



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Tracy Carluccio
Complainant

Complaint No. 2008-10

v.

New Jersey Department of Environmental Protection
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 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. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant’s OPRA request is invalid under OPRA and the Custodian had no legal duty to research the New Jersey Department of Environmental Protection’s records to locate records potentially responsive to the Complainant’s request **under OPRA** pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). See Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Many agencies grant administrative records requests outside the bounds of OPRA for such documents as building inspection reports, motor vehicle accident reports, birth certificates and municipal resolutions. Based on the foregoing, although the New Jersey Department of Environmental Protection made a considerable effort to comply with the Complainant’s invalid OPRA request, the New Jersey Department of Environmental Protection may have considered suggesting to the Complainant (and all requestors of similarly broad and unclear requests which have been judicially determined invalid



under OPRA) an alternate process to obtain the records sought, separate from the legal requirements and constraints of OPRA.

3. The New Jersey Department of Environmental Protection's policy of a flat \$48.00 Extraordinary Time charge is not legally appropriate pursuant to N.J.S.A. 47:1A-5.c. because each special service charge must be the reasonable actual direct cost of providing records determined on a case by case basis, as held in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). Thus, the special service charge assessed by the Custodian and paid by the Complainant is not supported by OPRA. However, the GRC takes notice that the "actual direct cost" is likely much higher than the amount charged by the Custodian. The GRC will not order the Custodian to charge more since the request is not a valid OPRA request.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 7, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Tracy Carluccio¹
Complainant**

GRC Complaint No. 2008-10

v.

**New Jersey Department of
Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: All reports, notices of violation, correspondence, e-mails and other documents related to facility discharges through storm water, air or other sources for Atlantic States Cast Iron Pipe Company.

Request Made: November 13, 2007

Response Made: November 26, 2007

Custodian: Evelyn Molder

GRC Complaint Filed: December 26, 2007³

Background

November 13, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 26, 2007

Custodian's response to the OPRA request attaching the Complainant's OPRA request with the Custodian's response therein. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that pursuant to a telephone conversation with the Complainant, an extension of time to respond to the Complainant's request has been granted until December 3, 2007.

November 29, 2007

E-mail from the Custodian to the Complainant. The Custodian states that N.J.S.A. 47:1A-5.c. authorizes a public agency to impose a special service charge for an extraordinary expenditure of time and effort to accommodate an OPRA request. The Custodian states that the New Jersey Department of Environmental Protection ("DEP")

¹ No legal representation listed on record.

² Represented by DAG Christine Piatek, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

expended 3.1 hours of extraordinary time in order to fulfill the Complainant's OPRA request. The Custodian states that a special service charge of \$148.80 must be paid before the Complainant is provided with the requested records.

Further, the Custodian states that additional costs may apply if the DEP incurs additional time to fulfill the Complainant's request. The Custodian advises that the Complainant may contact the Custodian if she has any additional questions.

December 5, 2007

Letter from the Custodian to the Complainant with the following attachments:

- Complainant's OPRA request dated November 13, 2007.
- New Jersey DEP Records Billing Statement dated November 29, 2007.

The Custodian requests that the Complainant submit a payment of \$148.80 at which time the records will be provided to the Complainant.

December 17, 2007

E-mail from Ms. Patricia Scott ("Ms. Scott"), Head Vault Clerk, to the Complainant. Ms. Scott states that the requested records have been located and are available for review or copying. Ms. Scott requests that the Complainant contact the Custodian to schedule an appointment to review the records or to obtain copies because the DEP will consider this request closed if no response is received in the next two (2) weeks.

December 26, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated November 13, 2007.
- E-mail from the Custodian to the Complainant dated November 29, 2007.
- New Jersey DEP Records Billing Statement dated November 29, 2007.

The Complainant states that she submitted an OPRA request to the Custodian on November 13, 2007. The Complainant states that the Custodian responded in writing on November 26, 2007, confirming that an extension of time to respond until December 3, 2007 had been agreed upon. The Complainant states that the Custodian responded in writing on November 29, 2007, stating that access to the requested records was granted but that a special service charge of \$148.80 must be submitted to the DEP prior to the records being provided to the Complainant.

The Complainant states that she received a records billing statement for \$148.80 on December 5, 2007. The Complainant asserts that she contacted the GRC regarding DEP's special service charge and was informed that she could still file a complaint even if she chose to pay the special service charge. The Complainant states that she submitted a payment of \$148.80 to the DEP on December 19, 2007.

The Complainant asserts that the DEP's assessment of the special service charge of \$148.80 is unreasonable. The Complainant asserts that the time and effort to fulfill the Complainant's request for records pertaining to one facility could not have been extraordinary.

The Complainant does not agree to mediate this complaint.

