



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 29, 2013 Government Records Council Meeting

Clara Halper
Complainant

Complaint No. 2010-281

v.

Township of Piscataway (Middlesex)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 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 this complaint be dismissed. The Complainant’s Counsel, via letter dated September 30, 2013 to the Honorable James A. Geraghty, A.L.J., copied to the GRC, withdrew her complaint from the Office of Administrative Law as the parties had reached settlement in this matter. Therefore, no further adjudication is required.

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 29th Day of October, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Clara Halper¹
Complainant**

GRC Complaint No. 2010-281

v.

**Township of Piscataway (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Legal fees and expenses for 2010 paid by the Township of Piscataway (“Township”) to law firms including but not limited to Hoagland, Long, Doukas, LLP, J. Clarkin Law Firm, and Waters, McPherson, McNeil P.C.
2. Invoices from 2006 through 2009 from all law firms including but not limited to Hoagland, Long, Doukas law firm, J. Clarkin Law Firm, and Waters, McPherson, McNeil law firm that provided legal services to the Township.

Custodian of Record: Melissa Seader

Request Received by Custodian: July 7, 2010

Response Made by Custodian: July 14, 2010

GRC Complaint Received: October 26, 2010

Background

December 18, 2012 Council Meeting:

At its December 18, 2012 public meeting, the Council considered the October 23, 2012 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 supplemental findings and recommendations. The Council, therefore, found that:

1. Because the Custodian certified that the Complainant did not respond to the Council’s Order within eight (8) business days from receipt of said Order, the Custodian has complied with the Council’s September 26, 2012 Interim Order. Thus, the Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006).

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

² Represented by James Clarkin, III, Esq. (Piscataway, NJ).

2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond to each request item individually. The Custodian also violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for invoices responsive to Item No. 2. The Custodian further violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the records responsive to request Item No. 1 because a request for legal invoices is a request for identifiable government records. The Custodian additionally violated N.J.S.A. 47:1A-5.c. because she failed to prove that the special service charge of \$2,969.88 for the records responsive to request Item No. 2 was reasonable and warranted. However, the Custodian properly assessed a special service charge of \$465.44 for the records responsive to request Item No. 1 pursuant to the Council's July 31, 2012 Order. In addition, the Custodian complied with the Council's September 26, 2012 Order by timely providing certified confirmation of compliance that the Complainant failed to respond to the September 26, 2012 within the prescribed five (5) business days. Thus, the Complainant's failure to take any action within five (5) business days of receipt of the Council's Order is construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's July 31, 2012 Interim Order, 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 causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council ordered the Custodian to calculate the "actual cost" of the records responsive to request Item No. 1 within five (5) business days from receipt of the July 31, 2012 Interim Order and ordered the Custodian to assess a special service charge of \$1,857.75 for the records responsive to request Item No. 2 and not \$2,969.88 as the Custodian originally calculated. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public

importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Settlement:

On December 19, 2012, the Council distributed its Interim Order to all parties. On September 30, 2013, Complainant's counsel sent a letter to the Honorable James A. Geraghty, A.L.J., copied to the GRC, advising the Office of Administrative Law and the GRC that the parties had reached a settlement and requested that the complaint be withdrawn.

Analysis

No analysis is required.

Conclusion and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed. The Complainant's Counsel, via letter dated September 30, 2013 to the Honorable James A. Geraghty, A.L.J., copied to the GRC, withdrew her complaint from the Office of Administrative Law as the parties had reached settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

October 22, 2013



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

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Clara Halper
Complainant

Complaint No. 2010-281

v.

Township of Piscataway (Middlesex)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 2012 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. Because the Custodian certified that the Complainant did not respond to the Council’s Order within eight (8) business days from receipt of said Order, the Custodian has complied with the Council’s September 26, 2012 Interim Order. Thus, the Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006).
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond to each request item individually. The Custodian also violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s request for invoices responsive to Item No. 2. The Custodian further violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the records responsive to request Item No. 1 because a request for legal invoices is a request for identifiable government records. The Custodian additionally violated N.J.S.A. 47:1A-5.c. because she failed to prove that the special service charge of \$2,969.88 for the records responsive to request Item No. 2 was reasonable and warranted. However, the Custodian properly assessed a special service charge of \$465.44 for the records responsive to request Item No. 1 pursuant to the Council’s July 31, 2012 Order. In addition, the Custodian complied with the Council’s September 26, 2012 Order by timely providing certified confirmation of compliance that the Complainant failed to respond to the September 26, 2012 within the prescribed five (5) business days. Thus, the Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Order is construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Additionally, the evidence of record does not indicate that the Custodian’s violation of



OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's July 31, 2012 Interim Order, 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 causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council ordered the Custodian to calculate the "actual cost" of the records responsive to request Item No. 1 within five (5) business days from receipt of the July 31, 2012 Interim Order and ordered the Custodian to assess a special service charge of \$1,857.75 for the records responsive to request Item No. 2 and not \$2,969.88 as the Custodian originally calculated. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2012

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: December 19, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Clara Halper¹
Complainant**

GRC Complaint No. 2010-281

v.

**Township of Piscataway (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Legal fees and expenses for 2010 paid by the Township of Piscataway (“Township”) to law firms including but not limited to Hoagland, Long, Doukas, LLP, J. Clarkin Law Firm, and Waters, McPherson, McNeil P.C.
2. Invoices from 2006 through 2009 from all law firms including but not limited to Hoagland, Long, Doukas law firm, J. Clarkin Law Firm, and Waters, McPherson, McNeil law firm that provided legal services to the Township.

Request Made: July 7, 2010

Response Made: July 14, 2010

Custodian: Melissa Seader

GRC Complaint Filed: October 26, 2010³

Background

September 25, 2012

Government Records Council’s (“Council”) Interim Order. At its September 25, 2012 public meeting, the Council considered the September 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian could not comply with paragraph four (4) of the Council’s Order because the Complainant disputed the Custodian’s assessment of the special service charge for the records responsive to request Item No. 1. The Complainant did not decline to purchase said records. However, the Custodian failed to timely comply with paragraph six (6) of the Council’s Order because the Custodian provided a legal certification certifying that that the Complainant declined to purchase the records responsive to request Item No. 2 on the ninth (9th) business day following receipt of said order.

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

² Represented by James Clarkin, III, Esq. (Piscataway, NJ).

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

2. Because the Custodian's assessment of the special service charge in the amount of \$465.44 is supported by the evidence in the record, and because such proposed charge is less than the total estimated hourly rate of all of the individuals involved in fulfilling the request, which totals \$556.36, the proposed special service charge of \$465.44 is reasonable pursuant to N.J.S.A. 47:1A-5.c. In addition, the Custodian's one (1) hour assessment to seek Counsel's assistance to redact the legal fee invoices is reasonable pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).
3. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$465.44 for the records responsive to request Item No. 1, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

September 26, 2012

Council's Interim Order distributed to the parties.

October 9, 2012

Custodian's response to the Council's Interim Order. The Custodian certifies that she received the Council's Order on September 27, 2012. The Custodian also certifies that the purpose of the certification is to comply with paragraph three (3) of the Council's Order. The Custodian further certifies that the Complainant failed to take any action within the five (5) business day period of receiving the Council's Order. The Custodian

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

additionally certifies that the Complainant's failure to take any action is thus construed as a declination to purchase the records.

Analysis

Whether the Custodian complied with the Council's September 26, 2012 Interim Order?

The Council's Order required the Complainant to deliver to the Custodian (a) a payment in the amount of \$465.44 for the records responsive to request Item No. 1, or (b) a statement declining to purchase the records, and further stated that the Complainant's failure to take any action within (5) business days of receipt of the Council's Order shall be construed as a declination to purchase the records and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). The Custodian was required to provide certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 within eight (8) business days from receipt of the Council's Order.

The Custodian responded to the Council's Order on the eighth (8th) business day following receipt of said Order. The Custodian certified that the Complainant failed to take any action within the five (5) business day period after receiving the Council's Order. The Custodian also certified that the Complainant's failure to take any action is construed as declining to purchase the records.

Therefore, because the Custodian certified that the Complainant did not respond to the Council's Order within eight (8) business days from receipt of said Order, the Custodian has complied with the Council's September 26, 2012 Interim Order. Thus, the Complainant's failure to take any action within five (5) business days of receipt of the Council's Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006).

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.

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).

The Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond to each request item individually. The Custodian also violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s request for invoices responsive to Item No. 2. The Custodian further violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the records responsive to request Item No. 1 because a request for legal invoices is a request for identifiable government records. The Custodian additionally violated N.J.S.A. 47:1A-5.c. because she failed to prove that the special service charge of \$2,969.88 for the records responsive to request Item No. 2 was reasonable and warranted. However, the Custodian properly assessed a special service charge of \$465.44 for the records responsive to request Item No. 1 pursuant to the Council’s July 31, 2012 Order. In addition, the Custodian complied with the Council’s September 26, 2012 Order by timely providing certified confirmation of compliance that the Complainant failed to respond to the September 26, 2012 within the prescribed five (5) business days. Thus, the Complainant’s failure to take any action within five (5) business days of receipt of the Council’s Order is construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

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.*

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

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

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

“OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

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).”

