



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
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-285

v.

Borough of Fort Lee Police Department (Bergen)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 24, 2011 Interim Order by certifying to the Executive Director within five (5) business days from receipt of the Council’s Interim Order that he had previously disclosed to the Complainant all of the records that were directed to be disclosed to the Complainant in paragraphs 4 and 5 of the Council’s Interim Order. Further, the evidence of record reveals that the Complainant is satisfied that he received all of the records required to be disclosed to him pursuant to paragraphs 4 and 5 of the Council’s May 24, 2011 Interim Order.
2. The Custodian failed to respond *in writing* to the Complainant’s September 25, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days which resulted in a “deemed” denial of the Complainant’s 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 (January 2010), and further the Custodian’s response to the Complainant’s request informing the Complainant only that the request was forwarded to the Police Department constituted an open ended response by the Custodian which is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Custodian did respond verbally to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request, and therefore the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s



Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006.
Proper service of submissions pursuant to any appeal is to be made to the Council in care of the
Executive Director at the State of New Jersey Government Records Council, 101 South Broad
Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-285

v.

**Borough of Fort Lee Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

The Complainant requests an on-site examination of the following records:

1. All Computer Aided Dispatch (“CAD”) event abstracts for funeral home and funeral escorts from 2006 to September 25, 2009.
2. Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background.
3. Police and Borough records of legal bills relating to OPRA requests made by the Complainant.
4. CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m.
5. CAD log for calls and events on August 27, 2009 from 4:00 p.m. until 11:59 p.m.
6. Police use of force annual summary reports for 2005 through 2008.³
7. Police use of force incident reports for 2008 filed by Officer Thomas Ripoli.

Requests Made: September 25, 2009

Responses Made: October 1, 2009⁴

Custodian: Neil Grant, Clerk

GRC Complaint Filed: October 16, 2009⁵

Background

May 24, 2011

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 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 No legal representation listed on record.

² Represented by J. Sheldon Cohen, Esq., DeCotiis, Cole & Wisler (Teaneck, NJ).

³ The Complainant states that he does not want individual use of force incident reports.

⁴ The evidence of record indicates that the Custodian’s response to the OPRA request was verbal.

⁵ The GRC received the Denial of Access Complaint on said date.

1. The Custodian's failure to respond *in writing* to the Complainant's September 25, 2009 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 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). Further, the Custodian's response to the Complainant's request, which informed the Complainant only that the request was forwarded to the Police Department, constituted an open ended response by the Custodian, is inadequate under OPRA and is therefore a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for Item No. 1 and Item No. 6 (for the years 2005 and 2006), and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request for Item No. 2 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.
4. The Custodian must disclose to the Complainant Item No. 3 which are all attorney bills or invoices, with any appropriate redactions, that the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1a-1.1.
5. Because Item Number 4, Item No. 5, Item No. 6 (for the years 2007 and 2008) and Item No. 7 of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose said records to the Complainant.
6. Because the Custodian has established that the proposed special service charge of \$202.05 for redacting and disclosing Item Numbers 3, 4, 5, 6 (for the years 2007 and 2008) and 7 of the records relevant to the complaint is reasonable and reflects the actual cost to the Borough to fulfill the

Complainant's OPRA request for said records, the estimated special service charge of \$202.05 proposed by the Custodian is reasonable and warranted under N.J.S.A. 47:1A-5.d.

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

May 26, 2011

Council's Interim Order distributed to the parties.

May 31, 2011

Custodian's response to the Council's Interim Order. The Custodian certifies that all records that the Council directed be disclosed to the Complainant had previously been disclosed either in response to the Complainant's GRC Complaint No. 2009-266 or his March 28, 2011 OPRA request. The Custodian further certifies that on May 27, 2011 the Custodian spoke to the Complainant and the Complainant acknowledged receipt of the records from the prior matters. The Custodian therefore states that he has fully complied with the Council's May 24, 2011 Interim Order.

June 15, 2011

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of a copy of the Custodian's May 31, 2011 certified confirmation of compliance. The Complainant emphasizes that police officers were injured in the process of providing the services which formed the basis of the records requested as Item Number 1 of the records relevant to the complaint. As such, the Complainant states that he finds it hard to believe that the police department does not have the records requested as Item Number 1 of the records relevant to the complaint.

