



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

February 26, 2013 Government Records Council Meeting

Fred U. Andes
Complainant

Complaint No. 2011-219

v.

New Jersey City University
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 Reconsideration and 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. There is no evidence to establish that the Custodian’s April 15, 2011 response occurred within seven (7) business days of the Custodian’s receipt of the Complainant’s April 2011 OPRA request. The Custodian has therefore failed to meet the required standard for reconsideration of the Council’s December 18, 2012 Interim Order in this regard.
2. The Custodian has established that the GRC did not consider, or failed to appreciate, the significance of probative, competent evidence, i.e., the handwritten notation of receipt on Attachment 6 of the Custodian’s Statement of Information. See, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Therefore, the Council grants reconsideration of the portion of its December 18, 2012 Interim Order which determined that the Custodian did not bear his burden of proof pursuant to N.J.S.A. 47:1A-6 that he timely responded to the May 19, 2011 OPRA request and finds that the Custodian’s June 1, 2011 response to said OPRA request was timely.
3. The competent, credible evidence of record indicates that the Complainant did not pay the required \$765 to New Jersey City University for the records requested within the time period set forth in the Council’s Interim Order, nor did the Complainant provide to the Custodian a statement declining to purchase the records. Thus, in accordance with the Council’s December 18, 2012 Interim Order, the Complainant’s failure to take any action within the time period prescribed by the Council’s Order is construed as a declination to purchase the records requested. N.J.S.A. 47:1A-5(b); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).



4. The Council's Interim Order required the Custodian to provide certified confirmation of compliance to the Executive Director within eight (8) business days from receipt of the Council's Interim Order. The evidence of record indicates that the Council's Order was disseminated to the parties on December 19, 2012 and further indicates that New Jersey City University was closed for business from December 24, 2012 to January 1, 2013; January 2, 2013 was the next day on which NJCU was open. Thus, the eighth (8th) business day after the Custodian's receipt of the Council's Interim Order was January 9, 2013. The Custodian transmitted his certification to the GRC on January 10, 2013, one (1) day beyond the required time period to submit certified confirmation of compliance. Thus, the Custodian did not fully comply with the Council's Interim Order;

5. Although the Custodian failed to respond in writing to the Complainant's April, 2011 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request, the Custodian bore his burden of proof under N.J.S.A. 47:1A-6 that he timely responded to the Complainant's May, 2011 OPRA request. Additionally, the Custodian bore his burden of proof that fulfilling the Complainant's OPRA requests would require an extraordinary expenditure of time and effort, which warranted a special service charge pursuant to 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), and the Council determined that the special service charge assessed by the Custodian was reasonable pursuant to N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(d) because the Custodian certified that the contract administrator is the only New Jersey City University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Finally, the Custodian certified that the Complainant failed to pay the special service charge of \$765 as required by the Council in its Interim Order dated December 18, 2012, although the Custodian failed to provide such certification within the time period prescribed by the Council. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 28, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL
Reconsideration and
Supplemental Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Fred U. Andes¹
Complainant**

GRC Complaint No. 2011-219

v.

**New Jersey City University²
Custodian of Records**

Records Relevant to Complaint:

April 2, 2011 request:

1. Copies of public notices soliciting bids for the renovation of the Gilligan Student Union Building, including: names, addresses, and bids of all bidders; names of the individuals who reviewed these bids for New Jersey City University (“NJCU”); scoring of the bids; criteria for scoring the bids; names of the individuals who selected the winning bids; names of the individuals who approved the winning bids;
2. Copies of public notices soliciting bids for the construction of Karnoutsos Hall, including: names, addresses and bids of all bidders; names of the individuals who reviewed these bids for NJCU; scoring of the bids; criteria for scoring the bids; names of individuals who selected the winning bids; names of individuals who approved the winning bids; the name of the project manager and/or lead person employed by Terminal Construction Corporation for the construction of Karnoutsos Hall.