After the filing of this Denial of Access Complaint and the issuance of the Council’s July 31, 2012 Interim Order, the Council ordered the Custodian to calculate the “actual cost” of the records responsive to request Item No. 1 within five (5) business days from receipt of the Interim Order. In response to the Council’s July 31, 2012 Interim Order, the Custodian accurately assessed a special service charge of \$465.44 for the records responsive to request Item No. 1 on August 9, 2012. In addition, the Council ordered the Custodian to assess a special service charge of \$1,857.75 for the records responsive to request Item No. 2 and not \$2,969.88 as the Custodian originally calculated.

The Council notes that in Teeters, *supra*, and Mason, *supra*, the Court did not limit the required change in the Custodian’s conduct to the providing of access to the requested records. Although the Complainant herein failed to take any action within five (5) business days of receipt of the Council’s Order, which was construed as a declination to purchase the requested records, the filing of this Complaint brought about a change in the Custodian’s conduct; *i.e.*, the recalculation of the actual cost of the records responsive to request Item No. 1.

Pursuant to Teeters, *supra*, and the Council’s July 31, 2012 Interim Order, 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. Specifically, the Council ordered the Custodian to calculate the “actual cost” of the records responsive to request Item No. 1 within five (5) business days from receipt of the July 31, 2012 Interim Order and ordered the Custodian to assess a special service charge of \$1,857.75 for the

records responsive to request Item No. 2 and not \$2,969.88 as the Custodian originally calculated. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that the Complainant did not respond to the Council's Order within eight (8) business days from receipt of said Order, the Custodian has complied with the Council's September 26, 2012 Interim Order. Thus, the Complainant's failure to take any action within five (5) business days of receipt of the Council's Order is therefore construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006).
2. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond to each request item individually. The Custodian also violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for invoices responsive to Item No. 2. The Custodian further violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the records responsive to request Item No. 1 because a request for legal invoices is a request for identifiable government records. The Custodian additionally violated N.J.S.A. 47:1A-5.c. because she failed to prove that the special service charge of \$2,969.88 for the records responsive to request Item No. 2 was reasonable and warranted. However, the Custodian properly assessed a special service charge of \$465.44 for the records responsive to request Item No. 1 pursuant to the Council's July 31, 2012 Order. In addition, the Custodian complied with the Council's September 26, 2012 Order by timely providing certified confirmation of compliance that the Complainant failed to respond to the September 26, 2012 within the prescribed five (5) business days. Thus, the Complainant's failure to take any action within five (5) business days of receipt of the Council's Order is construed as a declination to purchase the requested records and the Custodian is no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Additionally, the evidence of record does

not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's July 31, 2012 Interim Order, 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 causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Council ordered the Custodian to calculate the "actual cost" of the records responsive to request Item No. 1 within five (5) business days from receipt of the July 31, 2012 Interim Order and ordered the Custodian to assess a special service charge of \$1,857.75 for the records responsive to request Item No. 2 and not \$2,969.88 as the Custodian originally calculated. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee 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. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁵

⁵ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.



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

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Clara Halper
Complainant

Complaint No. 2010-281

v.

Township of Piscataway (Middlesex)
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 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 could not comply with paragraph four (4) of the Council’s Order because the Complainant disputed the Custodian’s assessment of the special service charge for the records responsive to request Item No. 1. The Complainant did not decline to purchase said records. However, the Custodian failed to timely comply with paragraph six (6) of the Council’s Order because the Custodian provided a legal certification certifying that that the Complainant declined to purchase the records responsive to request Item No. 2 on the ninth (9th) business day following receipt of said order.
2. Because the Custodian’s assessment of the special service charge in the amount of \$465.44 is supported by the evidence in the record, and because such proposed charge is less than the total estimated hourly rate of all of the individuals involved in fulfilling the request, which totals \$556.36, the proposed special service charge of \$465.44 is reasonable pursuant to N.J.S.A. 47:1A-5.c. In addition, the Custodian’s one (1) hour assessment to seek Counsel’s assistance to redact the legal fee invoices is reasonable pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).
3. **The Complainant shall, within five (5) business days from receipt of the Council’s Interim Order, deliver to the Custodian (a) a payment in the amount of \$465.44 for the records responsive to request Item No. 1, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant’s failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No.**



2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.

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

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2012

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: September 26, 2012

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Clara Halper¹
Complainant**

GRC Complaint No. 2010-281

v.

**Township of Piscataway (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Legal fees and expenses for 2010 paid by the Township of Piscataway (“Township”) to law firms including but not limited to Hoagland, Long, Doukas, LLP, J. Clarkin Law Firm, and Waters, McPherson, McNeil P.C.
2. Invoices from 2006 through 2009 from all law firms including but not limited to Hoagland, Long, Doukas law firm, J. Clarkin Law Firm, and Waters, McPherson, McNeil law firm that provided legal services to the Township.

Request Made: July 7, 2010

Response Made: July 14, 2010

Custodian: Melissa Seader

GRC Complaint Filed: October 26, 2010³

Background

July 31, 2012

Government Records Council’s (“Council”) Interim Order. At its July 31, 2012 public meeting, the Council considered the July 24, 2012 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. Although the Custodian responded in writing to the Complainant’s July 7, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. Moreover, the Custodian’s failure to respond immediately to the Complainant’s OPRA request for legal invoices results in a violation of N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

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

² Represented by James Clarkin, III, Esq. (Piscataway, NJ).

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

2. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), and Paff v. Borough of Wildwood Crest (Cape May), GRC Complaint No. 2009-54 (Interim Order April 2010) the Township's Ordinance No. 06-51 is invalid as it applies to OPRA. The Township must charge the "actual cost" of providing the requested copies pursuant to N.J.S.A. 47:1A-5.c.
3. The Complainant's request Item No. 1, a request for legal fees, is a request for identifiable government records, i.e., legal invoices, and therefore the Complainant's OPRA request for Item No. 1 does seek an identifiable government record. Thus, the Custodian must disclose the legal invoices responsive to request Item No. 1. See Halper v. Township of Piscataway (Middlesex), GRC Complaint No. 2004-130 (December 2004).
4. **The Custodian shall calculate the "actual cost" to provide the records responsive to request Item No. 1 (see No. 3 above) within five (5) business days and present said cost to the Complainant. The Complainant shall deliver to the Custodian (a) payment of the actual cost of the records responsive to request Item No. 1 or (b) a statement declining to purchase these records. The Complainant's failure to take any action within three (3) business days of receipt of the estimated cost shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁴**
5. The Custodian failed to prove that the special service charge of \$2,969.88 was reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.c. N.J.S.A. 47:1A-6. Specifically, it is reasonable to charge a special service charge for time expended by Ms. Field (\$281.40), Ms. Kopidowski (\$749.81) and the two (2) Public Works employees (\$826.54) based on the amount of records, because all records were in approximately 500 boxes in storage and the four (4) employees expended 64 hours working on the Complainant's request Item No. 2. Therefore, the Custodian is only permitted to charge \$1,857.75, which represents the cost of these four (4) employees. However, the portion of the special service charge for the other four (4) employees is unreasonable and unwarranted pursuant to N.J.S.A. 47:1A-5.c. Specifically, the Custodian failed to bear her burden of proving that the assistance of these employees was necessary to identify the responsive invoices. Moreover, the

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Custodian is not permitted to charge the Complainant for Counsel and Mr. Crisuolo's review and redaction of the responsive records pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).

6. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$1,857.75, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

August 3, 2012

Council's Interim Order distributed to the parties.

August 9, 2012

Letter from the Custodian to the Complainant. The Custodian states that she is responding to paragraph four (4) of the Council's Order. The Custodian also states that the Council's Order directed the Custodian to advise the Complainant of the actual cost to provide the records responsive to request Item No. 1. The Custodian further states that the actual cost is \$1.00 for the compact disc ("CD") and an additional \$464.44 for an extraordinary expenditure of time and effort to accommodate the request pursuant to N.J.S.A. 47:1A-5.c.. The Custodian additionally states that the Council approved the Township's proposed special service charge of \$1,857.75 to locate and assemble four (4) years of legal fee invoices. The Custodian states that because the Complainant's request Item No. 1 sought records for only one (1) year, 2010, the Township divided \$1,857.75 by four (4), to reach the proposed special service charge of \$465.44.

⁵ "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."

August 10, 2012

Complainant's response to the Council's Order. The Complainant responds to paragraph six (6) of the Council's Order on the fourth (4th) business day following receipt of said order.⁶ The Complainant declines to pay the special service charge for the records responsive to request Item No. 2.

August 17, 2012

Telephone call from the Custodian to the GRC. The Custodian informs the GRC that she sent the Complainant the actual cost to provide the records responsive to request Item No. 1 as provided in paragraph four (4) of the Council's Order via letter on August 9, 2012. The Custodian states that she has not yet heard from the Complainant whether she wishes to accept or reject these charges. The Custodian also states that she will be on vacation from August 20, 2012 through August 25, 2012. The Custodian requests an extension of time to comply with paragraph four (4) of the Council's Order.

August 17, 2012

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until August 28, 2012 to comply with paragraph four (4) of the Council's Order.

August 17, 2012

E-mail from the Complainant's Counsel to the GRC. Counsel states that the Custodian's letter dated August 9, 2012 is not in compliance with paragraph four (4) of the Council's Order. Counsel also states that the Township was supposed to conduct an actual assessment of how much time it would take to gather copies of the records responsive to request Item No. 1. Counsel further states that instead the Township took the previous special service charge of \$1,857.75 and divided it by four (4) on the assumption that looking for one (1) year of invoices takes 25% of the time required to search for four (4) years of invoices. Counsel additionally states that the special service charge that the Township attempted to charge for the records responsive to request Item No. 2 took into account the representation that some of these records were storage or archived. Counsel states that Custodian's letter dated August 9, 2012 is not in compliance with the Council's Order. Counsel argues that the Custodian's special service charges are wildly inflated and that the information should be stored electronically or available through vendor reports, instead of searching through archives and files for the invoices responsive. Counsel states that the Township could call their law firms who provided work in 2010 and ask for copies of invoices for that year.

