



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2008-112

v.

Union City Board of Education (Hudson)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 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, accepts the Administrative Law Judge’s Initial Decision dated March 30, 2010 in which the Judge approved the Settlement Agreement and Release signed by the parties or their representatives.

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 28th Day of April, 2010

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: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2008-112

v.

**Union City Board of Education (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

- OPRA Requests dated March 17, 2008:
 1. Tenure charges filed by the Union City Board of Education against Sabino Valdes on April 27, 2000
 2. Tenure charges filed by the Union City Board of Education against Sabino Valdes on August 2, 2000
 3. Tenure charges filed against Union City Board of Education employee Charles Trelease pursuant to *N.J.A.C.* 6A:3-5.1
 4. Special meeting minutes dated June 13, 2000
 5. Special meeting minutes dated July 1, 2003
 6. Statement of items comprising the record filed pursuant to *N.J.A.C.* 6A:4-1.8(b) for In the Matter of the Tenure Hearing of Sabino Valdes³
- OPRA Requests dated April 8, 2008:
 1. Original meeting minutes dated August 24, 2000
 2. Original meeting minutes dated September 13, 2000⁴

Requests Made: March 17, 2008 and April 8, 2008

Responses Made: March 25, 2008, April 1, 2008, April 18, 2008, May 30, 2008, June 3, 2008, June 23, 2008, August 13, 2008 and August 25, 2008

Custodian: Anthony N. Dragona

GRC Complaint Filed: May 21, 2008⁵

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Susanne Lavelle, Esq. (Union City, NJ).

³ The Complainant submitted additional OPRA requests, however, said requests are not the subject of this Denial of Access Complaint.

⁴ The Complainant submitted additional OPRA requests, however, said requests are not the subject of this Denial of Access Complaint.

⁵ The GRC received the Denial of Access Complaint on said date from the Custodian's Counsel.

Background

August 11, 2009

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the August 4, 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, found that:

1. Because the Custodian requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008 in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency, and because the Custodian properly requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008, the Custodian's request for an extension of time to respond to the Complainant's OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g.
3. Although the Custodian properly requested an extension of time to respond to the Complainant's request for tenure charges filed against Sabino Valdes, the Custodian failed to adhere to the extended deadline date because the Custodian's written response dated April 1, 2008 did not grant or deny access to the requested tenure charges, but rather indicated that the Board Attorney was conducting research on whether the requested records could be released. Pursuant to Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request. As such, the Custodian's failure to grant or deny access in writing to the requested tenure charges filed against Sabino Valdes within the extended deadline date results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
4. Because the Custodian's estimated ten (10) hour expenditure of time to fulfill the Complainant's request for tenure charges filed against Sabino Valdes is based on the thirteen (13) hours the Board of Education actually expended searching the same 27 boxes in response to another OPRA request, the Custodian's estimated ten (10) hours constitutes an extraordinary expenditure of time and warrants a special service charge pursuant to N.J.S.A. 47:1A-5.c.
5. Pursuant to N.J.S.A. 47:1A-5.c. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the special service charge should reflect the estimated ten (10) hours to search, locate, copy, redact and

- return the records to their original location, as well as the Confidential Secretary to the Board Secretary's hourly rate of \$31.63 per hour. As such, the special service charge totals \$316.30. Thus, the Custodian's \$320.00 charge is unreasonable because it does not reflect the actual direct cost of fulfilling the request pursuant to N.J.S.A. 47:1A-5.c. However, this issue is now moot since the Custodian located the requested tenure charges dated April 27, 2000 while responding to another OPRA request and has made said record available to the Complainant for the per page copy fee and without a special service charge.
6. Because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for tenure charges filed against Sabino Valdes dated August 2, 2000, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian properly responded in writing within the extended deadline date pursuant to N.J.S.A. 47:1A-5.i.
 7. Although the Custodian properly requested an extension of time to respond to the Complainant's request for tenure charges filed against Charles Trelease, the Custodian failed to adhere to the extended deadline date because the Custodian's written response dated April 1, 2008 did not grant or deny access to the requested tenure charges, but rather indicated that the Board Attorney was conducting research on whether the requested records could be released. Pursuant to Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but not a lawful basis for delaying a response to an OPRA request. As such, the Custodian's failure to grant or deny access in writing to the requested tenure charges filed against Charles Trelease within the extended deadline date results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
 8. The Custodian's written request dated April 18, 2008 for an additional extension of time to fulfill the Complainant's request for tenure charges filed against Charles Trelease is improper pursuant to N.J.S.A. 47:1A-5.i. because the Custodian made said request beyond the extension deadline ending April 4, 2008 initially requested by the Custodian.
 9. The Custodian unlawfully denied access to the requested tenure charges filed against Charles Trelease by failing to properly grant or deny access, failing to comply with his extended deadline date, and failing to properly obtain a second extension of time.
 10. Because the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education's ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's Copies" in which the Custodian's assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his

burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.

11. Because the Custodian denied access to the Complainant's request for the Statement of Items Comprising the Record within the extended deadline date, and because the Custodian certifies that the Board of Education does not maintain any records responsive to said request, as well as because the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
12. The Custodian's failure to respond in writing to the Complainant's April 8, 2008 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Board Attorney made the requested records available to the Complainant via letter dated June 3, 2008.
13. The Custodian's failure to provide written responses to the Complainant's OPRA requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial. Additionally, although a special service charge was warranted to provide the requested tenure charges filed against Sabino Valdes, the special service assessed was unreasonable. However, the Custodian properly requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008 due to a substantial disruption of agency operations. Additionally, the Custodian bore his burden of proving a lawful denial of access to the requested Statement of Items Comprising the Record as well as the special meeting minutes. Therefore, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access and unreasonable special service charge appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
14. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law (the Custodian was legally obligated to respond to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g.). As such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint

should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

August 14, 2009

Council's Interim Order distributed to the parties.

September 28, 2009

Complaint transmitted to the Office of Administrative Law ("OAL").

March 30, 2010

Settlement Agreement and Release submitted to OAL by the parties.

March 30, 2010

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** that:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

As such, the ALJ **CONCLUDES** that "the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** the parties to comply with the settlement terms and that these proceedings be **CONCLUDED**."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council accept the Administrative Law Judge's Initial Decision dated March 30, 2010 in which the Judge approved the Settlement Agreement and Release signed by the parties or their representatives.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

August 11, 2009 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2008-112

v.

Union City Board of Education (Hudson)
Custodian of Record

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1. Because the Custodian requested an extension of time to respond to the Complainant’s OPRA requests dated March 17, 2008 in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency, and because the Custodian properly requested an extension of time to respond to the Complainant’s OPRA requests dated March 17, 2008, the Custodian’s request for an extension of time to respond to the Complainant’s OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g.
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- advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request. As such, the Custodian's failure to grant or deny access in writing to the requested tenure charges filed against Sabino Valdes within the extended deadline date results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
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8. The Custodian's written request dated April 18, 2008 for an additional extension of time to fulfill the Complainant's request for tenure charges filed against Charles Trelease is improper pursuant to N.J.S.A. 47:1A-5.i. because the Custodian made said request beyond the extension deadline ending April 4, 2008 initially requested by the Custodian.
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10. Because the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education's ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's Copies" in which the Custodian's assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
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with the legal responsibility of granting and denying access in accordance with the law.

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Interim Order Rendered by the
Government Records Council
On The 11th Day of August, 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
Government Records Council

Decision Distribution Date: August 14, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2008-112

v.

**Union City Board of Education (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

- OPRA Requests dated March 17, 2008:
 1. Tenure charges filed by the Union City Board of Education against Sabino Valdes on April 27, 2000
 2. Tenure charges filed by the Union City Board of Education against Sabino Valdes on August 2, 2000
 3. Tenure charges filed against Union City Board of Education employee Charles Trelease pursuant to *N.J.A.C.* 6A:3-5.1
 4. Special meeting minutes dated June 13, 2000
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 6. Statement of items comprising the record filed pursuant to *N.J.A.C.* 6A:4-1.8(b) for In the Matter of the Tenure Hearing of Sabino Valdes³
- OPRA Requests dated April 8, 2008:
 1. Original meeting minutes dated August 24, 2000
 2. Original meeting minutes dated September 13, 2000⁴

Requests Made: March 17, 2008 and April 8, 2008

Responses Made: March 25, 2008, April 1, 2008, April 18, 2008, May 30, 2008, June 3, 2008, June 23, 2008, August 13, 2008 and August 25, 2008

Custodian: Anthony N. Dragona

GRC Complaint Filed: May 21, 2008⁵

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Susanne Lavelle, Esq. (Union City, NJ).