June 21, 2011

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the Custodian in his certification dated May 31, 2011 certified that all records that the Council in its Interim Order dated May 24, 2011 directed the Custodian to disclose had previously been disclosed to the Complainant, either in response to an earlier OPRA request or an earlier Denial of Access Complaint. The GRC further informs the Complainant that the Custodian certified that he spoke to the Complainant on May 27, 2011, at which time the Complainant acknowledged receipt of the records from the prior matters and, in effect, waived his right to have the Custodian disclose the records in the above-referenced matter. The GRC also informs the Complainant that even if records were disclosed from a prior OPRA request or complaint, if the records in a subsequent

request are not denied, they must be disclosed again unless the custodian can prove that the requestor has such records in his/her possession or the requestor waives his/her right to receive the records. The GRC asks the Complainant to confirm with the GRC whether he is satisfied that the records that were ordered to be disclosed to him in the Council's May 24, 2011 Interim Order have been previously disclosed to him by the Custodian and that he does not want the records again disclosed to him as provided by the terms of the Council's May 24, 2011 Order.

June 22, 2011

E-mail from the Complainant to the GRC. The Complainant confirms that he is satisfied that the records that were ordered to be disclosed to him in the Council's May 24, 2011 Interim Order have been previously disclosed to him by the Custodian and that he does not want the records again disclosed to him as provided by the terms of the Council's May 24, 2011 Order.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

On May 26, 2011, the Council's Interim Order was distributed to the Custodian and the evidence of record reveals that the Order was received by the Custodian on May 27, 2011. The Council's Order allowed the Custodian five (5) business days to provide certified confirmation of compliance to the Executive Director. The Custodian responded with certified confirmation of compliance to the Executive Director on May 31, 2011, which was the first (1st) business day after the Custodian's receipt of the Interim Order, by certifying that he had previously disclosed all of the records required to be disclosed pursuant to paragraphs 4 and 5 of said Order. The Custodian further certified that on May 27, 2011 he spoke to the Complainant and the Complainant acknowledged receipt of the records from the prior matters. On June 22, 2011, the Complainant confirmed that he is satisfied that the records that were ordered to be disclosed to him in the Council's May 24, 2011 Interim Order have been previously disclosed to him by the Custodian and he does not want the records again disclosed to him as provided by the terms of the Council's order.

Accordingly, the Custodian complied with the Council's May 24, 2011 Interim Order by certifying to the Executive Director within five (5) business days from receipt of the Council's Interim Order that he had previously disclosed to the Complainant all of the records that were directed to be disclosed to the Complainant in paragraphs 4 and 5 of the Council's Interim Order. Further, the evidence of record reveals that the Complainant is satisfied that he received all of the records required to be disclosed to him pursuant to paragraphs 4 and 5 of the Council's May 24, 2011 Interim Order.

Whether the Custodian’s actions rise 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.

In the instant complaint, the Custodian failed to respond *in writing* to the Complainant’s September 25, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. The Custodian, however, did respond verbally to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request, informing the Complainant that his OPRA request was forwarded to the Police Department.

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).

Accordingly, the Custodian failed to respond *in writing* to the Complainant’s September 25, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days which resulted in a “deemed” denial of the Complainant’s 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 (January 2010), and further the Custodian’s response to the

Complainant's request informing the Complainant only that the request was forwarded to the Police Department constituted an open ended response by the Custodian which is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Custodian did respond verbally to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request, and therefore the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 24, 2011 Interim Order by certifying to the Executive Director within five (5) business days from receipt of the Council's Interim Order that he had previously disclosed to the Complainant all of the records that were directed to be disclosed to the Complainant in paragraphs 4 and 5 of the Council's Interim Order. Further, the evidence of record reveals that the Complainant is satisfied that he received all of the records required to be disclosed to him pursuant to paragraphs 4 and 5 of the Council's May 24, 2011 Interim Order.
2. The Custodian failed to respond *in writing* to the Complainant's September 25, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days which resulted in a "deemed" denial of the Complainant's 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 (January 2010), and further the Custodian's response to the Complainant's request informing the Complainant only that the request was forwarded to the Police Department constituted an open ended response by the Custodian which is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Custodian did respond verbally to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request, and therefore the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011



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
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-285

v.