August 17, 2012

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification in compliance with paragraph six (6) of the Council's Order. The Custodian certifies that she received the Council's Order on August 6, 2012. The Custodian also certifies that the Complainant declined to purchase the invoices responsive to request Item No. 2 pursuant to paragraph six (6) of the Council's Order.

⁶ The Complainant received Council's Order on August 6, 2012.

August 28, 2012

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification in compliance with paragraph four (4) of the Council's Order. The Custodian certifies that she received Council's Order on August 6, 2012. The Custodian also certifies that the Complainant through her Counsel declines to purchase the records responsive to request Item No. 1 on August 17, 2012, stating that the Complainant felt that the special service charges were widely inflated.

August 28, 2012

E-mail from the GRC to the Custodian. The GRC states that pursuant to Complainant Counsel's e-mail dated August 17, 2012, he disputes the Township's calculation of the 2010 legal invoices responsive to request Item No. 1. The GRC states that, in order to determine whether a special service charge was warranted in this case, the Custodian must complete the GRC's 14-point analysis for special service charges pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5(c). 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.

September 6, 2012

E-mail from the Custodian to the GRC. The Custodian responds to the GRC's request for a completed special service charge analysis with regard to the charge for providing records responsive to request Item No. 1 as follows:

Questions	Custodian's Response
1. What records are requested?	All invoices for legal fees incurred by the Township for fifteen (15) law firms providing services during the year 2010.
2. Give a general nature description and number of the government records requested.	Unknown number of copies of legal fee invoices. Based upon the number of pages of invoices for the four (4) year period, from 2006 through 2009, it is reasonable to assume that the average number of pages for those years is (750) will be the approximate number of pages for the year 2010.
3. What is the period of time over which the records extend?	One (1) year.
4. Are some or all of the records sought archived or in storage?	All were in storage.
5. What is the size of the agency (total number of employees)?	216 full time employees; 212 part time employees.
6. What is the number of employees available to accommodate the records request?	Four (4) employees whose participation has been authorized by the GRC Interim Order dated July 31, 2012
7. To what extent do the requested records have to be redacted?	Each invoice must be reviewed for possible redaction concerning the ongoing litigation cases involving the Complainant and members of her family and the Township. Redact names of employees with disciplinary matters; redact confidential information concerning pending litigation in which the Township is a party.
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?	The Custodian encloses a one (1) page list of personnel, hourly rates and number of hours expected to be expended.
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?	Not applicable, the request was to obtain copies of all invoices, not to examine them.
10. What is the level of personnel, hourly	Two (2) public work laborers are expected

rate and number of hours, if any, required for a government employee to return records to their original storage place?	to expend two and a half hours to return the boxes of records to their original storage place. Their hourly rates are both \$28.94.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	Legal invoices are processed and paid by both the Purchasing and Finance Departments and they have the most knowledge of the types of documents requested. Whenever possible, the Township utilized employees with the lowest hourly wage in those Departments.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	See response to Items No. 8 and No. 10.
13. What is the availability of information technology and copying capabilities?	The Township utilizes modern photocopying equipment. Information technology could not be utilized because individual invoices were not scanned and entered into the Township's computerized records until 2011.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	The Custodian directs the GRC to the one (1) page list of personnel, hourly rates and number of hours expected to be expended, response to Item No. 8 and No. 10 and Custodian's Counsel argument to the GRC.

The Custodian attaches the following table identifying the Township employees, job titles, number of hours expended and the hourly compensation of each employee:

Employee Name	Job Title	Hourly Wage	Estimated Hours to be Expended	Total Value of Employee Time
Barbara Dowiak	Finance Clerk	\$28.70	6 hours	\$172.20
Carolyn Field	General Clerk	\$20.10	3.5 hours	\$70.35
Employee A	Public Works Assistant	\$28.94	2.5 hours	\$72.35
Employee B	Public Works Assistant	\$28.94	2.5 hours	\$72.35
Melissa Seader	Municipal Clerk	\$56.37	3 hours	\$169.11
			Total Anticipated Amount	\$556.36

Custodian's Counsel states that to fulfill the Complainant's first (1st) OPRA request for legal invoices for the year 2010, in response to paragraph four (4) of the Council's Order, will be the same process utilized by the Township to respond to the

Complainant's second (2nd) OPRA request. Counsel also states that this process includes 1) locating the invoices, because such invoices are not filed by vendor but are grouped and filed by check number and the month in which they are paid and thus the Township staff will be required to examine all invoices that the Township paid during the year 2010; 2) segregate those invoices for legal services; 3) remove the staple attached to each invoice; 4) put aside documents related to the legal invoice, such as the municipal voucher form and/or cover letter; 5) photocopy the invoices; 6) return the legal invoices to their appropriate files.

Counsel states that in responding to the Complainant's second (2nd) OPRA request for legal fee invoices for the year 2006 through 2009, the Township engaged various Township employees to actually locate the invoices, assemble the invoices and return the original legal invoices to their appropriate files. Counsel also states that actually engaging in the process of responding to the Complainant's request for invoices for 2006 through 2009 has given the Township a reliable basis to estimate the time that would be expended to comply with the Complainant's OPRA request for legal invoices for the year 2010. Counsel argues that OPRA permits a municipality to utilize an estimate and the Township's estimate of the expenditure of time for the 2010 legal invoices is appropriate. Counsel also argues that to not permit a municipality to estimate the special service charge would create an undue financial burden. Counsel states that the Township has expended \$1,875.75 in charges which have upheld by the GRC in responding to the Complainant's request for legal invoices for the years 2006 through 2009. Counsel also states that the Complainant has chosen not to purchase these records. Counsel further states that if the Complainant pays the estimated cost of the special service charge, then the Township will base the special service charge upon the actual direct cost of providing the records to the Complainant, utilizing those employees in the Finance and Public Works Departments with the lowest hourly rates.

Counsel states that the Township is seeking as part of its estimate one (1) hour of time for the Custodian to consult with Counsel in the process of redacting possible attorney-client privilege material. Counsel also states that there are a number of legal issues in various litigations involving the Complainant's family and further states that one of these issues is more than twelve (12) years old and has resulted in numerous decisions of the Law Division of Superior Court, the Appellate Division and the New Jersey Supreme Court. Counsel argues that it is essential that the Custodian obtains the assistance of and interfaces with Counsel in redacting possible attorney-client privileged material. Counsel also argues that while the one (1) hour estimated is not by itself an extraordinary expenditure of time and effort, it is to be considered a necessary part of the overall process of responding to the Complainant's request for Item No. 1.

The Custodian certifies that in preparing the table identifying the employees, job titles, number of hours expended and the hourly compensation of each employee, the Custodian designated those employees in the Finance Department and the Public Works Department who earn the least hourly salary rate. The Custodian also certifies that the extent of her formal education is a high school diploma. The Custodian further certifies that she never enrolled in a college or university and has no legal training. The Custodian additionally certifies that without legal training, she would not have the expertise to determine whether a particular entry in a legal fee invoice is privilege material and which

is permitted to be redacted. The Custodian certifies that she will have to spend time seeking the assistance of Counsel. Lastly, the Custodian certifies that she estimates that consulting with Counsel will take approximately one (1) hour.

September 6, 2012

E-mail from Complainant's Counsel to the GRC. Counsel states that the Complainant's second (2nd) OPRA request requested invoices for the years 2006 through 2009. However, Counsel states that the Complainant's first (1st) OPRA request sought "*legal fees and expenses for 2010 paid by the Township to law firms including but not limited to Hoagland, Long, Doukas, LLP, J. Clarkin Law Firm, and Waters, McPherson, McNeil P.C.*"⁷ Counsel further states that the amount of legal fees/expenses paid in 2010 can be established by looking up vendor reports or looking up a check register and sorting the bill.

Analysis

Whether the Custodian complied with the Council's July 31, 2012 Interim Order?

At its July 31, 2012 meeting, the Council ordered the Custodian to: 1) calculate the "actual cost" to provide the records responsive to request Item No.1 within five (5) business days and present that cost to the Complainant; 2) within eight (8) days from receipt of the Council's Order the Custodian shall provide a certification in accordance with N.J. Court Rule 1:4-4 with respect to the Complainant's willingness or refusal to purchase the requested records; 3) provide certified confirmation of compliance to the Executive Director with respect to the Complainant's willingness or refusal to purchase the records responsive to request Item No. 2.⁸ The Council delivered the Interim Order to all parties on August 3, 2012.

OPRA Request Item No. 2, Paragraph six (6) of the Council's Order

The Complainant responded to the Council's Order on the fourth (4th) business day following receipt of said Order. The Complainant declined to purchase the special service charge of \$1,875.75 for the records responsive to request Item No. 2. The Custodian responded to the Council's Order on August 17, 2012, the ninth (9th) business day following receipt of said Order. The Custodian certified that she received the Council's Order on August 6, 2012. The Custodian also certified that the Complainant declined to purchase the records responsive to request Item No 2.