³ The Complainant submitted additional OPRA requests, however, said requests are not the subject of this Denial of Access Complaint.

⁴ The Complainant submitted additional OPRA requests, however, said requests are not the subject of this Denial of Access Complaint.

⁵ The GRC received the Denial of Access Complaint on said date from the Custodian's Counsel.

Background

March 17, 2008

Complainant's first Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.⁶

March 25, 2008

Custodian's response to the Complainant's first OPRA requests. The Custodian responds in writing to the Complainant's OPRA requests on the sixth (6th) business day following receipt of such requests. The Custodian states that he needs additional time to respond to the Complainant's OPRA requests. The Custodian states that on the same date the Complainant submitted his twelve (12) OPRA requests,⁷ the Custodian received nine (9) OPRA requests from another requestor. The Custodian asserts that responding to all requests in one week would substantially disrupt the operations of his agency. The Custodian states that he will respond to the Complainant's requests by April 4, 2008.

April 1, 2008

Custodian's subsequent response to the Complainant's request for tenure charges filed against Sabino Valdes on April 27, 2000. The Custodian states that in light of a case recently brought to the Board of Education's ("BOE") attention, the Board Attorney is researching whether said record is subject to disclosure.

April 1, 2008

Custodian's subsequent response to the Complainant's request for tenure charges filed against Charles Trelease. The Custodian states that in light of a case recently brought to the BOE's attention, the Board Attorney is researching whether said record is subject to disclosure.

April 1, 2008

Custodian's subsequent response to the Complainant's request for special meeting minutes dated June 13, 2000. The Custodian states that the BOE has been unable to locate said record. The Custodian states that he will provide said record to the Complainant, if located.

April 1, 2008

Custodian's subsequent response to the Complainant's request for special meeting minutes dated July 1, 2003. The Custodian states that the BOE has been unable to locate said record. The Custodian also states that he will provide said record to the Complainant, if located.

April 1, 2008

Custodian's subsequent response to the Complainant's request for the statement of items comprising the record in In Re Valdes. The Custodian states that the BOE is not in possession of any records responsive to this request.

⁶ The Complainant submitted a separate OPRA request form for each enumerated item.

⁷ Only six (6) of the Complainant's twelve (12) OPRA requests are the subject of this Denial of Access Complaint.

April 8, 2008

Complainant's second OPRA requests. The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.⁸

April 18, 2008

Letter from Custodian to Complainant regarding the Complainant's OPRA requests dated March 17, 2008. The Custodian states that the Board Attorney advised him that the requested tenure charges are subject to public access. The Custodian contends that fulfilling the Complainant's request for tenure charges against Sabino Valdes would involve an extraordinary amount of time and effort because the Custodian would have to search 27 boxes for the requested records. Additionally, the Custodian states that once the records are located, said records must be reviewed by the Board Attorney for the possible redaction of personal information such as social security number or home address. The Custodian requests a deposit of \$320.00 (\$32.00 per hour for an estimated ten (10) hours) prior to undertaking any search to locate the records. The Custodian states that if the search and reproduction of the records exceeds the estimated ten (10) hours, the Complainant will be responsible for any additional hourly cost. Further, the Custodian states that if said search does not amount to ten (10) hours, the unused portion of the deposit will be refunded to the Complainant. The Custodian states that once he is in receipt of the Complainant's deposit, he will commence the search for the records responsive to the Complainant's request and advise the Complainant of an anticipated date on which the records will be provided.

Additionally, the Custodian states that the records responsive to the Complainant's request for tenure charges filed against Charles Trelease must be retrieved from closed files. As such, the Custodian states that he must retrieve said files before he can determine whether the search for the requested record requires a special service charge. The Custodian states that upon his receipt of the closed files, he will contact the Complainant and advise if a deposit is necessary. Further, the Custodian states that he is requesting a two (2) week extension of time to retrieve the closed files before advising whether a special service charge is required because BOE offices are closed from April 21-25, 2008.

April 25, 2008

E-mail from Custodian's Counsel to Thomas R. Kobin, Esq., of Chasan Leyner & Lamparello, P.C.⁹ The Custodian's Counsel requests that Mr. Kobin obtain the file pertaining to Charles Trelease from storage. Counsel asks Mr. Kobin to notify her when said file is available to be picked up.

May 21, 2008

Letter from Custodian's Counsel to the Government Records Council ("GRC"). Counsel states that she received the Complainant's Denial of Access Complaint via facsimile on May 20, 2008. However, Counsel states that she only received two (2) pages of the complaint with no supporting documentation. Counsel states that because the Complainant submitted twelve (12) OPRA requests on March 17, 2008 and has not

⁸ The Complainant submitted a separate OPRA request form for each enumerated item.

⁹ Mr. Kobin is former Counsel to the BOE.

provided any supporting documentation with his Denial of Access Complaint, it is impossible for the BOE to respond or defend against this complaint.

May 21, 2008

Denial of Access Complaint filed with the GRC.¹⁰ The Complainant states that he submitted his OPRA requests on March 17, 2008 and received a response on April 1, 2008. The Complainant does not agree to mediate this complaint.

May 21, 2008

E-mail from Custodian's Counsel to Thomas R. Kobin, Esq. The Custodian's Counsel asks for the status of the Trelease file she requested to be pulled from storage.

May 21, 2008

E-mail from Thomas R. Kobin, Esq., to Custodian's Counsel. Mr. Kobin states that he passed over Counsel's first e-mail dated April 25, 2008. Mr. Kobin states that he will notify Counsel when he obtains the file for Charles Trelease.

May 29, 2008

Letter from Complainant to Custodian's Counsel. The Complainant states that he has not yet filed a Denial of Access Complaint with the GRC. The Complainant states that he had hoped to resolve some of the issues informally but because the Custodian responded to the Complainant's requests beyond the statutorily mandated response time, the Complainant intends to file a complaint with the GRC. The Complainant also asserts that the \$320.00 special service charge is unreasonable because the requested tenure charges should have been maintained with the meeting minutes at which meeting the BOE approved said charges.

May 30, 2008

Letter from Custodian to Complainant. The Custodian states that he initially responded to the Complainant's request for special meeting minutes dated June 13, 2000 by advising that the BOE has been unable to locate the requested record. The Custodian states that upon searching his files, he located one (1) page of the executive session minutes dated June 13, 2000 and has enclosed said page free of charge. The Custodian states that he will continue to search for the completed minutes and if located, provide same to the Complainant.

June 2, 2008

Letter from Custodian's Counsel to Complainant. Counsel states that the Complainant indicated in his letter dated May 29, 2008 that he filed his Denial of Access Complaint with the GRC because the Custodian failed to respond to his OPRA requests within the statutorily mandated seven (7) business days. Counsel states that the Custodian informed the Complainant via letter dated March 25, 2008 that he needed additional time to respond to the Complainant's requests because responding to the large volume of requests submitted by the Complainant and another requestor on the same date

¹⁰ The GRC received the Denial of Access Complaint from the Custodian's Counsel. Said complaint was incomplete because it did not include any supporting documentation.

would substantially disrupt agency operations. Counsel contends that by statute, the BOE may be permitted to request additional time under such circumstances.

Counsel also states that the Complainant claimed in his letter dated May 29, 2008 that the estimated \$320.00 special service charge is unreasonable because the requested tenure charges would have been approved at a BOE meeting and would have remained with the minutes of said meeting. Counsel states that the \$320.00 special service charge is based on a prior search of the 27 boxes regarding Mr. Valdes for another record which took approximately thirteen (13) hours to complete. Counsel asserts that because she must review the requested record for possible redactions after said record is located, the estimated \$320.00 for ten (10) hours is reasonable. Further, Counsel states that the Custodian advised the Complainant that if the search took less than the estimated ten (10) hours, the remainder of the Complainant's deposit would be refunded. Counsel requests that the Complainant provide the statutory or common law authority that requires tenure charges to be maintained on file with meeting minutes.

June 2, 2008

Letter from Custodian's Counsel to Complainant regarding his OPRA requests dated April 8, 2008. Counsel apologizes for the BOE's failure to respond to the Complainant's requests. Counsel states that while preparing her response to the Complainant's letter dated May 29, 2008, she noticed that the Complainant's OPRA requests dated April 8, 2008, which were attached, were not signed by the Custodian. Counsel states that she immediately contacted the Custodian who confirmed that said requests had been misfiled and never answered. Counsel states that the BOE will contact the Complainant by the end of the week with a response to said OPRA requests.