Borough of Fort Lee Police Department (Bergen)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond *in writing* to the Complainant’s September 25, 2009 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 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). Further, the Custodian’s response to the Complainant’s request, which informed the Complainant only that the request was forwarded to the Police Department, constituted an open ended response by the Custodian, is inadequate under OPRA and is therefore a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. Because the Custodian certified that there are no records responsive to the Complainant’s request for Item No. 1 and Item No. 6 (for the years 2005 and 2006), and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant’s request for Item No. 2 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant’s request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council’s decision in Schuler



v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.

4. The Custodian must disclose to the Complainant Item No. 3 which are all attorney bills or invoices, with any appropriate redactions, that the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1a-1.1.
5. Because Item Number 4, Item No. 5, Item No. 6 (for the years 2007 and 2008) and Item No. 7 of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant.
6. Because the Custodian has established that the proposed special service charge of \$202.05 for redacting and disclosing Item Numbers 3, 4, 5, 6 (for the years 2007 and 2008) and 7 of the records relevant to the complaint is reasonable and reflects the actual cost to the Borough to fulfill the Complainant's OPRA request for said records, the estimated special service charge of \$202.05 proposed by the Custodian is reasonable and warranted under N.J.S.A. 47:1A-5.d.
7. **The Custodian shall comply with the provisions of paragraphs 4 and 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

¹ In accordance with N.J. Court Rule 1:4-4, the following language must immediately precede the Custodian's signature on the certification: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: May 26, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL
Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-285

v.

**Borough of Fort Lee Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

The Complainant requests an on-site examination of the following records:

1. All Computer Aided Dispatch (“CAD”) event abstracts for funeral home and funeral escorts from 2006 to September 25, 2009.
2. Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background.
3. Police and Borough records of legal bills relating to OPRA requests made by the Complainant.
4. CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m.
5. CAD log for calls and events on August 27, 2009 from 4:00 p.m. until 11:59 p.m.
6. Police use of force annual summary reports for 2005 through 2008.³
7. Police use of force incident reports for 2008 filed by Officer Thomas Ripoli.

Requests Made: September 25, 2009

Responses Made: October 1, 2009⁴

Custodian: Neil Grant, Clerk

GRC Complaint Filed: October 16, 2009⁵

Background

September 25, 2009

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above as Items No. 1 through No. 7 on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by J. Sheldon Cohen, Esq., DeCotiis, Cole & Wisler (Teaneck, NJ).

³ The Complainant states that he does not want individual use of force incident reports.

⁴ The evidence of record indicates that the Custodian’s response to the OPRA request was verbal.

⁵ The GRC received the Denial of Access Complaint on said date.

September 25, 2009

E-mail from the Custodian to the Police Chief and the Custodian's Counsel. The Custodian forwards to the Police Chief and the Custodian's Counsel a copy of the Complainant's OPRA request.

October 1, 2009

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian places a telephone call to the Complainant and informs the Complainant that his OPRA request was forwarded to the Police Department.

October 7, 2009

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian to inform him when the records the Complainant requested on September 25, 2009 will be ready.

October 7, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he will have to check with the Police Department to determine when the Complainant's records will be ready.

October 7, 2009

Letter from the Complainant to the Borough Mayor and Council members. The Complainant states that the Borough's Police Department is intentionally denying the Complainant access to the records he requests.⁶

October 8, 2009

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he received a voicemail message from the Custodian that a record responsive to the OPRA request was available. The Complainant asks the Custodian if the other records he requested are also ready.

October 8, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he will call the Complainant when the Custodian expects to have the other records requested in the Complainant's OPRA request available.

October 8, 2009

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he will file a Denial of Access Complaint.

October 16, 2009

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

⁶ The Complainant makes reference to other issues which are described in attachments to the letter; however, the Complainant did not provide the GRC with said attachments.
Richard Rivera v. Borough of Fort Lee Police Department (Bergen), 2009-285 – Findings and Recommendations of the Executive Director

- Complainant's OPRA request dated September 25, 2009
- Letter from the Complainant to the Borough Mayor and Council members dated October 7, 2009

The Complainant states that the Custodian "indicated" that the Complainant would receive redacted copies of the requested records within seven (7) business days and that the Complainant would be responsible for paying for the copies. The Complainant contends that the Police Department is the holder of the records and that they are intentionally denying the Complainant access to the records he requested.