OPRA Request Item No. 1, Paragraph four (4) of the Council's Order

The Custodian sent a letter to the Complainant on August 9, 2012, the fourth (4th) business day from receipt of said Order, informing the Complainant that the actual cost is

⁷ Paragraph three (3) of the Council's Order stated "a request for legal fees, is a request for identifiable government records, i.e., legal invoices and therefore the Complainant's request Item No. 1 does seek an identifiable government record."

⁸ The Complainant was required to deliver to the Custodian a payment of the actual cost of the records responsive to request Item No. 1 or a statement declining to purchase these records. The Complainant was also required to deliver to the Custodian a payment in the amount of \$1,875.75 or deliver a statement declining to purchase the records responsive to request Item No. 2.

\$1.00 for the CD and an additional \$464.44 for a special service charge pursuant to N.J.S.A. 47:1A-5.c.. The Custodian also stated that the Council approved the Township's proposed special service charge of \$1,875.75 to locate and assemble four (4) years of legal fee invoices. The Custodian further stated that because the Complainant's request Item No. 1 sought only records for one (1) year, the Township divided \$1875.75 by four (4) to reach the special service charge of \$465.44. The GRC granted the Custodian an extension until August 28, 2012 to comply with paragraph four (4) of the Council's Order because the Custodian had not yet heard from the Complainant whether she wished to accept or reject these charges. Complainant's Counsel sent an e-mail to the GRC on August 17, 2012 asserting that the Custodian's special service charge of \$465.44 is greatly inflated.

The Custodian provided a legal certification in response to Council's Order on August 28, 2012, within the granted extended time frame. Although the Custodian certified that the Complainant through her Counsel declined to purchase the records responsive on August 17, 2012 stating that the Complainant felt that the special service charges were inflated, a review of the Complainant's submission reveals that the Complainant did not decline to purchase the records but merely disputed the special service charge of \$465.44.

Therefore, the Custodian could not comply with paragraph four (4) of the Council's Order because the Complainant disputed the Custodian's assessment of the special service charge for the records responsive to request Item No. 1. The Complainant did not decline to purchase said records. However, the Custodian failed to timely comply with paragraph six (6) of the Council's Order because the Custodian provided a legal certification certifying that that the Complainant declined to purchase the records responsive to request Item No. 2 on the ninth (9th) business day following receipt of said order.

Whether the Custodian's proposed special service charge of \$465.44 in response to OPRA request Item No. 1 pursuant to paragraph four (4) of the Council's Order is reasonable and warranted under OPRA?

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 ...* 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.

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. 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 the request” 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;⁹ 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, *supra*, 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 certain inquiries.

⁹ The court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.
Clara Halper v. Township of Piscataway (Middlesex), 2010-281, – Supplemental Findings and Recommendations of the Executive Director 11

In the instant complaint, the Custodian responded to the Council's Order and sent a letter to the Complainant on August 9, 2012 stating the actual cost is \$1.00 for the CD and an additional \$464.44 for a special service charge pursuant to N.J.S.A. 47:1A-5.c. The Custodian also stated that the Council approved the Township's proposed special service charge of \$1,875.75 to locate and assemble four (4) years of legal fee invoices. The Custodian further stated that because the Complainant's request Item No. 1 sought only records for one (1) year, the Township divided \$1875.75 by four (4) to reach the special service charge of \$465.44. In an e-mail to the GRC on August 17, 2012, the Complainant's Counsel argued that the Township was supposed to conduct an actual assessment of how much time it would take to gather copies of the records responsive to request Item No. 1. Counsel also argued that the Township assumed that looking for one (1) year of invoices takes 25% of the time required to search for four (4) years of invoices.

In the response to the 14-point analysis, the Custodian certified that the Complainant requested all invoices for legal fees incurred by the Township for fifteen (15) law firms providing services during the year 2010. The Custodian also certified that there are an unknown number of copies of legal fee invoices and based upon the number of pages of invoices for the four (4) year period, from 2006 through 2009, it is reasonable to assume that the average number of pages for the year 2010 is 750. The Custodian further certified that all the records are located in storage and each invoice must be reviewed for possible redactions concerning the ongoing litigation cases involving the Complainant and her family and the Township, the names of employees involved with disciplinary matters and for confidential information concerning pending litigation in which the Township is a party. The Custodian additionally certifies that the information technology could not be utilized because individual invoices were not scanned and entered into the Township's computerized records until 2011.

The Custodian identified the Township employees, job titles and number of hours expended and the hourly compensation for each employee that will be utilized to respond to the Complainant's request Item No. 1. Counsel asserted that the Township is basing the special service charge on those employees with the lowest hourly rates. The Custodian certified that the special service charge is \$556.36. The Custodian also certified that approximately one (1) hour is necessary to consult with Counsel as to what information in the invoices should be redacted for attorney client privilege material. The Custodian further certified that the extent of her formal education is a high school degree and never enrolled in college and has no legal training. The Custodian additionally certified that without legal training she would not have the legal expertise to determine whether a particular entry in a legal fee invoice is privilege material and which is permitted to be redacted.

Finally, regarding the additional charge for review and redaction of the invoices, OPRA provides that if a custodian "... 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. However, OPRA does not prohibit a public agency's use of an attorney to advise, supervise or even to perform such redactions.

The Court in Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002), agreed with the rationale that OPRA provided:

“for the ‘*custodian*’ to redact, excise or delete the exempt information. The Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the *custodian* is responsible for asserting the privilege and making the redaction.” (Emphasis added.) *Id.* at 203-204.

The Court in Courier Post ultimately held that “[a]ttorneys’ fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material.” *Id.* at 207.

The Custodian’s response to this complaint provide clearly indicate why Counsel’s assistance is necessary to redact the legal invoices. Further the Custodian’s assessment of one (1) hour to as part of the overall process of responding to the Complainant’s OPRA request is reasonable.

Therefore, because the Custodian’s assessment of the special service charge in the amount of \$465.44 is supported by the evidence in the record, and because such proposed charge is less than the total estimated hourly rate of all of the individuals involved in fulfilling the request, which totals \$556.36, the proposed special service charge of \$465.44 is reasonable pursuant to N.J.S.A. 47:1A-5.c. In addition, the Custodian’s one (1) hour assessment to seek Counsel’s assistance to redact the legal fee invoices is reasonable pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).

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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian could not comply with paragraph four (4) of the Council’s Order because the Complainant disputed the Custodian’s assessment of the special

service charge for the records responsive to request Item No. 1. The Complainant did not decline to purchase said records. However, the Custodian failed to timely comply with paragraph six (6) of the Council's Order because the Custodian provided a legal certification certifying that that the Complainant declined to purchase the records responsive to request Item No. 2 on the ninth (9th) business day following receipt of said order.

2. Because the Custodian's assessment of the special service charge in the amount of \$465.44 is supported by the evidence in the record, and because such proposed charge is less than the total estimated hourly rate of all of the individuals involved in fulfilling the request, which totals \$556.36, the proposed special service charge of \$465.44 is reasonable pursuant to N.J.S.A. 47:1A-5.c. In addition, the Custodian's one (1) hour assessment to seek Counsel's assistance to redact the legal fee invoices is reasonable pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).
3. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$465.44 for the records responsive to request Item No. 1, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

¹⁰ "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."
Clara Halper v. Township of Piscataway (Middlesex), 2010-281, – Supplemental Findings and Recommendations of the Executive Director 14

September 18, 2012



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

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Clara Halper
Complainant

Complaint No. 2010-281

v.

Township of Piscataway (Middlesex)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 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. Although the Custodian responded in writing to the Complainant’s July 7, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. Moreover, the Custodian’s failure to respond immediately to the Complainant’s OPRA request for legal invoices results in a violation of N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), and Paff v. Borough of Wildwood Crest (Cape May), GRC Complaint No. 2009-54 (Interim Order April 2010) the Township’s Ordinance No. 06-51 is invalid as it applies to OPRA. The Township must charge the “actual cost” of providing the requested copies pursuant to N.J.S.A. 47:1A-5.c.
3. The Complainant’s request Item No. 1, a request for legal fees, is a request for identifiable government records, i.e., legal invoices, and therefore the Complainant’s OPRA request for Item No. 1 does seek an identifiable government record. Thus, the Custodian must disclose the legal invoices responsive to request Item No. 1. See Halper v. Township of Piscataway (Middlesex), GRC Complaint No. 2004-130 (December 2004).
4. **The Custodian shall calculate the “actual cost” to provide the records responsive to request Item No. 1 (see No. 3 above) within five (5) business days and present**

said cost to the Complainant. The Complainant shall deliver to the Custodian (a) payment of the actual cost of the records responsive to request Item No. 1 or (b) a statement declining to purchase these records. The Complainant's failure to take any action within three (3) business days of receipt of the estimated cost shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹

5. The Custodian failed to prove that the special service charge of \$2,969.88 was reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.c. N.J.S.A. 47:1A-6. Specifically, it is reasonable to charge a special service charge for time expended by Ms. Field (\$281.40), Ms. Kopidlowski (\$749.81) and the two (2) Public Works employees (\$826.54) based on the amount of records, because all records were in approximately 500 boxes in storage and the four (4) employees expended 64 hours working on the Complainant's request Item No. 2. Therefore, the Custodian is only permitted to charge \$1,857.75, which represents the cost of these four (4) employees. However, the portion of the special service charge for the other four (4) employees is unreasonable and unwarranted pursuant to N.J.S.A. 47:1A-5.c. Specifically, the Custodian failed to bear her burden of proving that the assistance of these employees was necessary to identify the responsive invoices. Moreover, the Custodian is not permitted to charge the Complainant for Counsel and Mr. Crisuolo's review and redaction of the responsive records pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).
6. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$1,857.75, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,² to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**

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

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

7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 2012

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: August 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Clara Halper¹
Complainant**

GRC Complaint No. 2010-281

v.