June 3, 2008

Letter from Custodian's Counsel to Complainant. Regarding the Complainant's requests for tenure charges, Counsel states that the Custodian notified the Complainant that the Board Attorney was researching whether the requested tenure charges were subject to public access. Counsel also states that the Custodian notified the Complainant about a special service charge to locate the tenure charges for Sabino Valdes. Counsel states that the Custodian notified the Complainant that the tenure charges for Charles Trelease had to be retrieved from storage. Counsel states that she made two (2) requests to retrieve said file from storage and that neither herself nor the BOE have access to the former Board Attorney's storage facility. Counsel states that she has been assured that she will be contacted when the file is available and that she will then contact the Complainant.

As for the requested special meeting minutes, Counsel states that the BOE has been attempting to locate said minutes since January 2008 and the Custodian provided the one (1) page that has been located to date. Counsel states that the BOE will continue to search for the remainder of the minutes.

June 3, 2008

Custodian's response to the Complainant's OPRA request dated April 8, 2008 for meeting minutes dated August 24, 2008. The Custodian responds in writing to the Complainant's OPRA request on the thirty-fourth (34th) business day following receipt of

such request.¹¹ The Custodian states that the only copy available is ready to be picked up upon payment of \$13.05 for 52 pages.

June 3, 2008

Custodian's response to the Complainant's OPRA request dated April 8, 2008 for meeting minutes dated September 13, 2000. The Custodian responds in writing to the Complainant's OPRA request on the thirty-fourth (34th) business day following receipt of such request.¹² The Custodian states that the only copy available is ready to be picked up upon payment of \$1.75 for 7 pages.

June 18, 2008

Letter of Representation from Complainant's Counsel. The Complainant's Counsel asserts that the special service charge assessed by the Custodian to fulfill the Complainant's request for tenure charges filed against Sabino Valdes is unreasonable. Specifically, Counsel contends that the special service charge is based on a predetermined hourly rate of \$32.00 per hour. Counsel asserts that it is well established that special service charges cannot be predetermined. Counsel also states that the Custodian claims ten (10) hours is required to search for two (2) records which Counsel contends is unreasonable. Counsel asserts that the 27 boxes of records to be searched should have some index or other form of organization, and if no such index exists it is the fault of the Custodian, not the Complainant.

Counsel also states that the Custodian admitted that he failed to respond to the Complainant's March 17, 2008 OPRA requests within the statutorily mandated seven (7) business days via letter dated June 2, 2008. Counsel states that the Custodian has not yet provided a date certain on which he will fulfill three (3) of the Complainant's OPRA requests. Counsel also asserts that the Custodian should provide a legal certification regarding the search undertaken to locate the requested statement of items comprising the record in In Re Valdes.

Additionally, regarding the Complainant's OPRA requests dated April 8, 2008, Counsel asserts that the Custodian violated OPRA by not responding to said requests within the statutorily mandated seven (7) business days. Counsel states that the Custodian responded to said requests via letter dated June 3, 2008 in which the Custodian indicated that the requested records were available and that the delay in responding to said requests was caused by the Custodian's misfiling of the Complainant's OPRA requests. Further, Counsel contends that because the Custodian did not provide any records to the Complainant until after the Complainant filed his Denial of Access Complaint, the Complainant is entitled to an award of prevailing party's attorney's fees.

June 18, 2008

E-mail from GRC to Complainant's Counsel. The GRC states that it is not in receipt of the Complainant's Denial of Access Complaint asserted to have been faxed on May 30, 2008.

¹¹ This time period does not include April 12-25, 2008 because BOE offices were closed.

¹² This time period does not include April 12-25, 2008 because BOE offices were closed.

June 23, 2008

Letter from Thomas R. Kobin, Esq., to Custodian's Counsel. Mr. Kobin encloses the requested files regarding Charles Trelease.

June 23, 2008

Letter from Custodian's Counsel to Complainant. Counsel states that the BOE has located the requested tenure charges for Charles Trelease; however said copy is unsigned. Counsel states that because the file consists of only two (2) folders, there is no special service charge for this request. Counsel states that any personal information contained in said record will be redacted. Counsel asks the Complainant if he still wishes to obtain a copy of said record.

July 31, 2008

E-mail from GRC to Complainant's Counsel. The GRC states that it is not in receipt of the Complainant's completed Denial of Access Complaint including attachments. The GRC states that in order to proceed with this complaint, said attachments are required. The GRC requests that Counsel submit said attachments as soon as possible.

August 12, 2008

E-mail from Complainant's Counsel to GRC. Counsel apologizes for the delay in submitting the attachments to the Complainant's Denial of Access Complaint. Counsel states that he has been out of town. Counsel states that he is in the process of preparing said attachments.

August 13, 2008

Letter from Custodian's Counsel to Complainant's Counsel. The Custodian's Counsel states that the tenure charges for Sabino Valdes dated April 27, 2000 have been located and are available without a special service charge, but with a standard copying fee. The Custodian's Counsel states that personal information such as home address, social security number and date of birth will be redacted. The Custodian's Counsel asks the Complainant's Counsel if the Complainant still wishes to receive said record.

August 25, 2008

Letter from Custodian's Counsel to Complainant's Counsel. The Custodian's Counsel states that the BOE located the requested special meeting minutes dated July 1, 2003. Counsel states that if the Complainant still wishes to receive a copy of said record, the copying fee is \$8.50 for twelve (12) pages.

September 15, 2008

E-mail from GRC to Complainant's Counsel. The GRC states that it is still not in receipt of the Complainant's completed Denial of Access Complaint including attachments. The GRC requests that Counsel submit said attachments by the close of business on September 22, 2008 in order for the GRC to process said complaint.

September 29, 2008

Letter from Complainant's Counsel to GRC. Counsel submits the following records regarding the Complainant's Denial of Access Complaint:

- Complainant's OPRA request dated March 17, 2008 for tenure charges filed against Sabino Valdes on April 27, 2000
- Complainant's OPRA request dated March 17, 2008 for tenure charges filed against Sabino Valdes on August 2, 2000
- Complainant's OPRA request dated March 17, 2008 for tenure charges filed against Charles Trelease pursuant to *N.J.A.C. 6A:3-5.1*
- Complainant's OPRA request dated March 17, 2008 for special meeting minutes dated June 13, 2000
- Complainant's OPRA request dated March 17, 2008 for special meeting minutes dated July 1, 2003
- Complainant's OPRA request dated April 8, 2008 for original meeting minutes dated September 13, 2000
- Complainant's OPRA request dated April 8, 2008 for original meeting minutes dated August 24, 2000
- Letter from Custodian to Complainant dated April 18, 2008
- Letter from Custodian's Counsel to GRC dated May 21, 2008
- Letter from Complainant to Custodian's Counsel dated May 29, 2008
- Letter from Custodian to Complainant dated May 30, 2008
- Letter from Custodian's Counsel to Complainant dated June 2, 2008
- Letter from Custodian's Counsel to Complainant dated June 2, 2008
- Letter from Custodian's Counsel to Complainant dated June 3, 2008

Counsel asserts that the Custodian's proposed special service charge of \$320.00 to fulfill the Complainant's request for Sabino Valdes' tenure charges is unreasonable and was set at a predetermined rate pursuant to the OPRA request form. Counsel also states that the Custodian failed to provide a date certain on which he would provide the records responsive to the Complainant's request for Charles Trelease's tenure charges, as well as special meeting minutes dated June 13, 2000 and July 1, 2003. Additionally, Counsel asserts that the Custodian failed to respond to the Complainant's OPRA requests dated April 8, 2008 in a timely manner and thus denied access to said records.

October 1, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

October 3, 2008

E-mail from GRC to Custodian's Counsel. The GRC grants the Custodian a five (5) business day extension of time to submit the Custodian's completed SOI.¹³

October 15, 2008

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

- Complainant's OPRA requests dated March 17, 2008
- Complainant's OPRA requests dated April 8, 2008
- Custodian's response to the Complainant's March 17, 2008 OPRA requests dated March 25, 2008

¹³ In response to the Custodian Counsel's verbal request via telephone on October 3, 2008.

