 2013 in the Wickman, matter.
   OPRA request No. 2: The subjects of the e-mails regard the Board and the LFB.

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

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

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

   All records would be electronically maintained on the FFD's server or held by the individuals on their personal computers.

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

   One (1) employee for the entire 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, 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 based on the subject matter provided by the Complainant, which is still 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) hour 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) hour, not inclusive of review, redaction, preparation and disclosure.

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 review of the records for possible exemptions would need to be conducted by Custodian's Counsel.[7] The monitoring cost would have been passed to the Complainant had he insisted on being monitored, but the review cost would not have been passed on.

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.

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 could change almost annually. 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 it was most qualified for these 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?**

[7] 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.

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) hour per OPRA request to locate, retrieve, group, and convert the records.

The Custodian affirmed that, as of the date of the SOI, the FFD received the Council's decision in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014), in which the Council determined that the imposition of a special service charge is not warranted for similar types of requests seeking electronic correspondence. The Custodian stated that, in understanding that the FFD's argument in Verry, GRC 2013-287, was unsuccessful, the FFD will have to undertake a search to locate electronic records responsive to the subject OPRA requests. However, the Custodian stated that the FFD reserved the right to supplement the SOI prior to the Council's adjudication of these complaints.

The Custodian also certified that he reached out to the individuals listed in the request to determine whether they possessed any text messages responsive to the Complainant's OPRA requests. The Custodian affirmed that all individuals responded stating that they did not possess any responsive text messages; thus, no records responsive exist.

Additional Submissions:

On August 19, 2014, the Complainant's Counsel, via letter, stated that there is no need to provide any further arguments to dispute the Custodian's proposed special service charge based on the Council's decision in Verry, GRC 2013-287. However, the Complainant's Counsel argued that the Custodian had eight (8) additional days to search for and locate responsive records but failed to do so. Further, the Complainant's Counsel contended that the Custodian continued deliberately to withhold records by failing to submit a document index as part of the SOI 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 properly submit a document index in Carter, GRC 2013-281 *et seq.*, Carter, GRC 2013-328 *et seq.*, and other complaints filed with the GRC.

The Complainant's Counsel also argued that the Custodian failed to provide a lawful basis for denying access to responsive e-mail records held in individuals' private e-mail accounts. The Complainant's Counsel noted that the Custodian vaguely certified to contacting individuals about text messages but did not include a similar explanation as to whether he also sought e-mails from their personal accounts.

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 recognized in the SOI that the Council reviewed a similar set of facts in Verry, GRC 2013-287, and ultimately denied the FFD's proposed special service charge. Additionally, 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*.

In the absence of any additional compelling arguments, the GRC is satisfied that the proposed special service charge was not reasonable or warranted.

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 it has previously explained that the contention of a special service charge could result in a custodian's inability to submit a document index as part of the SOI. *See* Carter, GRC 2013-281 *et seq.*; Carter, GRC 2013-328 *et seq*. However, in this complaint, the Custodian acknowledged receipt of Verry, GRC 2013-287 prior to submitting the SOI. Based on his own admission, the Custodian should have produced a document index as part of SOI.

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,[8] to the Executive Director.[9]**

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.

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Reviewed By: Joseph D. Glover
Executive Director

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[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."

[9] 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.