**Township of Piscataway (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Legal fees and expenses for 2010 paid by the Township of Piscataway (“Township”) to law firms including but not limited to Hoagland, Long, Doukas, LLP, J. Clarkin Law Firm, and Waters, McPherson, McNeil P.C.
2. Invoices from 2006 through 2009 from all law firms including but not limited to Hoagland, Long, Doukas law firm, J. Clarkin Law Firm, and Waters, McPherson, McNeil law firm that provided legal services to the Township.

Request Made: July 7, 2010

Response Made: July 14, 2010

Custodian: Melissa Seader

GRC Complaint Filed: October 26, 2010³

Background

July 7, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant encloses a check for \$10.00. The Complainant states that the Custodian may deliver the records via e-mail and/or compact disc (“CD”).

July 14, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the third (3rd) business day following receipt of such request.⁴ The Custodian states the estimated cost to compile the records responsive is \$500.00. The Custodian requests that the Complainant supply the Clerk’s office with a check for \$500.00 so that the Custodian may process the Complainant’s OPRA request. The Custodian states that the Township ordinances permit the Custodian to charge an hourly rate of \$23.50 to \$47.32.

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

² Represented by James Clarkin, III, Esq. (Piscataway, NJ).

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

⁴ The Custodian certifies in the Statement of Information that she received the Complainant’s OPRA request on July 9, 2010.

October 26, 2010

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

- Complainant’s OPRA request dated July 7, 2010
- Letter from the Custodian to the Complainant dated July 14, 2010.

Complainant’s Counsel states that the Complainant filed an OPRA request on July 7, 2010. Counsel also states that the Complainant requested copies of: 1) Legal fees and expenses for 2010 paid by the Township to law firms including but not limited to Hoagland, Long, Doukas law firm, J. Clarkin Law Firm, and Waters, McPherson, McNeil law firm and 2) Invoices from 2006 through 2009 from all law firms including but not limited to Hoagland, Long, Doukas law firm, J. Clarkin Law Firm, and Waters, McPherson, McNeil law firm that provided legal services to the Township. Counsel further states that the Custodian demanded a \$500.00 deposit to fulfill the Complainant’s OPRA request with no justification for this charge.

Counsel states that OPRA mandates that “government records shall be readily accessible for inspection, copying or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access is accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” N.J.S.A. 47:1A-1. Counsel also states that the Custodian has the burden of proof in any proceeding under OPRA pursuant to N.J.S.A. 47:1A-6.

Counsel asserts that to fulfill the Complainant’s OPRA request the Custodian only had to either retrieve the requested invoices from the Township’s files or request copies of those records from the Township’s attorneys. Counsel also asserts that the GRC should be guided by Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Counsel further asserts in that case, the Plaintiff requested copies of “[a]ny and all settlements, releases, or similar documents entered into, approved or accepted from January 1, 2006 through March 14, 2008.”

The Complainant does not agree to mediate this complaint.

October 27, 2010

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

November 1, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation in which the Custodian requested a five (5) business day extension to complete the SOI. The GRC states that the SOI will be due no later than November 12, 2010.

November 10, 2010

E-mail from the Custodian to the GRC. The Custodian states that the Finance and Purchasing Departments have been working frantically to compile the required records. The Custodian also states that she needs to compile a list of those records in order to comply with the request for the SOI. The Custodian requests an additional extension to complete the SOI.

November 10, 2010

E-mail from the GRC to the Custodian. The GRC states that a three (3) business day extension will be granted to complete the SOI. The GRC also states that the Custodian must submit the SOI by November 17, 2010.

November 16, 2010

E-mail from the Custodian’s Counsel to the GRC. Counsel requests a one (1) week extension to complete the SOI. Counsel states that Mr. Daniel Lampty, Chief Financial Officer (“Mr. Lampty”), is unavailable and has the calculations of all the pages of the various legal invoices.

November 16, 2010

E-mail from the GRC to Custodian’s Counsel. The GRC states that an additional extension of time is granted until November 23, 2010 to complete the SOI.

November 23, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 7, 2010
- Letter from the Custodian to the Complainant dated July 14, 2010.

The Custodian certifies that the Township employees in the Department of Finance and the Municipal Clerk’s Office coordinated a search of the records in the current files of the Finance office and also the records in storage for the years 2006 through 2009. The Custodian also certifies that the records responsive to the Complainant’s OPRA request are required to be kept on file for six (6) years in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that the records responsive to the Complainant’s OPRA request were not denied. The Custodian also certifies that a special service charge of \$500.00 was requested pursuant to N.J.S.A. 47:1A-5.c. The Custodian attaches the following table to show the total pages of invoices for 2006 through 2009 from all law firms that provided legal services to the Township of Piscataway in response to request Item No. 2.

Attorney/Law Firm	Approximate Number of Pages
Wolff & Samson, P.C.	5
Wisniewski & Associates, LLC	39
Abrams, Gran, Hendricks, Reina & Rosenberg, P.C.	9
McManimon & Scotland	14

Field, Womack & Kawczynski, LLC	8
DeCotiis, FitzPatrick, Cole & Wisler, LLP	715
Venezia & Nolan, P.C.	407
Scarinci & Hollenbeck, LLC	19
James F. Clarkin, Esq. & Clarkin and Vignuolo, P.C.	1,484
Hoagland, Longo, Moran, Dunst, & Doukas, LLP	97
DiFransecso, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer, P.C.	149
Knapp, Trimboli, & Prusinowki, LLC	162
Waters, McPherson & McNeil	12
Benedict & Altman	6
David Frank, Esq.	1
James Kinneally, Esq.	11
Wilentz, Goldman & Spitzer P.A.	9
Approximate Total	3,147

Custodian's Counsel states that the Township employed seventeen (17) individual attorneys and law firms from 2006 through 2009. Counsel also states that Township employees have identified and photocopied more than 3,000 pages of legal invoices responsive to request Item No. 2. Counsel further states that the invoices are not filed by vendor but are grouped and filed by check number in the month in which they are paid. Counsel additionally states that staff was required to examine all invoices that the Township paid from 2006 through 2009, segregate those invoices for legal services, photocopy said invoices and return the invoices to their appropriate files. Counsel states that approximately five hundred (500) boxes were moved in this process.

Counsel states that as of November 15, 2010, eighty-seven and a quarter (87¼) hours have been expended by Township employees in response to the Complainant's OPRA request. Counsel also states that the only method by which the Township can justify its request for the \$500.00 deposit is to respond to the request. Counsel attaches the following table identifying the Township employees, job titles, number of hours expended and the hourly compensation of each employee:

Employee Name	Job Title	Hourly Wage	Date	Hours Expended	Total Paid to Employee
Diane Kopidowski	Finance Clerk	\$30.92	11/3/10	5.00	\$749.81
			11/8/10	5.25	
			11/9/10	5.50	
			11/10/10	2.50	
			11/12/10	5.00	
			11/15/10	1.00	
			Total 24.25 hours		
Carolyn Field	General Clerk	\$20.10	11/8/10	3.50	\$281.40
			11/10/10	2.00	
			11/12/10	6.50	
			11/15/10	2.00	
			Total 14.00 hours		

Daniel Blair	Public Works	\$31.79	11/9/10 11/10/10	8.00 5.00 Total 13.00 hours	\$413.27
Edward Hatten	Public Works	\$31.79	11/9/10 11/10/10	8.00 5.00 Total 13.00 hours	\$413.27
Monique Thompson	Purchasing	\$28.91		Total time 7.00 hours	\$202.37
Karen Light	Finance	\$41.10		Total time 3.00 hours	\$123.30
Daniel Lampety	Chief Financial Officer	\$72.77		Total time 8.00 hours	\$582.16
Melissa Seader	Deputy Municipal Clerk	\$40.86		Total time 5.00 hours	\$204.30
				Total Paid	\$2,969.88 ⁵

Counsel states that as of November 15, 2010 the Township has expended \$2,969.88 in resources in responding to the Complainant's OPRA request Item No. 2. Counsel also states that this process is not yet complete. Counsel further states that the responsive invoices must be reviewed and, where appropriate, be redacted. Counsel states that this review and redaction process will only be undertaken if the Complainant pays not only the revised estimate of special charges for the work performed to date but also pays for the Township Administrator and Township Attorney to review and redact the invoices. Lastly, Counsel states that the Township has not responded to the Complainant's request for records responsive to Item No. 1 because it is not a request for a government record.

December 27, 2010

Complainant's Counsel response to the Custodian's SOI. Counsel asserts that although the SOI submitted by the Custodian is certified, the correspondence submitted by Custodian's Counsel is not certified. Counsel also asserts that if the SOI contains material statements of fact, such statements must be presented in the form of affidavits or certifications. Counsel argues that the special service charge has grown from \$500.00 to \$2,969.88. Counsel states that the Township's response to the Complainant's OPRA request has not complied at all with OPRA.