The Complainant does not agree to mediate this complaint.

October 16, 2009

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

October 20, 2009

Telephone call from the Custodian to the GRC. The Custodian requests an extension until October 30, 2009 to complete and return the SOI.

October 20, 2009

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until October 30, 2009 to complete and return the SOI.

October 28, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 25, 2009
- E-mail from the Custodian to the Police Chief and the Custodian's Counsel dated September 25, 2009
- E-mail from the Complainant to the Custodian dated October 7, 2009
- E-mail from the Custodian to the Complainant dated October 7, 2009
- E-mail from the Complainant to the Custodian dated October 8, 2009
- E-mail from the Custodian to the Complainant dated October 8, 2009
- E-mail from the Complainant to the Custodian dated October 8, 2009

The Custodian certifies that his search for the requested records involved e-mailing a copy of the Complainant's OPRA request to the Borough Police Chief who maintains actual physical custody of the requested records. The Custodian certifies he also provided a copy to the Borough Attorney. The Custodian also certifies that no records which may have been responsive to the request were destroyed in accordance with Record Destruction Schedules 0026-0000 and 0319-0001 established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian further certifies that he received the Complainant's OPRA request on September 25, 2009 and responded to said request on October 1, 2009, by calling the Complainant and telling him his OPRA request was forwarded to the Police Department.

The Custodian certifies that the following records relevant to the complaint do not exist:

- Item No. 1: all CAD event abstracts for funeral home and funeral escorts from 2006 to September 25, 2009
- Item No. 6: police use of force annual summary reports for the years 2005 and 2006

The Custodian certifies that Item No. 2 and Item No. 3 of the records relevant to the complaint cannot be disclosed because these records are relevant to pending litigation against the Borough of Fort Lee and contain privileged material. Item No. 2 constitutes Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background and Item No. 3 contains Police and Borough records of attorney bills relating to OPRA requests made by the Complainant.

The Custodian further certifies that the records comprising the Complainant's request will have to be reviewed for redaction of personal identifying information and social security numbers, juvenile information, criminal investigatory information and any information relevant to an open case. The Custodian also certifies that because of the sensitive nature of police records, any releasable records responsive to the request will have to be reviewed and redacted before access can be granted, therefore none of the records will be available for on-site examination.

The Custodian certifies that 263 records totaling 411 pages were located that are responsive to the Complainant's request. The Custodian further certifies that the records will have to be retrieved from the files, copied and then redacted and that such operations will generate a special service charge. The Custodian calculates the special service charge by estimating that the overtime hourly rate for clerical personnel to retrieve, copy and assemble the records is \$24.85 per hour and that it will take 65.75 hours to complete the task, totaling \$1,633.89. The Custodian also certifies that a police captain will have to redact the records at an hourly rate of \$67.04. The Custodian certifies that it will take 43.66 hours to complete the redactions, totaling \$2,926.83⁷ at a captain's salary. The Custodian further certifies that the Police Chief must review and approve the redactions and authorize disclosure of the redacted records. The Custodian certifies that the Chief gets paid \$76.93 per hour and it will take the Chief 8.77 hours for a total of \$674.68. The Custodian also certifies that copying charges based upon \$.75 for the first ten pages, \$.50 for the second ten pages and \$.25 for each page thereafter, for a total of 411 pages, would cost \$110.25. Accordingly, the Custodian estimates the total special service charge for redacting the records to be \$5,345.65.

The Custodian certifies that payment must be received by the Borough before work commences and that the Complainant must allow a reasonable amount of time for the Borough to comply with the Complainant's requests.

⁷ This figure should be \$2,926.97; therefore the total should be \$5,345.79.
Richard Rivera v. Borough of Fort Lee Police Department (Bergen), 2009-285 – Findings and Recommendations of the Executive Director

January 14, 2011

E-mail from the GRC to the Custodian. The GRC forwards a fourteen (14) item special service charge questionnaire to the Custodian for completion.

January 21, 2011

E-mail from the Custodian to the GRC. The Custodian returns to the GRC the completed special service charge questionnaire.