- Custodian's response to the Complainant's request for tenure charges filed against Sabino Valdes on April 27, 2000, dated April 1, 2008
- Custodian's response to the Complainant's request for tenure charges filed against Sabino Valdes on August 2, 2000, dated April 1, 2008
- Custodian's response to the Complainant's request for tenure charges filed against Charles Trelease, dated April 1, 2008
- Custodian's response to the Complainant's request for special meeting minutes held on June 13, 2000, dated April 1, 2008
- Custodian's response to the Complainant's request for special meeting minutes held on July 1, 2000, dated April 1, 2008
- Letter from Custodian to Complainant dated April 18, 2008
- Letter from Custodian's Counsel to Complainant dated June 2, 2008
- Letter from Custodian's Counsel to Complainant dated June 3, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated August 13, 2008
- Letter from Custodian's Counsel to Complainant dated June 23, 2008
- Letter from Custodian to Complainant dated May 30, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated August 25, 2008
- Letter from Custodian's Counsel Complainant dated June 2, 2008
- Custodian's responses to the Complainant's April 8, 2008 OPRA requests dated June 3, 2008
- E-mail from Custodian's Counsel to Thomas R. Kobin, Esq., dated April 25, 2008
- E-mail from Custodian's Counsel to Thomas R. Kobin, Esq., dated May 21, 2008
- E-mail from Thomas R. Kobin, Esq., to Custodian's Counsel dated May 21, 2008
- Letter from Thomas R. Kobin, Esq., to Custodian's Counsel dated June 23, 2008
- Letter from Complainant to Custodian's Counsel dated May 29, 2008¹⁴

The Custodian certifies that on March 17, 2008 he received twelve (12) OPRA requests from the Complainant (only seven (7) of said requests are at issue in this complaint). The Custodian certifies that he also received nine (9) OPRA requests from another requestor on said date. The Custodian certifies that he notified the Complainant via letter dated March 25, 2008 that he needed additional time, pursuant to N.J.S.A. 47:1A-5.i., to respond to the twenty one (21) OPRA requests submitted on the same date because attempting to respond to said requests within one (1) week would substantially disrupt the operations of his agency. The Custodian certifies that he informed the Complainant in said letter that he would respond to the Complainant's OPRA requests by April 4, 2008.

Complainant's Request for Tenure Charges Against Sabino Valdes dated April 27, 2000 and August 2, 2000

The Custodian certifies that he responded to the Complainant's request in writing on April 1, 2008 in which he indicated that the Board Attorney was researching whether said records are subject to disclosure under OPRA. The Custodian certifies that when the

¹⁴ The Custodian attached additional records; however, said records are not relevant to the adjudication of this Denial of Access Complaint.
 Richard Rivera v. Union City Board of Education (Hudson), 2008-112 – Findings and Recommendations of the Executive Director 9

Board Attorney determined that said charges were subject to disclosure, the Custodian notified the Complainant of same via letter dated April 18, 2008. Additionally, the Custodian certifies that he notified the Complainant in said letter of a \$320.00 special service charge because of the extraordinary expenditure of time and effort to accommodate said request pursuant to N.J.S.A. 47:1A-5.c. The Custodian certifies that said charge was based on Ms. Festa's, the administrative clerk who assists the Custodian, hourly rate, which is \$31.00, and the Board Attorney's hourly rate of \$160.00 per hour and an estimated ten (10) hours to search through Mr. Valdes' 27 boxes of records. The Custodian certifies that the estimated ten (10) hours was based on a previous search for records in said boxes which took approximately thirteen (13) hours. Further, the Custodian asserts that after the requested records were located, the Board Attorney would have to review said records for the potential redaction of personal information. The Custodian states that such review by Counsel was upheld by the court in Fisher v. Division of Law, 400 N.J. Super. 61 (App. Div. 2008). The Custodian asserts that the proposed special service charge was reasonable.

However, the Custodian certifies that on August 7, 2008 the subject of the requested tenure charges inspected the 27 boxes of records and the BOE located the requested tenure charges dated April 27, 2000. The Custodian states that the Board Attorney notified the Complainant's Counsel on August 13, 2008 that the requested record was available without a deposit or special service charge. The Custodian certifies that the BOE has not received any response from the Complainant or the Complainant's Counsel.

Further, the Custodian asserts that the filing of this Denial of Access Complaint was not the substantive motivating factor behind the release of said record pursuant to O'Shea v. Borough of Emerson, 2008 WL 2328239 (Law Div. 2008). Additionally, the Custodian contends that because said record was made available to the Complainant prior to the adjudication of this complaint and was not the catalyst in the record production, an award of counsel fees is not warranted pursuant to Mason v. City of Hoboken et al., 19 N.J. 51 (2008).

Additionally, the Custodian certifies that neither the BOE nor Mr. Valdes were able to locate the requested tenure charges dated August 2, 2000. The Custodian asserts that it is unknown whether said tenure charges exist. The Custodian contends that he cannot be deemed to have violated OPRA because he is unable to produce a government record that is not in the BOE's possession and perhaps never existed, pursuant to O'Shea v. Borough of Emerson, 2008 WL 2328239 (Law Div. 2008); Paff v. New Jersey Department of Labor, 392 N.J. Super. 333, 341 (App. Div. 2007); Bent v. Stafford Police Dept., 381 N.J. Super. 30, 39 (App. Div. 2005).

Tenure Charges filed Against Charles Trelease

The Custodian certifies that he responded to the Complainant's request in writing on April 1, 2008 in which he indicated that the Board Attorney was researching whether said record is subject to disclosure under OPRA. The Custodian also certifies that he advised the Complainant in writing on April 18, 2008 that the file containing said record had to be retrieved from storage. The Custodian states that Ms. Festa, his assistant,

contacted the BOE's storage facility to obtain said file and determined that the file was actually maintained by the former Board Attorney. The Custodian states that the current Board Attorney contacted the former Board Attorney via e-mail on April 25, 2008 to obtain said file. The Custodian states that the current Board Attorney sent a follow-up e-mail to the former Board Attorney on May 21, 2008. The Custodian states that the former Board Attorney responded on said date that he would search for the requested file. The Custodian states that the current Board Attorney received said file on June 23, 2008 and the requested tenure charges were located on the same date. The Custodian also states that on June 23, 2008 the current Board Attorney notified the Complainant and his Counsel that the tenure charges had been located and asked if the Complainant still sought access to the record. The Custodian states that the BOE has not received a response from the Complainant.

Additionally, the Custodian asserts that the BOE exceeded its responsibilities and obligation under OPRA and took the extra step to obtain said record from the former Board Attorney. Additionally the Custodian asserts that because the record was made available prior to the adjudication of this complaint, and because the delay in obtaining the requested record was no fault of the BOE, and the filing of the complaint was not the substantive motivating factor behind the release of said record. As such, the Custodian claims that the Complainant is not entitled to an award of reasonable attorney's fees pursuant to Mason, *supra*.

Complainant's Request for Special Meeting Minutes dated June 13, 2000 and July 1, 2003

The Custodian certifies that he responded to the Complainant's requests in writing on April 1, 2008 and notified the Complainant that said records could not be located but would be provided, if found. Regarding the search undertaken to locate records responsive, the Custodian states that his assistant, Ms. Festa, searched the BOE ledger minute books as well as six (6) archived boxes located at the BOE and could not locate the requested meeting minutes. The Custodian states that Ms. Festa continued to search for the requested minutes and on or about May 30, 2008 when searching through boxes in storage located one (1) page of the meeting minutes dated June 13, 2000 and immediately provided same to the Complainant. The Custodian states that Ms. Festa continued to search for the requested minutes and on or about August 25, 2008 located a copy of the July 1, 2003 special meeting minutes in a box labeled "Nancy's Copies." The Custodian states that the Board Attorney notified the Complainant and his counsel and asked if said minutes were still desired. The Custodian states that the Board Attorney has not received a response. Additionally, the Custodian believes that the special meeting minutes dated June 13, 2000 will not be located because they have not yet been found. The Custodian certifies that said minutes predate his tenure as Board Secretary.

The Custodian states that while the BOE takes full responsibility for the failure to properly maintain its records, resulting in the BOE's inability to locate the requested record, the Custodian notes that one of said records dates back to 2000. The Custodian contends that there is no evidence to suggest that the BOE's failure to maintain these records is the result of malicious destruction or concealment. The Custodian asserts that the BOE failed, by way of its former Board Secretary, in its recordkeeping function. The

Custodian asserts that the BOE made a good faith effort to locate said records and continues to search through archived files to locate said record. Further, the Custodian asserts that an OPRA violation should not be substantiated pursuant to O'Shea and Paff v. Borough of Emerson, 2008 WL 2328239 (Law Div. 2008).

As for the requested special meeting minutes dated July 1, 2003, the Custodian asserts that because he made said record available to the Complainant prior to the adjudication of this complaint, and the delay in obtaining the file was not the substantive motivating factor or catalyst behind the release of said record, the Complainant should not be entitled to an award of prevailing party's fees pursuant to Mason, *supra*.

Complainant's Request for Statement of Items Comprising the Record in In re Valdes

The Custodian certifies that he responded to said request in writing on April 1, 2008 in which he informed the Complainant that the BOE is not in possession of any records responsive to said request. The Custodian certifies that Mr. Valdes made the same request and when the BOE staff expended approximately 13 hours searching 27 boxes of records, staff did not locate any records responsive.