May 19, 2011 request:

Copies of all change orders made during the renovations of the Gilligan Student Union building and Karnoutsos Hall, including detail description, complete itemization of costs associated with each change order, names of individuals who requested the change orders, the reasons for the change orders, and the names of individuals who approved or authorized the change orders.

Request Made: April 2, 2011³ and May 11, 2011⁴

Response Made: April 19, 2011 and June 1, 2011

Custodian: Alfred E. Ramey, Esq.

GRC Complaint Filed: June 20, 2011⁵

¹ No legal representation listed on record.

² Represented by Sarah T. Darrow, DAG, on behalf of the New Jersey Attorney General’s Office.

³ The Complainant asserts that he filed three (3) OPRA requests simultaneously on this date. The GRC will refer to these requests as a single request for administrative efficiency and ease of understanding.

⁴ The Complainant asserts that he filed two (2) separate OPRA request forms simultaneously on this date. The GRC will refer to these requests as a single request for administrative efficiency and ease of understanding.

Background

December 18, 2012

Government Records Council's ("Council") Interim Order. At its December 18, 2012 public meeting, the Council considered the November 20, 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 did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g) N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that fulfilling the Complainant's OPRA requests dated April 2, 2011 and May 11, 2011 would require an extraordinary expenditure of time and effort, a special service charge is warranted pursuant to 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. Moreover, the special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(d) because the Custodian has certified that the contract administrator is the only University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post, *supra*. Therefore, the Custodian shall disclose requested change orders for construction and renovation of the Gilligan Student building and Karnoutsos Hall to the Complainant upon the Complainant's payment of the \$765 special service charge assessed by the Custodian.
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 \$765 for the records responsive to the Complainant's May 19, 2011 OPRA request, 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**

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

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, 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.

December 19, 2012

Council's Interim Order ("Order") distributed to the parties.

January 10, 2013

Custodian's response to the Council's Order.⁶

The Custodian certifies that NJCU was open for business on Thursday, December 20 and Friday, December 21, 2012. The Custodian further certifies that NJCU was open for business on Monday, December 24, 2012, but closed for business from December 24, 2012 through January 1, 2013. The Custodian certifies that NJCU re-opened for business on January 2, 2013.

The Custodian certifies that as of January 9, 2013, the Complainant has not made payment of \$765 for records responsive to the request.

January 10, 2013

Custodian's request for reconsideration of the Council's December 18, 2012 Interim Order, attaching:

- Letter brief from Custodian's Counsel to the GRC dated January 10, 2013
- Certification of the Custodian dated January 10, 2013
- Letter from Complainant to Custodian dated April 2, 2011
- Three (3) OPRA requests from Complainant to Custodian dated April 2, 2011
- E-mail from Custodian to Wilton Thomas Hooke, Mary Bolowski and Edie Delvecchio dated April 8, 2011
- Letter from Custodian to the Complainant dated April 15, 2011
- Federal Express air bill from Custodian to Complainant dated April 15, 2011

Custodian's Counsel requests that the Council reconsider its December 18, 2012 Interim Order and argues that the GRC's finding that the Custodian did not bear his burden of proof under N.J.S.A. 47:1A-6 and failed to respond within the statutorily required seven (7) business days with respect to the Complainant's April and May 2011

⁶ The Custodian provided a certification to the GRC via e-mail on this date.

2011 requests violates the Custodian's due process rights because the Custodian was not afforded notice that the timeliness of his response had been challenged and was not afforded an opportunity to be heard and to present evidence on this issue as provided by N.J.S.A. 47:1A-7(e). Custodian requests that the GRC re-open and supplement the record to include a Certification of the Custodian dated January 10, 2013.