January 21, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that Item No. 14 of the questionnaire requires more detail. Specifically, the GRC requests that the Custodian provide a more detailed estimate categorizing the hours required for each employee to perform the duties necessary to prepare the records for disclosure. The GRC informs the Custodian that the GRC will consider the lowest paid employee listed on the questionnaire to be capable of performing the duties required to ready the records for disclosure unless the Custodian provides the GRC with a reason why that particular employee is not capable of performing the duties. The GRC informs the Custodian that if the clerk/typist performs the services, the total special service charge would be \$212.31. The GRC requests that the Custodian inform the GRC if said amount is inaccurate and, in such event, to provide an accurate break-down of total services.

January 21, 2011⁸

E-mail from the Custodian to the GRC. The Custodian informs the GRC that the total proposed by the GRC is accurate except for the two (2) hours of attorney bill review. The Custodian states that such review must be conducted at Borough Hall, not the Police Department. The Custodian informs the GRC that he was advised by the Borough's Chief Financial Officer ("CFO") that the CFO's clerk/typist could review the attorney bills. The Custodian states that the CFO's clerk/typist is paid \$25.20 per hour, which is less per hour than the clerk/typist at the Police Department is paid. The Custodian states that for the two (2) hours needed to review the attorney bills the difference in the clerk/typist's rate of pay is \$10.26; therefore the total special service charge should be reduced by that amount.

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:

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Richard Rivera v. Borough of Fort Lee Police Department (Bergen), 2009-285 – Findings and Recommendations of the Executive Director

“... 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 also provides that:

“A government record shall not include...any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that *such bills or invoices may be redacted* to remove any information protected by the attorney-client privilege...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“A copy or copies of a government record may be purchased by any person upon payment of the actual cost of duplicating the record...[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c.” N.J.S.A. 47:1A-5.b.

OPRA states that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record . . . requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special service charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

OPRA further states that:

“[a] custodian shall promptly comply with a request to inspect, examine, copy or provide a copy of a government record. If 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 thereof...[i]f the custodian of a government record

asserts that part of a particular record is exempt from public access...the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

OPRA additionally provides that:

“Unless 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* ... [i]n the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... [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...” (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. 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).

The Custodian certified that he received the Complainant’s OPRA request on September 25, 2009 and responded to the request on October 1, 2009 by calling the Complainant and telling him his OPRA request was forwarded to the Police Department. Although the Custodian responded to the Complainant’s OPRA request in a timely manner on the fourth (4th) business day following receipt of the request, the Custodian failed to respond to the Complainant in writing. Further, the Custodian certified that he

informed the Complainant only that the Complainant's request was forwarded to the Police Department. As such, the Custodian's response to the Complainant's OPRA request was defective.

N.J.S.A. 47:1A-5.i. provides that a custodian shall advise the requestor when a record can be made available. In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request on the date the request was received stating that the requested records may not be readily available and that the custodian may have to reach out to several units within the agency to obtain the records. Subsequently, on the seventh (7th) business day following the custodian's receipt of the request, the custodian requested an extension of time to respond to the complainant's request; however, the custodian failed to notify the complainant when the requested records would be provided. The council determined that such an open ended communication by the custodian goes against the spirit of OPRA. Thus, the Custodian's response was found to be inadequate under OPRA and constituted a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.

Here, the Custodian's failure to respond *in writing* to the Complainant's September 25, 2009 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 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). Further, the Custodian's response to the Complainant's request, which informed the Complainant only that the request was forwarded to the Police Department, constituted an open ended response by the Custodian, is inadequate under OPRA and is therefore a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Item No. 1 of the Records Request – All CAD event abstracts for funeral home and funeral escorts from 2006 to September 25, 2009.

Item No. 6: police use of force annual summary reports for the years 2005 and 2006.

The Custodian certified that that there are no records responsive to the Complainant's request for Item No. 1 and Item No. 6 (for years 2005 and 2006), and the Complainant did not submit any evidence to refute the Custodian's certification in this regard.

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the complainant's request, the custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent. The complainant provided no evidence to refute the custodian's

certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access.”