Complainant's OPRA Requests dated April 8, 2008

The Custodian certifies that on or about April 8, 2008 he received four (4) new OPRA requests from the Complainant, although only two (2) are the subjects of this Denial of Access Complaint. The Custodian asserts that said OPRA requests were misfiled and went unanswered. The Custodian states that the Board Attorney discovered said requests when she was preparing a response to the Complainant's letter dated May 29, 2008. The Custodian states that the Board Attorney contacted him to determine the status of said requests, and realized that said requests had been misfiled and unanswered. The Custodian states that the Board Attorney responded to said requests on June 2, 2008 apologizing for the error and advising the Complainant that his requests would be answered immediately. The Custodian states that he responded to said requests on the next day, June 3, 2008, and advised the Complainant of the immediate availability of the requested records. The Custodian certifies that the 117 pages responsive to the Complainant's requests have not been paid for or picked up.

Additionally, the Custodian certifies that although the Complainant's Denial of Access Complaint was the impetus for the BOE to realize that the Complainant's OPRA requests dated April 8, 2008 were misfiled and unanswered, the Custodian contends that said complaint was not the impetus for the BOE's response. The Custodian asserts that if said requests were not inadvertently misfiled, said requests would have been answered and the records made available within days because the requested meeting minutes were immediately located. The Custodian asserts that the Complainant should not be entitled to an award of prevailing party's fees pursuant to Mason, *supra*.

April 3, 2009

Letter from GRC to Custodian's Counsel. The GRC requests that the Custodian provide a legal certification in response to the following questions regarding the special service charged assessed in this matter:

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?
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.

April 7, 2009

Custodian's Certification. The Custodian certifies that his responses to the questions below are true and accurate to the best of his knowledge.

Questions	Custodian's Response
1. What records are requested?	April 27, 2000 and August 2, 2000 tenure charges against Sabino Valdes.
2. Give a general nature description and number of the government records requested.	Two (2) government records were requested. Each consists of a statement of charges, evidence, and voluminous numbered, tabbed exhibits.
3. What is the period of time over which the records extend?	The requested records date back to 2000.
4. Are some or all of the records sought archived or in storage?	Yes.
5. What is the size of the agency (total number of employees)?	Approximately 1,720 employees.
6. What is the number of employees available to accommodate the records request?	1 employee
7. To what extent do the requested records have to be redacted?	The records would have to be reviewed by the Board Attorney for potential redaction of personal information such as home address, date of birth, social security number and unlisted telephone number. Most of the exhibits likely came from an underlying personnel file.

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?	Confidential Secretary to Board Secretary/Custodian; hourly rate: \$31.63/hour. Estimated number of hours to locate, assemble, copy, return records to original location: 10 hours (see response to question no. 14 for explanation of estimate).
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?	Board Secretary/Custodian; hourly rate: \$0.00 (Board Secretary is an unpaid position being performed by the Business Administrator). Estimated number of hours to review/inspect records requested: 1 hour.
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?	Confidential Secretary to Board Secretary/Custodian; hourly rate: \$31.63/hour. Estimated number of hours to return records to original location: included in 10 hour estimate contained in response to question no. 8. (see response to question no. 14 for explanation of estimate).
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	Board Attorney would have to review and redact the record for personal and confidential information after the records were located, retrieved, assembled and copied. The time the Board Attorney would spend was also included in the 10 hour estimate.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Eva Festa, Confidential Secretary to Board Secretary; hourly rate: \$31.63/hour. Anthony N. Dragona, Board Secretary; hourly rate: \$0.00/hour. Susanne Lavelle, Esq., Board Counsel; hourly rate: \$160.00/hour.
13. What is the availability of information technology and copying capabilities?	A photocopier is onsite.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	Initially, the estimate provided was 10 hours. The estimate encompassed a review of the 27 boxes of records in which the requested records were thought to be located and included the amount of time the Confidential Secretary needed to attempt to locate the 2 requested records within the 27 boxes, copy, assemble (with exhibits) and replace, review by the Board Secretary, review and redact by Board Counsel and then copy the redacted pages again. The estimate was based on the amount of time spent to search these same 27 boxes in response to a previous OPRA request for another record. After the BOE's request for a deposit in this instant request, the BOE reviewed the 27 boxes in response to an OPRA request from another requestor and the records at issue here were located. Accordingly, the BOE informed the Complainant that the requested deposit would be waived and that only copy fees were required.

April 28, 2009

Letter from GRC to Custodian's Counsel. The GRC requests a legal certification from the Custodian in response to the following:

1. In the Custodian's SOI dated October 15, 2008, the Custodian provided a certification regarding the search undertaken to locate the records responsive to the Complainant's request for special meeting minutes dated June 13, 2000 and July 1, 2003. Specifically, the Custodian indicated that Ms. Festa, Confidential Secretary to the Board Secretary, continued to search for said records, and located one (1) page from the June 13, 2000 meeting minutes in a storage box on or about May 30, 2008. The GRC requests that the Custodian indicate whether Ms. Festa's search through boxes in storage on or about May 30, 2008 was directly related to the search for the requested special meeting minutes, or whether Ms. Festa's location of the one (1) page was unintentional and related to a search for other records which are not the subject of this complaint.
2. The GRC requests a general nature description of the contents of the box in which Ms. Festa located said page.
3. The GRC requests that the Custodian indicate whether he was aware of the existence and contents of the box entitled "Nancy's Copies" during the Custodian's initial search for the requested special meeting minutes.

May 1, 2009

Custodian's Certification. The Custodian certifies that when Ms. Festa located the one (1) page of the June 13, 2000 meeting minutes on or about May 30, 2008, she had undertaken a search of all boxes in storage solely in an attempt to locate the requested special meeting minutes. The Custodian states that according to Ms. Festa, the general nature of the contents of the box entitled "Nancy's Copies" in which she located the one (1) page of the June 13, 2000 minutes, consisted of copies of meeting minutes. Additionally, the Custodian certifies that he was not aware of the existence of the box entitled "Nancy's Copies" or the contents thereof when he conducted the initial search for the requested special meeting minutes.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

kept on file ... or that has been received in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“[w]henver 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 ... involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that *shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies* ... The requestor shall have the opportunity to review and object to the charge prior to it being incurred. (Emphasis added). N.J.S.A. 47:1A-5.c.

OPRA states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ... If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If 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.” N.J.S.A. 47:1A- 5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ... failure to respond shall be deemed a denial of the request*If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, N.J.S.A. 47:1A-5.i. provides that a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

Complainant’s OPRA Requests dated March 17, 2008

The Custodian certified that he received twelve (12) OPRA requests from the Complainant on March 17, 2008, although only six (6) of said OPRA requests are the subject of this Denial of Access Complaint. The Custodian also certified that he received nine (9) OPRA requests from another requestor on the same date. The Custodian certified that he provided the Complainant with a written response to his OPRA requests on March 25, 2008, the sixth (6th) business day following receipt of said requests, in which the Custodian indicated that responding to the twenty-one (21) OPRA requests he received from the Complainant and another requestor in one (1) week would substantially disrupt the operations of the agency. As such, the Custodian certified that he requested an extension of time until April 4, 2008 to respond to the Complainant’s OPRA requests.

OPRA provides 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.” N.J.S.A. 47:1A-5.g. Here, the Custodian attempted to reach a reasonable solution with the requestor that accommodated the interests of the requestor and the agency by requesting an extension of time until April 4, 2008 to respond to the Complainant’s OPRA requests. OPRA provides for such requests in N.J.S.A. 47:1A-5.i. which states that “[t]he requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.”

¹⁵ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.”

Similarly in this instant complaint, the Custodian provided the Complainant with a written response to his OPRA requests on the sixth (6th) business day following receipt of said requests in which the Custodian requested an extension of time until April 4, 2008 to respond to said requests.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

Further, because the Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency, and because the Custodian properly requested an extension of time to respond to the Complainant’s OPRA requests, the Custodian’s request for an extension of time to respond to the Complainant’s OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g.

Complainant’s Request for Tenure charges Against Sabino Valdes

As stated above, the Custodian requested an extension of time until April 4, 2008 to respond to the Complainant’s OPRA requests. The Custodian certified that he responded to the Complainant in writing on April 1, 2008 in which the Custodian advised the Complainant that the Board Attorney was researching whether the requested tenure charges are subject to public access. The Custodian did not provide the Complainant with a subsequent response until April 18, 2008, ten (10) business days beyond the Custodian’s extended deadline date to respond to said request.

In Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Council held that “[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond.”

In this instant complaint, the Custodian did request an extension of time to respond, but did not meet his extended deadline date because he was seeking legal advice from the Board Attorney regarding whether the requested tenure charges were subject to public access.