Counsel states that the Complainant requested copies of legal invoices from the law firms that have provided legal services to the Township from 2006 through 2009. Counsel states that, as shown in the Custodian's SOI, 83% of invoices are from three (3) law firms. Counsel further states that the Custodian does not explain why the Township did not attempt to contact these firms and ask for copies of their invoices to be e-mailed to the Township. Counsel states that the Custodian's SOI does not state why an examination of all invoices was necessary. Counsel asserts that the Township might have an accounting or bookkeeping system that can electronically track and create reports

⁵ The \$2,969.88 special service charge relates to the Complainant's OPRA request Item No. 2. Custodian's Counsel asserted that the Township did not respond to the Complainant's request for Item No. 1 because it is not a request for a government record.

showing what the Township paid for legal services. Counsel also asserts that the Township must have an accounting system that is more sophisticated than one that is based entirely on paper. Counsel further asserts that the Township almost certainly has the capability to identify checks paid to law firms for legal services so that a search through every single invoice paid by the Township for four (4) years was neither necessary nor reasonable.

Counsel argues that even if a special service charge is warranted, the charge cannot be greater than \$500.00. Counsel states that the GRC has held that special service charges must be presented to the requestor in advance. Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (November 18, 2008 Interim Order). Counsel argues that despite the fact that the Township knew it was accumulating hours grossly in excess of the original \$500.00, the Township never reassessed its special service charge and thus the Township is bound by its original charge. Counsel also argues that the Township's calculation of its special service charge is faulty because the hourly rates changed range from \$20.10 to \$72.77 and there is no evidence that anyone above the \$20.10 pay grade was required to pull invoices for copying.

Counsel further argues that there should be no special service charge for the redaction of invoices. Counsel states that attorney invoices are not privileged and ordinarily will not contain any privileged information. *See Hunterdon County Policemen's Benevolent Association Local 188 v. Township of Franklin*, 286 N.J. Super. 389 (App. Div. 1996). Counsel argues that legal invoices should be redacted if they reveal client secrets or strategy. Counsel argues that mundane statements such as "conference call with client" or "review and digest Smith deposition" are not privileged. Lastly, Counsel argues that employee names are public information and should not be redacted pursuant to N.J.S.A. 47:1A-10.

December 30, 2010

E-mail from Custodian's Counsel to the GRC.⁶ Counsel states that the Appellate Division has ruled that invoices for legal services are generally not insulated by the attorney client privilege, but this is not an absolute rule. Counsel asserts that the Township is still in litigation with the Complainant's family over a number of issues which include eminent domain involving the proper date of valuation and the appropriate rate of interest on the condemnation award. Counsel states that these issues are relevant to Township of Piscataway v. South Washington Avenue, LLC, pending in the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-11715-99. Counsel also states that there are issues relating to the relocation of Laurence Halper, Complainant's husband ("Mr. Halper"), which are currently pending in the Appellate Division of the Superior Court, Docket No. A-000356-10T3. Counsel further states that there is ongoing litigation between the Township and Mr. Halper related to his claim for damages for the loss of crops on the property which is the subject of the eminent domain litigation. Counsel additionally states that there is ongoing litigation initiated by Mr. Halper against the Township relating to certain equipment which Mr. Halper claims to own, which is in the possession of the Township. Counsel states that the Superior Court of New Jersey, Law Division, decided this case in the Township's favor on motion for

⁶ Counsel also includes a certification from Custodian's Counsel and Ms. Lyn Evers, Business Administrator.

summary judgment in Laurence Halper v. Township of Piscataway, Docket No. MID-L-2541-08.

Counsel asserts that the Township is aware that mundane statements that appear in typical invoices are not privileged and will not be redacted. Counsel also asserts that due to the number of current lawsuits involving the Township and Mr. Halper, it is essential that the Township avail itself of a review of all the invoices to redact any privileged information. Counsel further asserts that whether privileged information exists is not the issue; rather, the issue is the need to review the invoices for possible redactions and the special service charge which should accompany same. Counsel asserts that based on the affidavits submitted, the hourly rates of the staff in the firm's office are comparable to those persons employed by the Township. Lastly, Counsel asserts that requesting the Township's various outside legal firms to furnish these invoices would have amounted to increased expense when taking into consideration the fees charged by the law firms.

Counsel certifies that after receiving the Complainant's OPRA request he reviewed his law firm's filing and storage for legal invoices with Ms. Lyn Evers, Business Administrator ("Ms. Evers"). Counsel also certifies that he advised Ms. Evers that his law firm's invoices for the years in question were located offsite in a public storage facility, not in the computer system, and would have to be retrieved from storage, photocopied, and delivered to the Township. Counsel further certifies that he advised Ms. Evers that his law firm would charge for the time expended by his staff to fulfill the Complainant's OPRA request. Counsel additionally certifies that there are two (2) persons in his law firm who would have handled this OPRA request: a part-time employee whose hourly wage is \$20.50 and the other is a full-time employee whose hourly wage is \$35.71.

Ms. Evers certifies that the Township has a population of approximately 55,000 people. Ms. Evers also certifies that from 2006 through 2009, the Township employed seventeen (17) individual attorneys or law firms. Ms. Evers further certifies that approximately five hundred (500) boxes were moved to locate the invoices responsive to request Item No. 2. Ms. Evers certifies that the Township does not file invoices by vendor; the invoices are filed and grouped by check number in the month said invoices are paid. Ms. Evers certifies that the Township staff examined all invoices that the Township paid during the years 2006 through 2009 and segregated those invoices for legal services. Ms. Evers also certifies that the legal invoices are stapled together with a municipal voucher form or a cover letter. Ms. Evers further certifies that the Township staff needed to remove a staple, put aside the records related to the invoices, photocopy the invoice, reattach the invoice to its related records and then return the invoice to the appropriate file. Ms. Evers additionally certifies that as of November 15, 2010, Township employees expended 87¼ hours fulfilling the Complainant's OPRA request. Lastly, Ms. Evers certifies that the Township has spent \$2,969.88 in employee wages in response to the Complainant's OPRA request.

Ms. Evers notes that Complainant's Counsel suggests that the Township could have produced the legal invoices in a less costly way by requesting the three (3) law firms with the most invoices to provide copies. Ms. Evers certifies that this option was not less

costly. Ms. Evers further certifies that she contacted the Township attorney, whose firm has the most invoices and further certified that the Township attorney advised her that the firm's invoices would need to be located, scanned and then e-mailed to the Township. Ms. Evers additionally certifies that the Township attorney informed her that they would bill the Township for the time of the law firm's staff. Ms. Evers certifies that even if the Township attorney's law firm pulled the invoices, the Township staff must then receive and review these invoices, which would amount to double handling of the records. Ms. Evers also certifies that the Township does have the ability to electronically track and create reports concerning what the Township paid for legal services in response to request Item No. 1. Ms. Evers further certifies that the Complainant requested copies of the actual invoices in response to request Item No. 2 and said invoices are not scanned during the payment process, nor anytime thereafter. Ms. Evers additionally certifies that the lowest rate employee is Ms. Carolyn Field, General Clerk, ("Ms. Field"), a part-time employee who works a limited number hours per week and thus could not complete all of the tasks required in the limited number of hours she works per week. Ms. Evers certifies that there is a basis for the Township to utilize other personnel at a higher hourly rate to perform the necessary tasks to comply. Ms Evers also certifies that Ms. Diane Kopidowski, Finance Clerk, ("Ms. Kopidowski"), expended the most time. Lastly, Ms. Evers certifies that the hours expended by the two (2) public works employees were necessary because the job descriptions of Ms. Kopidowski and other municipal employees do not include the manual labor of lifting boxes.

May 7, 2012

E-mail from the GRC to the Custodian. The GRC states that, in order to determine whether a special service charge was warranted in this case, the Custodian must complete the GRC's 14-point analysis for special service charges pursuant to The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5(c). 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.

May 8, 2012

E-mail from the Custodian's Counsel to the GRC. Counsel requests an additional five (5) business days to respond to the GRC's 14-point analysis for special service charges.

May 9, 2012

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel's request for a five (5) business day extension to complete the GRC's 14-point analysis for special service charges.

May 21, 2012

E-mail from the Custodian to the GRC. The Custodian responds to the GRC's request for a completed special service charge analysis as follows:

Questions	Custodian's Response
1. What records are requested?	All invoices for legal fees incurred by the Township from seventeen (17) law firms providing services during the years 2006 through 2009.
2. Give a general nature description and number of the government records requested.	Copies of legal fee invoices in excess of 3,000 pages.
3. What is the period of time over which the records extend?	Four (4) years.
4. Are some or all of the records sought archived or in storage?	All were in storage.
5. What is the size of the agency (total number of employees)?	215 full time employees; 216 part time employees.
6. What is the number of employees available to accommodate the records request?	Eight (8) employees
7. To what extent do the requested records have to be redacted?	Each invoice must be reviewed for possible redaction concerning the ongoing litigation cases involving the Complainant and members of her family and the Township. Redact names of employees with disciplinary matters; redact confidential information concerning pending litigation in which the Township is a party.