Therefore, because the Custodian certified that there are no records responsive to the Complainant’s request for Item for Item No. 1 and Item No. 6 (for the years 2005 and 2006), and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer, supra.

Item No. 2 the Records Request - Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background.

The Custodian certified that this record will not be released because the information sought is potentially relevant to current litigation involving the Borough of Fort Lee. The Custodian further certified that such records are subject to the attorney-client privilege and/or deliberative privilege.

Whether the information sought in Item No. 2 is exempt from disclosure due to it being attorney-client privileged and/or relevant to current litigation need not be analyzed because the request is overly broad and unclear.

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

In determining that MAG Entertainment’s request for “all documents or records” from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division’s records custodian to manually search through all of the agency’s files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then

be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005),⁹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”¹⁰

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

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

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In the present complaint, the Complainant requested both Police Department and/or Borough records of any and all written communications to the Chief of Police and/or from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment and/or his background. There are so many variations of records

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

that could be gleaned from this request that it would be impossible to specifically identify a particular record or records with any certainty.

Therefore, because the Complainant's request for Item No. 2 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and the Council's decision in Schuler, supra. Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.

Item No. 3 of the Records Request – Police and Borough records of legal/attorney bills relating to OPRA requests made by the Complainant.

Although this request is somewhat broad, it is not overly broad pursuant to Burnett, supra, because the Complainant is seeking a specific type of document, and although the Complainant's request did not specify a date range or a particular case to which such document or documents pertained, the Complainant narrowed the request to only those attorney bills relating to OPRA requests that he filed with the agency.

The Custodian denied the Complainant access to these records because the Custodian asserted that they are subject to the attorney-client privilege. OPRA provides that any record within the attorney-client privilege is not a government record subject to disclosure except for attorney bills. Moreover, OPRA specifically provides that attorneys' bills may be redacted to remove any information protected by the attorney-client privilege.

Accordingly, the Custodian must disclose to the Complainant Item No. 3, which are all attorney bills or invoices, with any appropriate redactions, which the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1a-1.1.

Item No. 4 of the Records Request – CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m.

Item No. 5 of the Records Request – CAD log for calls and events on August 27, 2009 from 4:00 p.m. until 11:59 p.m.

Item No. 6 of the Records Request – Police use of force annual summary reports for 2007 and 2008.

Item No. 7 of the Records Request – Police use of force incident reports for 2008 filed by Officer Thomas Ripoli.

The Custodian failed to address Item Numbers 4, 5, 6 (for the years 2007 and 2008) and 7 in the SOI. These requests clearly specified not only the type of records sought but also the dates and/or times of the records.

Therefore, because Item Number 4, Item No. 5, Item No. 6 (for the years 2007 and 2008) and Item No. 7 of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant with any appropriate redactions.

Whether the special service charge proposed by the Custodian is reasonable and warranted pursuant to OPRA?

The Custodian certified that the records comprising the Complainant's request would have to be reviewed for the existence of personal identifying information, social security numbers, juvenile information, criminal investigatory information and any information relevant to an open case. The Custodian also certified that many of the reviewed records may have to be redacted before access can be granted, therefore none of the records will be available for on-site examination as requested by the Complainant. The Custodian certified in the SOI that the Police Department's total estimated cost for retrieving and redacting the requested records would be \$5,345.65.

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

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*" (Emphasis added.) N.J.S.A. 47:1A-5.c.

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

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

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;¹¹ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

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

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

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?

¹¹ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

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.

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

| Questions | Custodian's Certifications |
|--|--|
| 1. What records are requested? | See OPRA request dated September 25, 2009. |
| 2. Give a general nature description and number of the government records requested. | Seven requests for multiple items. See retired [police] Captain Hervey's report dated October 21, 2009 which deals with [GRC Complaint No.] 2009-285 and 2009-266. |
| 3. What is the period of time over which the records extend? | 2005 – 2009 |
| 4. Are some or all of the records sought archived or in storage? | Archived on-site. |
| 5. What is the size of the agency (total number of employees)? | 1 Borough Clerk, 89 Police Officers, 4 clerical [personnel] from Police Department. |
| 6. What is the number of employees available to accommodate the records request? | Three: one police captain...one clerical records room person from the Police Department, one Borough Clerk with [police] assistance. |
| 7. To what extent do the requested records have to be redacted? | 90 CAD reports (34 for 6/29 and 56 for 8/27) have information including personal identifying information [which must be redacted]. |
| 8. What is the level of personnel, hourly rate and | Captain: \$73.33 hourly rate. |