Therefore, although the Custodian properly requested an extension of time to respond to the Complainant’s request for tenure charges filed against Sabino Valdes, the Custodian failed to adhere to the extended deadline date because the Custodian’s written response dated April 1, 2008 did not grant or deny access to the requested tenure charges, but rather indicated that the Board Attorney was conducting research on whether the requested records could be released. Pursuant to Paff, *supra*, seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request. As such, the Custodian’s failure to grant or deny access in writing to the requested tenure charges filed against Sabino Valdes within the extended deadline date results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

However, the Custodian certified that he notified the Complainant that the requested tenure charges were subject to public access via letter dated April 18, 2008, in which the Custodian assessed a special service charge to locate the records responsive. The Complainant’s Counsel asserts that the special service charge is unreasonable. Specifically, Counsel contends that the special service charge is based on a predetermined hourly rate of \$32.00 per hour. Counsel asserts that it is well established that special service charges cannot be predetermined. Counsel also states that the Custodian claims ten (10) hours is required to search for two (2) records which Counsel contends is unreasonable. Counsel asserts that the 27 boxes of records to be searched should have some index or other form of organization, and if no such index exists it is the fault of the Custodian, not the Complainant.

N.J.S.A. 47:1A-5.c. permits a custodian to charge a special service charge that is reasonable and based upon the actual direct cost of providing the copy or copies in addition to the actual cost of duplicating the record if accommodating the request requires an extraordinary expenditure of time and effort. Additionally, the Custodian must provide the Complainant with an opportunity to object to the special service charge prior to said charge being incurred.

The GRC established criteria for the assessment of whether a special service charge is warranted and reasonable in Fisher v. Division of Law and Public Safety, GRC Complaint No. 2004-55 (December 2004). The same questions asked in Fisher provide the basis for the analysis in this instant complaint. The GRC’s questions and the Custodian’s responses are as follows:

Questions	Custodian’s Response
1. What records are requested?	April 27, 2000 and August 2, 2000 tenure charges against Sabino Valdes.
2. Give a general nature description and number of the government records requested.	Two (2) government records were requested. Each consists of a statement of charges, evidence, and voluminous numbered, tabbed exhibits.
3. What is the period of time over which the records extend?	The requested records date back to 2000.

4. Are some or all of the records sought archived or in storage?	Yes.
5. What is the size of the agency (total number of employees)?	Approximately 1,720 employees.
6. What is the number of employees available to accommodate the records request?	1 employee
7. To what extent do the requested records have to be redacted?	The records would have to be reviewed by the Board Attorney for potential redaction of personal information such as home address, date of birth, social security number and unlisted telephone number. Most of the exhibits likely came from an underlying personnel file.
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?	Confidential Secretary to Board Secretary/Custodian; hourly rate: \$31.63/hour. Estimated number of hours to locate, assemble, copy, return records to original location: 10 hours (see response to question no. 14 for explanation of estimate).
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?	Board Secretary/Custodian; hourly rate: \$0.00 (Board Secretary is an unpaid position being performed by the Business Administrator). Estimated number of hours to review/inspect records requested: 1 hour.
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?	Confidential Secretary to Board Secretary/Custodian; hourly rate: \$31.63/hour. Estimated number of hours to return records to original location: included in 10 hour estimate contained in response to question no. 8. (see response to question no. 14 for explanation of estimate).
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	Board Attorney would have to review and redact the record for personal and confidential information after the records were located, retrieved, assembled and copied. The time the Board Attorney would spend was also included in the 10 hour estimate.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Eva Festa, Confidential Secretary to Board Secretary; hourly rate: \$31.63/hour. Anthony N. Dragona, Board Secretary; hourly rate: \$0.00/hour. Susanne Lavelle, Esq., Board Counsel; hourly rate: \$160.00/hour.
13. What is the availability of information technology and copying capabilities?	A photocopier is onsite.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return	Initially, the estimate provided was for 10 hours. The estimate encompassed a review of the 27 boxes of records in which the requested records were thought to be located and included the amount of time the Confidential Secretary needed to attempt to locate the 2 requested records within the 27 boxes, copy, assemble

the requested documents.	<p>(with exhibits) and replace, review by the Board Secretary, review and redact by Board Attorney and then copy the redacted pages again. The estimate was based on the amount of time spent to search these same 27 boxes in response to a previous OPRA request for another record.</p> <p>After the BOE's request for a deposit in this instant request, the BOE reviewed the 27 boxes in response to an OPRA request from another requestor and the records at issue here were located. Accordingly, the BOE informed the Complainant that the requested deposit would be waived and that only copy fees were required.</p>
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Before the Council can assess whether a special service charge is reasonable, the Council must assess whether the special service charge is warranted. Pursuant to N.J.S.A. 47:1A-5.c., special service charges are only warranted when fulfilling the request requires an extraordinary expenditure of time and effort. What constitutes an extraordinary expenditure of time and effort is subjective and depends on the specific circumstances surrounding the request and as well as the size of the agency.

Here, the Custodian certified that the requested tenure charges, which date back to 2000, are located within 27 boxes of records. The Custodian certified that out of approximately 1,720 employees within the agency, one (1) employee, the Confidential Secretary to the Board Secretary, would complete the search for the requested records. Additionally, the Custodian certified that the estimated amount of time to search for, locate, copy, redact and return the records to their original location would be approximately ten (10) hours. The Custodian certified that he based this estimate on the actual time of thirteen (13) hours the BOE expended searching the same 27 boxes for another record in response to another OPRA request. Further, the Custodian informed the Complainant that if fulfilling the request required less than the estimated ten (10) hours of time, the Custodian would refund the Complainant's deposit for the unused hours.

Therefore, because the Custodian's estimated ten (10) hour expenditure of time to fulfill the Complainant's request is based on the thirteen (13) hours the BOE actually expended searching the same 27 boxes in response to another OPRA request, the Custodian's estimated ten (10) hours constitutes an extraordinary expenditure of time and warrants a special service charge pursuant to N.J.S.A. 47:1A-5.c.

Because fulfilling the Complainant's OPRA request warrants a special service charge, the Council must now address whether said charge is reasonable. In Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Appellate Division held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the Custodian can prove that the professional level of human resource was needed to fulfill the request.

In this instant complaint, the Custodian certified that the hourly rate of the Confidential Secretary to the Board Secretary to complete the search, location, copying and returning the records to their original location is \$31.63. The Custodian also certified

that the hourly rate of the Board Attorney, who would redact personal information from the requested records, is \$160.00. The Custodian charged the Complainant \$32.00 per hour.

The Custodian asserts that the courts have upheld an attorney's review of records for potential redactions. Specifically, the Custodian states that in Fisher v. Division of Law, 400 N.J. Super. 61 (App. Div. 2008)¹⁶, the requestor sought access to e-mails between the GRC and the Division of Law regarding the assignment of Deputy Attorneys General as GRC staff. The Custodian assessed a special service charge of \$1,877.93 for Division of Law attorneys to search, identify and review the records for potential redactions. The Council upheld the Custodian's special service charge. The requestor appealed and objected to the reasonableness of assigning attorneys to complete the search, location and redaction of the requested e-mails rather than the Custodian. The basis for the requestor's argument relied upon the court's decision in Courier Post, *supra*, in which the court held that although fulfilling the OPRA request at issue warranted a special service charge, the attorney's fees paid to outside counsel to review the records for potential privileged information could not be included in the charge. Specifically, the court reasoned that OPRA "places the responsibility of identifying exempt material and redacting or excising it squarely on the custodian of the records sought to be inspected" rather than outside counsel. *Id.*

However, the court in Fisher, *supra*, distinguished the facts of its case from the facts presented in Courier Post, *supra*. Specifically, the court stated that:

"[t]his is not a case where the government records have already been retrieved and a public agency seeks to impose a 'special service charge' solely for the purpose of outside counsel determining whether the records contain privileged material that should be redacted...Instead, the special service charge the Division of Law seeks to impose upon appellant is for the cost of retrieval of the government records responsive to appellant's requests, and the public officials the Division has assigned to perform this responsibility are the same public officials who prepared the government records. Therefore, this appeal does not present the question involved in Courier Post, which was whether the special service charge authorized by *N.J.S.A. 47:1A-5(c)* may include fees a custodian of government records incurs for outside attorney review to determine whether government records contain privileged material."

As such, the court's decision in Fisher, *supra*, does not apply to this instant complaint. Further, the Custodian has failed to prove that the Board Attorney is the only employee who could perform the necessary redactions of personal information. In fact, the Custodian certified that such personal information included home address, date of birth, social security number and unlisted telephone number. Such information contained on a government record can be easily identified by the Confidential Secretary and does

¹⁶ On appeal from Fisher v. Department of Law & Public Safety, Division of Law, GRC Complaint No. 2004-55 (August 2006).
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not require the use of an attorney. Thus, the Board Attorney's hourly rate should not be included as part of the special service charge.