The Custodian certifies that the Complainant's April 2011 OPRA request was delivered to NJCU's mail room by the U.S. Postal Service certified mail, return receipt requested, and was logged in by an NJCU employee in the central mail room on April 6, 2011. The Custodian further certified that the "green card" receipt for certified mail was signed and returned to the U.S. Post Office for delivery to the Complainant. The Custodian further certified that he has no record of exactly when the certified mail was delivered to him, but that his file shows that he was working on the Complainant's request by at least April 8, 2011. The Custodian submitted a copy of an e-mail from him to various NJCU employees dated April 8, 2011.⁷ The Custodian certifies that on April 15, 2011, he responded to the Complainant that his letter was under review for costs associated with that request.

The Custodian certifies that the Complainant's May 2011 requests were dated by the Complainant May 19, 2011 and received by the Custodian on May 23, 2011, and the Custodian's initial response to the Complainant was dated and mailed on June 1, 2011. The Custodian certifies that these dates were included in the Statement of Information ("SOI") dated December 23, 2011. The Custodian certifies that his June 1, 2011 response was prepared and mailed on the fifth (5th) business day following receipt of the Complainant's OPRA request.

Analysis

Whether the Custodian has met the required standard for reconsideration of the Council's December 18, 2012 Interim Order?

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

Applicable case law holds that: "[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or

⁷ This e-mail was also submitted to the GRC as part of the Custodian's SOI.

unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' Ibid." In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

As part of the request for reconsideration, the Custodian submitted a certification in which he certified that the Complainant's April 2011 OPRA request was delivered to NJCU'S mail room by the U.S. Post Office certified mail, return receipt requested, and was logged in by an NJCU employee in the central mail room on April 6, 2011. The Custodian further certified that the "green card" receipt for certified mail was signed and returned to the U.S. Post Office for delivery to the Complainant. The Custodian further certified that he has no record of exactly when the certified mail OPRA request was delivered to him, but that his file shows that he was working on the Complainant's request by at least April 8, 2011. The Custodian submitted a copy of an e-mail from him to various NJCU employees dated April 8, 2011. This e-mail was also submitted to the GRC as part of the Custodian's SOI. The Custodian certifies that on April 15, 2011, he responded to the Complainant that his letter was under review for costs associated with that request.

Although the Custodian did not submit the aforementioned evidence regarding receipt of the Complainant's April, 2011 OPRA request by the NJCU mail room as part of the SOI, the GRC will consider it now in light of the Custodian's argument that he was not informed that timeliness of his responses was at issue in this case and was thus denied his due process rights under OPRA.

The evidence submitted by the Custodian regarding his response to the Complainant's April 2011 OPRA request does not establish by a preponderance of the competent, credible evidence that said response occurred within the statutorily-mandated seven business days from receipt of said request. The Custodian certified that he has no record when the certified mail OPRA request was delivered to him from the NJCU mailroom. Thus, there is no evidence to establish that the Custodian's April 15, 2011 response occurred within seven (7) business days of the Custodian's receipt of the Complainant's April 2011 OPRA request. The Custodian has therefore failed to meet the required standard for reconsideration of the Council's December 18, 2012 Interim Order in this regard.

However, regarding the Custodian's response to the Complainant's May 2011 OPRA request, the Custodian certified that the Complainant's May 2011 requests were dated by the Complainant May 19, 2011 and received by the Custodian on May 23, 2011,

and the Custodian's initial response to the Complainant was dated and mailed on June 1, 2011. The Custodian certified that these dates were included in the SOI dated December 23, 2011.

Upon review of the evidence submitted to the GRC by the Custodian in the SOI, Attachment 6 thereto is a copy of the Complainant's May 19, 2011 OPRA request, bearing a handwritten notation "Rec'd 5/23/11 AER". The GRC presumes that "AER" is Alfred E. Ramey, the Custodian. This evidence establishes the Custodian's receipt of the Complainant's May 19, 2011 OPRA request on May 23, 2011; the Custodian's June 1, 2011 response thereto therefore occurred on the sixth (6th) business day following receipt of the Complainant's OPRA request.