<p>8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?</p>	<p>The Custodian encloses the table she submitted along with her SOI to detail each employee's hourly rates and number of hours expended. In addition, an attorney must review each record for possible redaction concerning pending litigation matters between the Township and the Complainant's family. It is anticipated a minimum of eight (8) hours at either \$76.38 per hour for the Township Administrator or \$180.00 per hour for the Township Attorney to review.</p>
<p>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?</p>	<p>Not applicable, the request was to obtain copies of all invoices, not to examine them.</p>
<p>10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?</p>	<p>Two (2) public work laborers expended approximately thirteen (13) hours to return 500 boxes of record to their original storage place. Their hourly rates are both \$31.79.</p>
<p>11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?</p>	<p>Legal invoices are processed and paid by both the Purchasing and Finance Departments and they have the most knowledge of the types of documents requested. Whenever possible, the Township utilized employees with the lowest hourly wage in those Departments.</p>
<p>12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?</p>	<p>The retrieval and copying work has already been performed. The Custodian states that the hourly rates were set forth in the table she submitted along with her SOI. The work of reviewing and redacting will be performed by Mr. Joseph Crisuolo, Interim Township Administrator ("Mr. Crisuolo") and Custodian's Counsel.</p>
<p>13. What is the availability of information technology and copying capabilities?</p>	<p>The Township utilizes modern photocopying equipment. Information technology could not be utilized because the request was for copies of all the invoices.</p>
<p>14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.</p>	<p>The Custodian encloses the same table as she submitted along with her SOI. The Custodian also includes Custodian's Counsel's argument submitted along with the SOI on November 23, 2010.</p>

July 5, 2012

Telephone call from the GRC to the Custodian. The GRC requests a copy of the Township's ordinance which permits the Custodian to charge an hourly rate between \$23.50 and \$47.32 when responding to an OPRA request.

July 5, 2012

E-mail from the Custodian to the GRC. The Custodian e-mails the requested Township ordinance. Ordinance No. 06-51 states "[t]he hourly rate of the services encompassed by the special service charge shall not be less than \$23.50 per hour nor more than \$47.32 per hour. The actual fee to be charged in each case will be based upon the actual hourly personnel cost to research, retrieve and copy the requested records. The minimum and maximum hourly rates encompassed by the special service charge shall be subject to modification by the Township Council."

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides 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 thereof ..." N.J.S.A. 47:1A-5.g.

Further, 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 ... In 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 ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA specifically states that a custodian "shall promptly comply with a request... [for] a government record." (Emphasis added.) N.J.S.A. 47:1A-5.g. Additionally, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant's counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in Clara Halper v. Township of Piscataway (Middlesex), 2010-281 – Findings and Recommendations of the Executive Director

O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(holding that the custodian’s initial response stating that the complainant’s request was a duplicate of a previous request was legally insufficient because the custodian has a duty to answer each request item individually). The Council reasoned that, “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Here, the Custodian responded to the Complainant’s OPRA request on July 10, 2010, three (3) business days after receipt of the request, stating that the Complainant was required to submit a deposit of \$500.00. The Custodian’s Counsel subsequently admitted in the SOI that the Township did not respond to the Complainant’s request Item No. 1 because they believed the request was invalid. While on its face it was not clear whether the Custodian’s initial response encompassed both OPRA request items, Counsel’s admission established that the Custodian’s response was insufficient pursuant to Paff.

Further, the invoices requested in the instant complaint are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. *See* Burdick v. Township of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012). In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the Council held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should immediately respond to the request for those records, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant complaint, the Custodian responded in writing to Item No. 2 of the Complainant’s July 7, 2010 OPRA request on July 14, 2010, the third (3rd) business day after receipt of such request. Although the Custodian responded within seven (7) business days, the Custodian failed to respond to the Complainant’s OPRA request for invoices immediately and further failed to respond to request Item No. 1 for invoices at all, as is required pursuant to N.J.S.A. 47:1A-5.e.

Therefore, although the Custodian responded in writing to the Complainant’s July 7, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. Moreover, the Custodian’s failure to respond immediately to the

Complainant's OPRA request for legal invoices results in a violation of N.J.S.A. 47:1A-5.e. See Herron, *supra*.

Whether the Township ordinance allowing the Custodian to charge the Complainant an hourly rate of \$23.50 to \$47.32 is valid?

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:

"[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.*" (Emphasis added.) N.J.S.A. 47:1A-5.b.

N.J.S.A. 47:1A-5.c. 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 ...* 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 provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1.

Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the Custodian informed the Complainant that Township ordinances permit the Custodian to charge an hourly rate of \$23.50 to \$47.32.

OPRA provides that copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b. OPRA further authorizes a custodian to charge the actual cost for duplication of a record where the cost of duplication is not enumerated or exceeds the cost set forth in OPRA. N.J.S.A. 47:1A-5.b. OPRA further allows a custodian to for the “*actual cost* of any supplies such as computer discs.” (Emphasis added.) *Id.* However, OPRA does provide that whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter 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 copies. N.J.S.A. 47:1A-5.c.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff’s assertion is moot because the fee was never imposed and the requested records were available on the Township’s website free of charge. The court held that “...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA.” The court stated that:

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5b.”

The Court also stated that “...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. *See New Jersey Div. of Youth & Family Servs. v. J.B.*, 120 N.J. 112, 118-19, 576 A.2d 261 (1990).” Further, the Court stated that “...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.”

Further, in *Dugan v. Camden County Clerk’s Office*, 376 N.J. Super. 271 (App. Div. 2005), the Court stated that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor ... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. at 279.

In *Paff v. Borough of Wildwood Crest (Cape May)*, GRC Complaint No. 2009-54 (Interim Order April 2010), the custodian certified that the charge of \$25.00 for an audio cassette was established by Ordinance No. 1048. The custodian also certified that the fee was based upon the actual cost of the audio cassette at \$5.44, the estimated time of retrieving, duplicating, packaging, and returning the tape to its original location, the median salary of the three (3) employees who would perform the duplication and the cost of postage. The Council held “... the \$25.00 charge does not reflect the actual direct cost of providing the copies, but rather a hypothetical charge based on the median hourly rate of the Borough’s employees.” The Council further held “...the Borough’s Ordinance No. 1048 is invalid and the [c]ustodian must charge the actual cost of the audiotape with no charge for labor or overhead.” Lastly the Council held “...special service charges cannot be set in advance. Special service charges shall be based upon the actual direct cost of providing the copy or copies pursuant to N.J.S.A. 47:1A-5.c.”

The facts in this matter are similar to those in *Paff*, *supra*. In *Paff* the Council struck down the Borough’s ordinance because it set a special service charge, which did not reflect the actual cost pursuant to N.J.S.A. 47:1A-5.c. In the instant complaint, the Custodian stated that pursuant to the Township’s ordinance the Custodian was permitted to charge an hourly rate of \$23.50 to \$47.32. The Township ordinance states that “the hourly rate of the special service charge shall not be less than \$23.50 per hour nor more than \$47.32 per hour. The actual fee in to be charged in each case will be based upon the actual hourly personnel cost to research, retrieve and copy the requested records.” It is therefore obvious that the Township is setting the hourly rate to be charged as part of the special service charge amount; this is not necessarily the actual direct cost of providing the records to the Complainant.

Therefore, pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., *Spaulding, supra*, *Libertarian Party of Central New Jersey, supra*, *Dugan, supra*, and *Paff, supra*, the Township’s Ordinance No. 06-51 is invalid as it applies to OPRA. The Township must charge the “actual cost” of providing the requested copies pursuant to N.J.S.A. 47:1A-5.c.

Whether the Complainant's request Item No. 1 is valid under OPRA?

Custodian's Counsel stated in the SOI that the Township did not respond to the Complainant's request for records responsive to Item No. 1 because it is not a request for a government record. Thus, the GRC must address whether the Complainant's request Item No. 1 is overly broad.

In Halper v. Township of Piscataway (Middlesex), GRC Complaint No. 2004-130 (December 2004), the complainant requested "how much in legal fees has been expended in 2003 and 2004 to date." The custodian provided the Complainant with all the records responsive to her OPRA request. The GRC notes that the OPRA request at issue herein, as well as the parties, are identical to those in Halper. Thus, the GRC has set precedent regarding requests for legal fees.

In the instant complaint, the Complainant's request for Item No. 1 sought "legal fees and expenses for 2010 paid by the Township to law firms including but not limited to Hoagland, Long, Doukas, LLP, J. Clarkin Law Firm, and Waters, McPherson, McNeil P.C." In the Custodian's SOI, Custodian's Counsel stated that the Custodian did not respond to the Complainant's request Item No. 1 because it was not a request for a government record. However, in Halper, *supra*, the custodian provided the complainant with legal invoices responsive to these requests. A request for legal fees is therefore a request for legal invoices; thus, the Complainant's request Item No. 1 does seek identifiable government records.

Therefore, the Complainant's OPRA request Item No. 1 seeks an identifiable government record, a request for legal fees constitutes a request for legal invoices and therefore is valid under OPRA. *See* Halper v. Township of Piscataway (Middlesex), GRC Complaint No. 2004-130 (December 2004). Thus, the Custodian must disclose the legal invoices responsive to request Item No. 1 to the Complainant.

Whether the Custodian's proposed special service charge of \$2,969.88 in response to OPRA request Item No. 2 is reasonable and warranted under OPRA?

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 ...* 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.

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. 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 the request” 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;⁷ 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, *supra*, 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 certain inquiries:

⁷ The court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.
Clara Halper v. Township of Piscataway (Middlesex), 2010-281 – Findings and Recommendations of the Executive Director

In the instant complaint, the Custodian responded requesting that the Complainant pay a \$500.00 deposit to compile the responsive records. The Complainant subsequently filed this complaint over three (3) months later. The GRC notes that there is no indication in the record that the Complainant remitted any payment to the Township.