Therefore, pursuant to N.J.S.A. 47:1A-5.c. and Courier Post, *supra*, the special service charge should reflect the estimated ten (10) hours to search, locate, copy, redact and return the records to their original location, as well as the Confidential Secretary to the Board Secretary's hourly rate of \$31.63 per hour. As such, the special service charge totals \$316.30. Thus, the Custodian's \$320.00 charge is unreasonable because it does not reflect the actual direct cost of fulfilling the request pursuant to N.J.S.A. 47:1A-5.c. However, this issue is now moot since the Custodian located the requested tenure charges dated April 27, 2000 while responding to another OPRA request and has made said record available to the Complainant for the per page copy fee and without a special service charge.

As for the requested tenure charges filed against Sabino Valdes dated August 2, 2000, the Custodian certified that neither the BOE nor the subject of said charges has located the requested records in any of the 27 boxes believed to contain said records. As such, the Custodian asserts that said tenure charges do not exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that the Custodian did not unlawfully deny access to the requested record because the Custodian certified that no records responsive existed.

Therefore, because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for tenure charges filed against Sabino Valdes dated August 2, 2000, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*, had the Custodian properly responded in writing within the extended deadline date pursuant to N.J.S.A. 47:1A-5.i.

Tenure Charges Filed Against Charles Trelease

As stated above, the Custodian requested an extension of time until April 4, 2008 to respond to the Complainant's OPRA requests. The Custodian certified that he responded to the Complainant in writing on April 1, 2008 in which the Custodian advised the Complainant that the Board Attorney was researching whether the requested tenure charges are subject to public access. The Custodian did not provide the Complainant with a subsequent response until April 18, 2008, ten (10) business days beyond the Custodian's extended deadline date to respond to said request.

Therefore, although the Custodian properly requested an extension of time to respond to the Complainant's request for tenure charges filed against Charles Trelease, the Custodian failed to adhere to the extended deadline date because the Custodian's written response dated April 1, 2008 did not grant or deny access to the requested tenure charges, but rather indicated that the Board Attorney was conducting research on whether the requested records could be released. Pursuant to Paff, *supra*, seeking legal advice is reasonable, but not a lawful basis for delaying a response to an OPRA request. As such,

the Custodian's failure to grant or deny access in writing to the requested tenure charges filed against Charles Trelease within the extended deadline date results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Additionally, in the Custodian's subsequent written response dated April 18, 2008, ten (10) business days beyond the Custodian's initial extended deadline date, the Custodian informed the Complainant that the requested tenure charges had to be retrieved from storage and the Custodian requested a two (2) week extension of time to retrieve said record before advising whether a special service charge is warranted.

Therefore, the Custodian's written request dated April 18, 2008 for an additional extension of time to fulfill the Complainant's request for tenure charges filed against Charles Trelease is improper pursuant to N.J.S.A. 47:1A-5.i. because the Custodian made said request beyond the extension deadline ending April 4, 2008 initially requested by the Custodian.

Nevertheless, the purported two (2) week extension would have ended on May 2, 2008. The Custodian certified that his assistant contacted the storage facility and determined that the requested tenure charges were maintained by the former Board Attorney. The current Board Attorney contacted the former Board Attorney via e-mail dated April 25, 2008 in an attempt to access the requested tenure charges. The current Board Attorney sent a follow-up e-mail to the former Board Attorney dated May 21, 2008. Via letter dated June 3, 2008, beyond the Custodian's purported second extension deadline, the current Board Attorney informed the Complainant that she made attempts to access the requested tenure charges from the former Board Attorney and that she will contact the Complainant when she receives said records. However, the current Board Attorney's letter to the Complainant dated June 3, 2008 is untimely and similarly fails to grant or deny access to the requested tenure charges. The current Board Attorney received the requested tenure charges from the former Board Attorney on June 23, 2008 and provided said charges to the Complainant on the same date.

Therefore, the Custodian unlawfully denied access to the requested tenure charges filed against Charles Trelease by failing to properly grant or deny access, failing to comply with the extended deadline date, and failing to properly obtain a second extension of time.

Special Meeting Minutes

As stated above, the Custodian requested an extension of time until April 4, 2008 to respond to the Complainant's OPRA requests. The Custodian certified that he responded to the Complainant in writing on April 1, 2008 and indicated that the requested meeting minutes could not be located but would be provided, if found. The Custodian states that his assistant, Ms. Festa, searched the BOE ledger minute books as well as six (6) archived boxes located at the BOE and could not locate the requested meeting minutes.

The Custodian certified that Ms. Festa continued to search for the requested minutes in storage boxes and on or about May 30, 2008 located one (1) page of the

meeting minutes dated June 13, 2000 and immediately provided same to the Complainant.

Additionally, the Custodian states that Ms. Festa continued to search for the requested minutes and on or about August 25, 2008 located a copy of the July 1, 2003 special meeting minutes in a box labeled “Nancy’s Copies.” The Custodian states that according to Ms. Festa, the general nature of the contents of the box entitled “Nancy’s Copies” consisted of copies of meeting minutes. Additionally, the Custodian certifies that he was not aware of the existence of the box entitled “Nancy’s Copies” or the contents thereof when he conducted the initial search for the requested special meeting minutes.

The Custodian states that the Board Attorney informed the Complainant and his counsel and asked if said minutes were still desired. The Custodian certifies that the Board Attorney has not received a response. Additionally, the Custodian believes that the special meeting minutes dated June 13, 2000 will not be located because they have not yet been found. The Custodian certifies that said minutes predate his tenure as Board Secretary.

The GRC has previously adjudicated complaints in which the Custodian initially denied access to the requested records. In May v. Township of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007), the Complainant sought access to schematic floor plans of Edison High School. The Custodian initially denied the Complainant access to the requested floor plans by stating that the Complainant must submit his request to the Board of Education. After the Complainant filed his Denial of Access Complaint, the Custodian made the requested records available to the Complainant and indicated that she misunderstood the Complainant’s request to be for Board of Education records. The Council held that:

“[e]ven though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.”

Additionally, in Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian initially denied access to the requested records on the basis that no records responsive existed. However, in the Statement of Information, the Custodian certified he performed an inadequate initial search based on the assumption that the requested records was a Department of Personnel record, and that a proper search yielded other records responsive to the Complainant’s request. The Council held that the Custodian unlawfully denied access to the requested records.

In this instant complaint, the Custodian’s initial response to the Complainant was that he could not locate the requested meeting minutes. The Custodian certified that he

searched the BOE's ledger minute books as well as six (6) archived boxes of minutes. Ultimately, the Custodian's assistant located portions of the requested minutes in a storage box labeled "Nancy's Copies." The Custodian certified that he was unaware of both the existence and the contents of said box during his initial search for the requested minutes.

This instant complaint is distinguishable from May, *supra*, because the Custodian in May summarily denied the Complainant's request without conducting a search for said records. The Custodian here actually conducted a search for the requested meeting minutes prior to indicating that he could not locate said minutes.

Additionally, this complaint is distinguishable from Schneble, *supra*. In said complaint the Custodian admitted to performing an inadequate search for the requested records based on his misinterpretation of the request. In this instant complaint, the Custodian certified that he searched all locations where he believed the minutes could be located, including six (6) archived boxes. The Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's Copies" in which the Custodian's assistant located portions of the requested minutes.

Therefore, because the Custodian conducted a reasonable search for the requested special meeting minutes in the BOE's ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's Copies" in which the Custodian's assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.

Statement of Items Comprising the Record

As stated above, the Custodian requested an extension of time until April 4, 2008 to respond to the Complainant's OPRA requests. The Custodian certified that he responded to the Complainant in writing on April 1, 2008 and indicated that the BOE was not in possession of any records responsive to said request. The Custodian also certifies that the subject of said records made the same OPRA request. The Custodian certifies that in response to said request the BOE staff expended approximately 13 hours searching 27 boxes of records and was unable to locate the requested record. Thus, the Custodian certifies that the BOE does not maintain any records responsive.

Therefore, because the Custodian denied access to the Complainant's request for the Statement of Items Comprising the Record within the extended deadline date, and because the Custodian certifies that the BOE does not maintain any records responsive to said request, as well as because the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Complainant's OPRA Requests Dated April 8, 2008

The Custodian certifies that he received the Complainant's two (2) OPRA requests on or about April 8, 2008 and inadvertently misfiled said requests. The Custodian states that the Board Attorney notified the Complainant of the error via letter dated June 2, 2008 and indicated that the Custodian would respond to said requests immediately. The Custodian states that on June 3, 2008, the Board Attorney notified the Complainant in writing that the requested records are available upon payment of the copying fee. The Custodian states that neither he nor the Board Attorney received a response from the Complainant.