January 17, 2008

Request for the Statement of Information sent to the Custodian.

January 24, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until January 29, 2008 to submit the Statement of Information.

January 28, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until January 29, 2008 to submit the Statement of Information.

January 29, 2008

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated November 13, 2007.
- E-mail from Ms. Scott to the Complainant dated December 17, 2007.

The Custodian certifies that her search for the requested records included assigning the Complainant's request to the Office of Record Access ("ORA") Compliance and Enforcement ("C&E"), Environmental Regulation ("ER"), Land Use ("LU") and Site Remediation ("SRP").

The Custodian certifies that she received the Complainant's OPRA request on November 13, 2007.

The Custodian states that the Complainant's request encompassed a broad scope of "all records" related to "facility discharges." The Custodian states that she disseminated the Complainant's request to several programs in order to perform due diligence. The Custodian states that the programs then disseminated the Complainant's request to the appropriate bureaus which, with the exception of LU, reported records responsive. The Custodian states that the programs expended approximately 5.1 hours on this request:

- ORA – 0.4 hours
- C&E – 1.4 hours
- ER - 1.8 hours
- LU – 1.2 hours
- SRP – 0.4 hours

The Custodian contends that, based on the amount of time expended to respond to the Complainant's request, she determined a special service charge of \$148.80 for 3.1 hours, or two (2) hours less than actually expended, and did not include a charge for Counsel to review the records.

The Custodian states that N.J.S.A. 47:1A-5.c. allows a public agency to impose a special service charge when responding to an OPRA request involves an extraordinary expenditure of time and effort to accommodate such request. The Custodian states that the DEP receives the largest percentage of OPRA requests among state agencies. Moreover, the Custodian asserts that a survey in 2007 found that the average OPRA request to DEP takes an estimated two (2) hours to complete. The Custodian argues that the DEP developed a policy of imposing special service charges in which Extraordinary Time ("EOT") charges start after two (2) hours, but such charges are not imposed until 2.5 hours has been reached. The Custodian asserts that a rate of \$48.00 per hour was set by DEP Management & Budget based on hours reported in the DEP's FY2006 annual report.

February 23, 2009

Letter from the GRC to the Custodian. The GRC requests that the Custodian complete a 14-point analysis in order to determine whether the Custodian's assertion of a \$148.80 special service charge is warranted and reasonable.

February 23, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until March 9, 2009 to submit the 14-point analysis because the Custodian is out of the office until March 2, 2009.

February 23, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until March 9, 2009 to submit the 14-point analysis.

March 9, 2009

E-mail from the Custodian to the GRC attaching the Custodian's 14-point analysis. The Custodian asserts that the Complainant's OPRA request was overly broad in nature and required investigation of responsive records that are maintained by staff, located in file systems, microfilmed, archived to the record retention center, electronic records, and the DEP's e-mail system from four (4) program areas incorporating a number of divisions and numerous bureaus within the DEP.

The Custodian reiterates that an EOT was developed based on the fact that the DEP receives 63% of all OPRA requests submitted to state agencies and that EOT charges are applied to the amount of hours incurred over the initial 2 hours once 2.5 hours is exceeded.

The Custodian certifies that the required response time for this request was 5.1 hours and that the DEP calculated an EOT rate of 3.1 hours over the average normal processing time of 2 hours. The Custodian certifies that the DEP applies a fixed EOT charge of \$48.00 an hour based on the total annual based salary charge of DEP

employees incurred while working on OPRA related tasks, applying applicable rates and deriving the hourly rate.

Moreover, the Custodian asserts that the DEP's records are vital to development and redevelopment projects, property and business transactions, farm and open space preservation and recreational purposes, and as such, there is potential for requesters to request records that identify the "health" of a property and whether any outstanding environmental issues exist, which may involve many different program areas. Finally, the Custodian contends that the Complainant's OPRA request for environmental records relating to a specific facility was difficult to satisfy because of the lack of a specific universe of records within a set time frame, which led to additional time being allocated in order to fully comply with the Complainant's request.

Analysis

Whether the Complainant's November 13, 2007, OPRA request is a valid OPRA request?

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁴ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA only operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁵

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g. in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁵ As stated in Bent, *supra*.

that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that "[b]ecause the Complainant's OPRA requests [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

In Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the Complainant requested "[a]ny and all documents and evidence" relating to an investigation being conducted by the Somerset County Prosecutor's Office. The GRC reasoned that while the Complainant's request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

"because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra and Bent, supra and the Council's decisions in Asarnow, supra and Morgano, supra."