The Custodian's Counsel asserted in the SOI filed with the GRC on November 23, 2010 that the Township already incurred \$2,969.88 to fulfill the Complainant's OPRA request for Item No. 2. Moreover, the Custodian detailed the special service charge in her submission to the GRC on May 21, 2012.

In a letter to the GRC on December 27, 2010, the Complainant's Counsel argued that even if the special service charge was warranted, it cannot be greater than the \$500.00 deposit amount first proposed to the Complainant and cited to Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (November 18, 2008 Interim Order). However, the facts of that complaint are inapposite to the facts herein in that the custodian and complainant in Renna agreed to a fee that the custodian later attempted to increase after the complainant remitted payment. The Council cited to Loder v. County of Passaic, GRC Complaint No. 2005-161 (January 2006), in determining that:

“the Custodian estimated an incorrect special service charge because said charge was not based on the actual direct cost pursuant to N.J.S.A. 47:1A-5.c. Based on the Council's decision in Loder, the Custodian in this complaint may only charge the estimated special service charge of one (1) hour; however the Custodian must only charge \$26.16 because it is the actual direct cost of providing the copies.” *Id.* at pg. 13.

Here, the Complainant did not agree to the proposed \$500.00 deposit charge, nor did she remit payment of same, as was the case in both Renna, *supra*, and Loder, *supra*. Thus, the GRC declines to apply the holdings of those complaints to the instant matter.

In the complaint currently before the Council, the Custodian proposed a special service charge of \$2,969.88 to respond to the Complainant's OPRA request Item No. 2 in addition to the an anticipated cost of eight (8) additional hours at either \$76.38 or \$180.00 per hour for Mr. Crisuolo and Custodian's Counsel to review and redact the responsive records where necessary. This request item seeks copies of all legal invoices spanning a four (4) year period from 2006 to 2009. The Township, an agency of 215 full-time employees and 216 part-time employees, utilized eight (8) employees to fulfill the Complainant's OPRA request Item No. 2.

In the response to the 14-point analysis, the Custodian certified that there are an estimated 3,147 pages of responsive records: all records were located in storage and amounted to about 500 boxes. The Custodian further detailed the tasks performed in order to fulfill the OPRA request of her special service charge response to the GRC. The Custodian certified that the Township spent approximately 87 ¼ hours to respond to the Complainant's OPRA request. The Custodian further certified that because the Township files its invoices by check number by month, staff was required to search through all 36 months of invoices, identify the responsive invoice, remove and separate the invoice from the check, copy the invoice and reattach and return each invoice to its appropriate place

in the file. The Custodian certified that Public Works employees spent 26 hours to return the nearly 500 boxes to storage.

Ms. Evers also submitted a certification on December 30, 2010 that provided further detail. Ms. Evers certified that the Township employed 17 different attorneys from 2006 to 2009. Ms. Evers further certified that, although Complainant Counsel asserted that the Township could have saved on cost by asking each attorney to compile and provide the records, this option was actually more costly. Ms. Evers further certified that Ms. Field (\$20.10 an hour) is a part-time employee and could not complete all the tasks required within the limited number of hours she worked; thus, other personnel was necessary to fulfill the Complainant's OPRA request Item No. 2. Ms. Evers certified that Ms. Kopidowski (\$30.92 an hour) expended the most hours handling the OPRA request.

Based on the responses of the Custodian and Ms. Evers, the cost charged for Ms. Field and Ms. Kopidowski is reasonable because Ms. Field, who is part-time and expending 14 hours on the request, is the lowest paid of the employees that worked on the request and Ms. Kopidowski spent nearly 25 hours working on the request item. Additionally, it is reasonable to charge two (2) employees to move nearly 500 boxes worth of records back to storage. The number of records responsive and the fact that all records were contained in 500 boxes that were in storage factor heavily into the validation of these charges.

Aside from Ms. Field, Ms. Kopidowski and the two (2) Public Works employees, four (4) other employees with hourly rates ranging from \$28.91 to \$72.77 helped fulfill the request item. Of these employees, one was the Deputy Clerk and three (3) others came from the Purchasing and Finance Departments. The Custodian certified in the 14-point analysis that because the Purchasing and Finance Departments had the most knowledge of the types of records sought, those departments were needed to assist in the process. The Custodian further certified that where possible, the Custodian utilized the employee with the lowest hourly wage. However, it is unclear why Mr. Lampty (\$72.77 an hour for 8 hours), Ms. Karen Light (\$41.10 an hour for 3 hours) and Ms. Monique Thompson (\$28.91 an hour for 7 hours) were needed to identify simple invoices. The Custodian produced no convincing evidence that any expertise is necessary to identify an invoice from an attorney. The GRC's extensive experience regarding requests for invoices shows that the invoice usually identifies with reasonable clarity the party to whom payment should be made. Thus, the Township's utilization of these three (3) individuals is unnecessary for the purposes of identifying responsive invoices.

Finally, regarding the additional charge for review and redaction of the invoices, OPRA provides that if a custodian "... 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. However, OPRA does not prohibit a public agency's use of an attorney to advise, supervise or even to perform such redactions.

The Court in Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002), agreed with the rationale that OPRA provided:

“for the ‘*custodian*’ to redact, excise or delete the exempt information. The Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the *custodian* is responsible for asserting the privilege and making the redaction.” (Emphasis added.) *Id.* at 203-204.

The Court in Courier Post ultimately held that “[a]ttorneys' fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material.” *Id.* at 207.

The Custodian’s and Mr. Evers’ responses to this complaint provide no insight as to why the Custodian’s Counsel and Mr. Crisuolo are the only persons in the Township that are qualified to make redactions to the invoices at issue herein. Moreover, the Custodian did not provide an estimated amount of hours required to review and redact the invoices where necessary.

However, the Court’s holding in Courier Post, *supra*, is clear: the Custodian is specifically required to review and redact records. The Custodian failed to prove that she did not have the ability to contact Counsel to aid in redacting possible attorney-client privileged material. Further, the Custodian failed to adequately prove that Counsel or Mr. Crisuolo are the only persons with the expertise to locate and redact attorney-client privileged material. Finally, the current Custodian failed to prove that even if she did conduct the review and redaction of the requested records, said process would rise to an “extraordinary expenditure of time and effort...” N.J.S.A. 47:1A-5.c.

Therefore, the Custodian failed to prove that the special service charge of \$2,969.88 was reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.c. N.J.S.A. 47:1A-6. Specifically, a special service charge is reasonable for time expended by Ms. Field (\$281.40), Ms. Kopidowski (\$749.81) and the two (2) Public Works employees (\$826.54) based on the amount of records, because all records were in approximately 500 boxes in storage and the four (4) employees expended 64 hours working on the Complainant’s request Item No. 2. Therefore, the Custodian is only permitted to charge \$1,857.75, which represents the cost of these four (4) employees. However, the portion of the special service charge for the other four (4) employees is unreasonable and unwarranted pursuant to N.J.S.A. 47:1A-5.c. Specifically, the Custodian failed to bear her burden of proving that the assistance of these employees was necessary to identify the responsive invoices. Moreover, the Custodian is not permitted to charge the Complainant for Counsel and Mr. Crisuolo’s review and redaction of the responsive records pursuant to Courier Post, *supra*.

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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s July 7, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. Moreover, the Custodian’s failure to respond immediately to the Complainant’s OPRA request for legal invoices results in a violation of N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), and Paff v. Borough of Wildwood Crest (Cape May), GRC Complaint No. 2009-54 (Interim Order April 2010) the Township’s Ordinance No. 06-51 is invalid as it applies to OPRA. The Township must charge the “actual cost” of providing the requested copies pursuant to N.J.S.A. 47:1A-5.c.
3. The Complainant’s request Item No. 1, a request for legal fees, is a request for identifiable government records, i.e., legal invoices, and therefore the Complainant’s OPRA request for Item No. 1 does seek an identifiable government record. Thus, the Custodian must disclose the legal invoices responsive to request Item No. 1. See Halper v. Township of Piscataway (Middlesex), GRC Complaint No. 2004-130 (December 2004).
4. **The Custodian shall calculate the “actual cost” to provide the records responsive to request Item No. 1 (see No. 3 above) within five (5) business days and present said cost to the Complainant. The Complainant shall deliver to the Custodian (a) payment of the actual cost of the records responsive to request Item No. 1 or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within three (3) business days of receipt of the estimated cost shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield (Union), GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council’s Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the**

requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁸

5. The Custodian failed to prove that the special service charge of \$2,969.88 was reasonable and warranted under OPRA pursuant to N.J.S.A. 47:1A-5.c. N.J.S.A. 47:1A-6. Specifically, it is reasonable to charge a special service charge for time expended by Ms. Field (\$281.40), Ms. Kopidowski (\$749.81) and the two (2) Public Works employees (\$826.54) based on the amount of records, because all records were in approximately 500 boxes in storage and the four (4) employees expended 64 hours working on the Complainant's request Item No. 2. Therefore, the Custodian is only permitted to charge \$1,857.75, which represents the cost of these four (4) employees. However, the portion of the special service charge for the other four (4) employees is unreasonable and unwarranted pursuant to N.J.S.A. 47:1A-5.c. Specifically, the Custodian failed to bear her burden of proving that the assistance of these employees was necessary to identify the responsive invoices. Moreover, the Custodian is not permitted to charge the Complainant for Counsel and Mr. Crisuolo's review and redaction of the responsive records pursuant to Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002).
6. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian (a) a payment in the amount of \$1,857.75, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of same. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within eight (8) business days from receipt of the Council's Interim Order the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁹ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ "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."

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012