Therefore, the Custodian's failure to respond in writing to the Complainant's April 8, 2008 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Board Attorney made the requested records available to the Complainant via letter dated June 3, 2008.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

"... If 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.

The Custodian in this complaint properly requested an extension of time to fulfill the Complainant's OPRA requests dated March 17, 2008 pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra. Additionally, because the Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency, the Custodian's request for an extension of time to respond to the Complainant's OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g. However, the Custodian's failure to either grant or deny

access to the requested tenure charges filed against Sabino Valdes and Charles Trelease within the extended deadline date results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian’s failure to respond to the Complainant’s OPRA requests dated April 8, 2008 within the statutorily mandated seven (7) business days also results in a “deemed” denied of said requests.

Further, because the Custodian in this complaint certified that there are no records responsive to the Complainant’s request for tenure charges filed against Sabino Valdes dated August 2, 2000 and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian responded in writing within the extended deadline date. The Custodian did, however, carry his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the Complainant’s request for the Statement of Items Comprising the Record.

Moreover, because the Custodian’s estimated ten (10) hour expenditure of time to fulfill the Complainant’s request is based on the thirteen (13) hours the BOE actually expended searching the same 27 boxes in response to another OPRA request, the Custodian’s estimated ten (10) hours constitutes an extraordinary expenditure of time and warrants a special service charge pursuant to N.J.S.A. 47:1A-5.c. However, the Custodian’s \$320.00 special service charge is unreasonable because it does not reflect the actual cost of fulfilling the request pursuant to N.J.S.A. 47:1A-5.c. Despite the Custodian’s violation of OPRA, this issue is now moot since the Custodian made said record available to the Complainant for the per page copy fee and no special service charge.

Additionally, the Custodian did not unlawfully deny access to the requested special meeting minutes because he conducted a reasonable search for said records and certified that he was not aware of the existence or the contents of the box labeled “Nancy’s copies” in which the Custodian’s assistant located portions of the requested minutes.

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 (Berg); 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).

In this instant complaint, the Custodian's failure to provide written responses to the Complainant's OPRA requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial. Additionally, although a special service charge was warranted to provide the requested tenure charges filed against Sabino Valdes, the special service assessed was unreasonable. However, the Custodian properly requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008 due to a substantial disruption of agency operations. Additionally, the Custodian bore his burden of proving a lawful denial of access to the requested Statement of Items Comprising the Record as well as the special meeting minutes. Therefore, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access and unreasonable special service charge appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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/she 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.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her

access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

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 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, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon 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 court in Mason, *supra*, at 76, held that "requestors 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)."

In this present complaint, the Custodian's Counsel contends that the Complainant is entitled to an award of prevailing party attorney's fees because the Custodian did not provide any records to the Complainant until after he filed his Denial of Access Complaint.

Regarding the Complainant's OPRA requests dated March 17, 2008, the evidence of record indicates that the Custodian attempted to fulfill the Complainant's OPRA requests for tenure charges filed against Sabino Valdes on April 18, 2008, prior to the Complainant's filing of this Denial of Access Complaint, when the Custodian assessed a special service charge. Although the special service charge assessed is unreasonable, a charge is warranted. The record also indicates that the Custodian attempted to access the requested tenure charges filed against Charles Trelease on April 18, 2008 and April 25, 2008, also prior to the Complainant's filing of this Denial of Access Complaint. Additionally, the Custodian denied access to the Complainant's request for the statement of items comprising the record on the basis that no records responsive exist.

However, after the Custodian searched all reasonable locations for the requested meeting minutes, the Custodian continued to search for said records after the Complainant filed this Denial of Access Complaint. The Custodian located and provided the Complainant with portions of the requested meeting minutes on May 30, 2008. Additionally, the Custodian, in his SOI dated October 15, 2008, admitted that the Complainant's Denial of Access Complaint was the impetus for the BOE to realize that the Complainant's OPRA requests dated April 8, 2008 were misfiled and unanswered. However, the Custodian also asserts that he would have properly responded to said requests had they not been misfiled.

The issue of whether the Complainant is entitled to an award of prevailing party attorney's fees is based on the actual events surrounding the request and complaint, not what *may* have happened had the circumstances been different. The evidence of record indicates that the Complainant's Denial of Access Complaint was the motivating factor behind the BOE locating and answering the Complainant's OPRA requests dated April 8, 2008.

Therefore, pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law (the Custodian was legally obligated to respond to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g.). As such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008 in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency, and because the Custodian properly requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008, the Custodian's request for an extension of time to respond to the Complainant's OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g.
3. Although the Custodian properly requested an extension of time to respond to the Complainant's request for tenure charges filed against Sabino Valdes, the Custodian failed to adhere to the extended deadline date because the Custodian's written response dated April 1, 2008 did not grant or deny access to the requested tenure charges, but rather indicated that the Board Attorney was conducting research on whether the requested records could be released. Pursuant to Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request. As such, the Custodian's failure to grant or deny access in writing to the requested tenure charges filed

against Sabino Valdes within the extended deadline date results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

4. Because the Custodian’s estimated ten (10) hour expenditure of time to fulfill the Complainant’s request for tenure charges filed against Sabino Valdes is based on the thirteen (13) hours the Board of Education actually expended searching the same 27 boxes in response to another OPRA request, the Custodian’s estimated ten (10) hours constitutes an extraordinary expenditure of time and warrants a special service charge pursuant to N.J.S.A. 47:1A-5.c.
5. Pursuant to N.J.S.A. 47:1A-5.c. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the special service charge should reflect the estimated ten (10) hours to search, locate, copy, redact and return the records to their original location, as well as the Confidential Secretary to the Board Secretary’s hourly rate of \$31.63 per hour. As such, the special service charge totals \$316.30. Thus, the Custodian’s \$320.00 charge is unreasonable because it does not reflect the actual direct cost of fulfilling the request pursuant to N.J.S.A. 47:1A-5.c. However, this issue is now moot since the Custodian located the requested tenure charges dated April 27, 2000 while responding to another OPRA request and has made said record available to the Complainant for the per page copy fee and without a special service charge.
6. Because the Custodian in this complaint certified that there are no records responsive to the Complainant’s request for tenure charges filed against Sabino Valdes dated August 2, 2000, and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian properly responded in writing within the extended deadline date pursuant to N.J.S.A. 47:1A-5.i.
7. Although the Custodian properly requested an extension of time to respond to the Complainant’s request for tenure charges filed against Charles Trelease, the Custodian failed to adhere to the extended deadline date because the Custodian’s written response dated April 1, 2008 did not grant or deny access to the requested tenure charges, but rather indicated that the Board Attorney was conducting research on whether the requested records could be released. Pursuant to Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but not a lawful basis for delaying a response to an OPRA request. As such, the Custodian’s failure to grant or deny access in writing to the requested tenure charges filed against Charles Trelease within the extended deadline date results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

8. The Custodian's written request dated April 18, 2008 for an additional extension of time to fulfill the Complainant's request for tenure charges filed against Charles Trelease is improper pursuant to N.J.S.A. 47:1A-5.i. because the Custodian made said request beyond the extension deadline ending April 4, 2008 initially requested by the Custodian.
9. The Custodian unlawfully denied access to the requested tenure charges filed against Charles Trelease by failing to properly grant or deny access, failing to comply with his extended deadline date, and failing to properly obtain a second extension of time.
10. Because the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education's ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's Copies" in which the Custodian's assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
11. Because the Custodian denied access to the Complainant's request for the Statement of Items Comprising the Record within the extended deadline date, and because the Custodian certifies that the Board of Education does not maintain any records responsive to said request, as well as because the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
12. The Custodian's failure to respond in writing to the Complainant's April 8, 2008 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Board Attorney made the requested records available to the Complainant via letter dated June 3, 2008.
13. The Custodian's failure to provide written responses to the Complainant's OPRA requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial. Additionally, although a special service charge was warranted to provide the requested tenure charges filed against Sabino Valdes, the special service assessed was unreasonable. However, the Custodian properly requested an extension of time to respond to the Complainant's OPRA requests dated March 17, 2008 due to a substantial disruption of agency operations. Additionally, the Custodian bore his burden of proving a lawful denial of access to the requested Statement of Items Comprising the Record as well as the special meeting minutes. Therefore, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access and unreasonable special service charge appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

14. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law (the Custodian was legally obligated to respond to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g.). As such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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Executive Director

August 4, 2009