The Complainant's OPRA request sought "all reports, notices of violation, correspondence, e-mails and other documents" in regards to Atlantic States Cast Iron Pipe Co.'s facility discharges over an open-ended period of time. As in Feiler-Jampel, supra, the Complainant's OPRA request in this complaint is a blanket request for a class of various documents rather than a request for specifically named or identifiable government records. Therefore, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant's OPRA request is invalid under OPRA and the Custodian had no legal duty to research the DEP's records to locate records potentially responsive to the Complainant's request **under OPRA** pursuant to the Superior Court's decisions in MAG, supra, Bent, supra, and New Jersey Builders Association, supra. See Feiler-Jampel, supra. See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Additionally, due to the number of personnel used and time required to satisfy the Complainant's request, as certified by the Custodian in the 14-point analysis, the request is *per se* broad and unclear and is therefore invalid **under OPRA**.

Moreover, many agencies grant administrative records requests outside the bounds of OPRA for such documents as building inspection reports, motor vehicle accident reports, birth certificates and municipal resolutions. Based on the foregoing, although the DEP made a considerable effort to comply with the Complainant's invalid OPRA request, the DEP may have considered suggesting to the Complainant (and all requestors of similarly broad and unclear requests which have been judicially determined to be invalid under OPRA) an alternate process to obtain the records sought, separate from the legal requirements and constraints of OPRA.

Whether the special service charge assessed by the custodian is warranted and reasonable pursuant to OPRA?

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

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*" (Emphasis added.) 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 a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the "extraordinary burden" placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate" pursuant to OPRA:

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

- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁶ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
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?
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?

⁶ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

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?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above questions as follows:

Questions	Custodian's Response
1. What records are requested?	The request (DEP OPRA Tracking # 61088) requested "All reports, notices of violation, correspondence, emails, and other documents related to facility discharges through storm water, air or other sources" for the Atlantic States Cast Iron Pipe Company facility located at 183 Sitgreaves Street, Phillipsburg, NJ.
2. Give a general nature description and number of the government records requested.	The request sought all type of records (reports, correspondence, e-mails, etc.) involving all types of discharges (storm water, air, and other sources (which include groundwater and soils)) for a specific facility.
3. What is the period of time over which the records extend?	The request did not specify any time frames. The responsive records ranged from 1972 to the present; however, this range is what readily can be determined without reviewing every record. There may have been records prior to 1972 included in the responsive records.
4. Are some or all of the records sought archived or in storage?	The responsive records involved over ten (10) feet of hard-copy documents, four (4) archived boxes, seven (7) microfilm reels, and electronic records from various locations at the DEP building and two satellite field office locations.
5. What is the size of the agency (total number of employees)?	The total number of DEP employees is approximately 3,026.
6. What is the number of employees available to	For this request, the following number of employees were allocated due to the records being sought and the program areas involved:

<p>accommodate the records request?</p>	<p>One (1) Records Custodian reviewed the request for administrative deficiencies and subsequently referred it to four (4) program areas that potentially had responsive records.</p> <p>Four (4) program area Assistant Commissioner Records Custodians reviewed the request and assigned it to file officers overseeing division areas and bureaus within their program area that potentially had responsive records for investigation and response.</p> <p>Nineteen (19) file officers investigated their assigned program areas and responded to the request. This number does not include the program staff that may have responded to the file officers' record identification inquires and record preparation activities.</p> <p>One (1) Records Custodian coordinated with the New Jersey Law & Public Safety, Division of Law ("DOL") because there is an active litigation aspect with the particular facility.</p> <p>One (1) Records Custodian reviewed the responses from the program areas Assistant Commissioner Records Custodians, identified and calculated the EOT, issued the government records request form, and later coordinated access upon payment of the EOT.</p> <p>One (1) Office of Records Access staff person processed the EOT payment and contacted the requester to schedule File Review access.</p> <p>This request involved over twenty-seven (27) DEP employees to process.</p>
<p>7. To what extent do the requested records have to be redacted?</p>	<p>Due to the litigation aspect, the records were reviewed by DOL. However, most of the records had no privilege concerns and the few records with concerns were redacted with the citations to the applicable exemptions and/or privileges referenced in the file.</p>
<p>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?</p>	<p>There are no DEP requirements for employees with regards to investigating the location of responsive records, retrieving them, and assembling the records for access or copying. The amount of OPRA requests received by the DEP and the wide range of record types, multiple source areas & media, as well as the number and diverse range of employee titles, prevent the establishing of such requirements. The DEP applies a fixed EOT charge of \$48.00 an hour based on the total annual based salary charge of DEP employees incurred while working on OPRA related tasks, applying applicable rates & deriving the hourly rate.</p>
<p>9. What is the level of personnel, hourly rate and number of hours, if any, required for a government</p>	<p>Same response as # 8. Flat Rate applied.</p>