| | |
|---|--|
| number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying? | Clerk Typist: \$30.33 hourly rate. Approximately 4 hours to pull in CAD, print in PDF, redact, then save redacted file for each CAD. |
| 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? | Captain: \$73.33 hourly rate. Borough Clerk: \$69.95 hourly rate. Clerk Typist: \$30.33 hourly rate. |
| 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? | Captain: \$73.33 hourly rate. Clerk Typist: \$30.33 hourly rate. Should not be more than 4 hours. |
| 11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request? | They are the designated records custodians for this OPRA 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? | Captain Keith Bendul: \$73.33 hourly rate. Borough Clerk Neil Grant: \$69.95 hourly rate. Clerk Typist Melissa Monetti-Cuello: \$30.33 hourly rate. |
| 13. What is the availability of information technology and copying capabilities? | Scanning equipment, copying machine and Adobe [software.] |
| 14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents. | See [item #7 and] #8 [which] discussed the 90 CAD reports. Sorting through attorney legal bills could take up to 2 hours. The rest of the documents requested should take no more than 1 hour to copy and prepare for inspection. Approximately 7 hours overall to fulfill the OPRA request of 7 items. Certain items such as funeral CAD reports are not broken into categories and may be part of all CAD reports. ¹² |

It is reasonable for the Custodian to have estimated a total of seven (7) hours for Borough personnel to retrieve, review, copy, redact and return to storage Item Numbers 3, 4, 5, 6 (for the years 2007 and 2008) and 7 of the records relevant to the complaint. Using the information provided by the Custodian in the questionnaire and calculating the

¹² The Custodian did not specify in the questionnaire whether such CAD reports for funerals did or did not exist during the times relevant to the Complainant's request.
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special service charge based upon services rendered by the lowest paid employee capable of performing the required duties (the clerk/typist at an hourly rate of \$30.33) the GRC determined the special service charge should be \$212.31. The GRC asked the Custodian if such calculation was accurate and the Custodian informed the GRC that because a lower salaried employee could perform two (2) of the seven (7) hours of work required, the total could actually be reduced by \$10.26. The recalculated special service charge therefore totals \$202.05.

Accordingly, because the Custodian has established that the proposed special service charge of \$202.05 for redacting and disclosing Item Numbers 3, 4, 5, 6 (for the years 2007 and 2008) and 7 of the records relevant to the complaint is reasonable and reflects the actual cost to the Borough to fulfill the Complainant's OPRA request for said records, the estimated special service charge of \$202.05 proposed by the Custodian is reasonable and warranted under N.J.S.A. 47:1A-5.d.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond *in writing* to the Complainant's September 25, 2009 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 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). Further, the Custodian's response to the Complainant's request, which informed the Complainant only that the request was forwarded to the Police Department, constituted an open ended response by the Custodian, is inadequate under OPRA and is therefore a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for Item No. 1 and Item No. 6 (for the years 2005 and 2006), and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. Because the Complainant's request for Item No. 2 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.
4. The Custodian must disclose to the Complainant Item No. 3 which are all attorney bills or invoices, with any appropriate redactions, that the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1a-1.1.
5. Because Item Number 4, Item No. 5, Item No. 6 (for the years 2007 and 2008) and Item No. 7 of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant.
6. Because the Custodian has established that the proposed special service charge of \$202.05 for redacting and disclosing Item Numbers 3, 4, 5, 6 (for the years 2007 and 2008) and 7 of the records relevant to the complaint is reasonable and reflects the actual cost to the Borough to fulfill the Complainant's OPRA request for said records, the estimated special service charge of \$202.05 proposed by the Custodian is reasonable and warranted under N.J.S.A. 47:1A-5.d.
7. **The Custodian shall comply with the provisions of paragraphs 4 and 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹³ to the Executive Director.¹⁴**

¹³ In accordance with N.J. Court Rule 1:4-4, the following language must immediately precede the Custodian's signature on the certification: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Prepared By: John E. Stewart, Esq.
Mediator

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011