<p>employee to monitor the inspection or examination of the records requested?</p>	
<p>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?</p>	<p>Same response as # 8. Flat Rate applied.</p>
<p>11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?</p>	<p>The DEP is tasked with the authority and responsibility to preserve the ecological integrity, stewardship the natural resources and maintain/transform places into healthy, sustainable communities within the State of New Jersey. To achieve these responsibilities, the DEP is composed of numerous highly technical program areas and offices. As such and dependent on the nature of a request, a vast diversity of employee titles and pay ranges are encountered in responding to OPRA record requests.</p>
<p>12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?</p>	<p>See responses to questions 6 & 8. There was no one person that incurred the EOT. Instead, it was the total staff's time incurred versus the average staff's time incurred in processing an OPRA request.</p>
<p>13. What is the availability of information technology and copying capabilities?</p>	<p>The responsive records were chiefly maintained as hard-copy records with staff, in file systems, and archived (microfilm and box storage facility). This request did not involve copying since the Complainant did not request or authorize any copying of records.</p>

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	5.1 hours for about twenty-eight (28) employees to investigate any responsive records maintained by the NJDEP based on the nature of the request. ⁷ The Complainant did not access the records or request copying for any further expenditure of time.
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In Courier Post, *supra*, the court deliberated the meaning of “extraordinary” and how the term affects a special service charge in OPRA. The court decided that:

“[i]n the context of [OPRA], that term is incapable of a one-fits-all definition. There are many variables which require flexibility in the meaning of that term. The size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size, and number of documents sought, are but a few variables which can serve to modify the meaning of "extraordinary." Indeed, what may appear to be extraordinary to one...might be routine to another.” *Id.* at 202.

The court’s holding clearly defines that the legislative intent of determining a special service charge for an extraordinary amount of time and effort solely relies on the basis of an individual complaint. The court’s holding, read in the light of N.J.S.A. 47:1A-5.c., further clarifies that there is no clear cut cases in which a predetermined special service charge can be rendered to a party and that a special service charge must be based on the actual direct cost of such case.

Additionally, in Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), an Estell Manor ordinance permitted the imposition of a flat rate of \$20.00 per hour for an employee to fulfill an OPRA request. The GRC held that:

“...the custodial agency cannot set a flat rate cost of \$20.00 an hour for a special service charge because each request is unique and the special service charge should be reasonable for each individual request. The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).”

In the instant complaint, the Custodian certified in the SOI and 14-point analysis that the DEP has developed a policy that EOT charges of \$48.00 an hour are applied to the amount of hours incurred over the initial 2 hours once 2.5 hours is exceeded. This policy is inapposite to the court’s deliberation of the meaning of “extraordinary” in Courier Post, *supra*, and the GRC’s holding in Janney, *supra*.

⁷ The Custodian states that more than 27 employees were needed in response to Item No. 6 or the SSC, but then identified that approximately 28 employees were used in response to Item No. 14.
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Therefore, the DEP's policy of a flat \$48.00 EOT charge is not legally appropriate pursuant to N.J.S.A. 47:1A-5.c. because each special service charge must be the reasonable, actual direct cost of providing records determined on a case by case basis, as held in Courier Post, *supra*, and Janney, *supra*. Thus the special service charge assessed by the Custodian and paid by the Complainant is not supported by OPRA. However, the GRC takes notice that the "actual direct cost" is likely much higher than the amount charged by the Custodian. The GRC will not order the Custodian to charge more since the request is not a valid OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant's OPRA request is invalid under OPRA and the Custodian had no legal duty to research the New Jersey Department of Environmental Protection's records to locate records potentially responsive to the Complainant's request **under OPRA** pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). See Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Many agencies grant administrative records requests outside the bounds of OPRA for such documents as building inspection reports, motor vehicle accident reports, birth certificates and municipal resolutions. Based on the foregoing, although the New Jersey Department of Environmental Protection made a considerable effort to comply with the Complainant's invalid OPRA request, the New Jersey Department of Environmental Protection may have considered suggesting to the Complainant (and all requestors of similarly broad and unclear requests which have been judicially determined invalid under OPRA) an alternate process to obtain the records sought, separate from the legal requirements and constraints of OPRA.
3. The New Jersey Department of Environmental Protection's policy of a flat \$48.00 Extraordinary Time charge is not legally appropriate pursuant to N.J.S.A. 47:1A-5.c. because each special service charge must be the reasonable actual direct cost of providing records determined on a case by case basis, as held in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). Thus, the special service charge assessed by the Custodian and paid by the Complainant is not supported by OPRA. However, the GRC takes notice that the "actual direct cost" is likely much higher than the amount charged by the Custodian. The

GRC will not order the Custodian to charge more since the request is not a valid OPRA request.

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Executive Director

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