Thus, regarding the Custodian's May 2011 response to the Complainant's May 2011 OPRA request, the Custodian has established that the GRC did not consider, or failed to appreciate, the significance of probative, competent evidence, *i.e.*, the handwritten notation of receipt on Attachment 6 of the Custodian's SOI. *See, Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). Therefore, the Council grants reconsideration of the portion of its December 18, 2012 Interim Order which determined that the Custodian did not bear his burden of proof pursuant to N.J.S.A. 47:1A-6 that he timely responded to said OPRA request and finds that the Custodian's June 1, 2011 response to the Complainant's May 19, 2011 OPRA request was timely.

Whether the Custodian complied with the Council's December 18, 2012 Interim Order?

At its December 18, 2012 meeting, the Council ordered the following:

"[W]ithin five (5) business days from receipt of the Council's Interim Order, [the Complainant shall] deliver to the Custodian (a) a payment in the amount of \$765 for the records responsive to the Complainant's May 19, 2011 OPRA request, 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, to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records."

The competent, credible evidence of record indicates that the Complainant did not pay the requisite \$765 to the University for the records requested within the time period set forth in the Council's Interim Order, nor did the Complainant provide to the Custodian a statement declining to purchase the records. Thus, in accordance with the Council's December 18, 2012 Interim Order, the Complainant's failure to take any action

within the time period prescribed by the Council's Order is construed as a declination to purchase the records requested. N.J.S.A. 47:1A-5(b); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Additionally, the Council's Interim Order required the Custodian to provide certified confirmation of compliance to the Executive Director within eight (8) business days from receipt of the Council's Interim Order. The evidence of record indicates that the Council's Order was disseminated to the parties on December 19, 2012 and further indicates that NJCU was closed for business from December 24, 2012 to January 1, 2013; January 2, 2013 was the next day on which NJCU was open. Thus, the eighth (8th) business day after the Custodian's receipt of the Council's Interim Order was January 9, 2013. The Custodian transmitted his certification to the GRC on January 10, 2013, one (1) day beyond the required time period to submit certified confirmation of compliance. Thus, the Custodian did not fully comply with the Council's Interim Order.

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

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

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)).

Although the Custodian failed to respond in writing to the Complainant's April, 2011 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request, the Custodian bore his burden of proof under N.J.S.A. 47:1A-6 that he timely responded to the Complainant's May, 2011 OPRA request. Additionally, the Custodian bore his burden of proof that fulfilling the Complainant's OPRA requests would require an extraordinary expenditure of time and effort, which warranted a special service charge pursuant to 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), and the Council determined that the special service charge assessed by the Custodian was reasonable pursuant to N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(d) because the Custodian certified that the contract administrator is the only NJCU employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Finally, the Custodian certified that the Complainant failed to pay the special service charge of \$765 as required by the Council in its Interim Order dated December 18, 2012, although the Custodian failed to provide such certification within the time period prescribed by the Council. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. There is no evidence to establish that the Custodian's April 15, 2011 response occurred within seven (7) business days of the Custodian's receipt of the Complainant's April 2011 OPRA request. The Custodian has therefore failed to meet the required standard for reconsideration of the Council's December 18, 2012 Interim Order in this regard.
2. The Custodian has established that the GRC did not consider, or failed to appreciate, the significance of probative, competent evidence, i.e., the handwritten notation of receipt on Attachment 6 of the Custodian's Statement of Information. See, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Therefore, the Council grants reconsideration of the portion of its December 18, 2012 Interim Order which determined that the Custodian did not bear his burden of proof pursuant to N.J.S.A. 47:1A-6 that he timely responded to the May 19, 2011 OPRA request and finds that the Custodian's June 1, 2011 response to said OPRA request was timely.
3. The competent, credible evidence of record indicates that the Complainant did not pay the required \$765 to New Jersey City University for the

records requested within the time period set forth in the Council's Interim Order, nor did the Complainant provide to the Custodian a statement declining to purchase the records. Thus, in accordance with the Council's December 18, 2012 Interim Order, the Complainant's failure to take any action within the time period prescribed by the Council's Order is construed as a declination to purchase the records requested. N.J.S.A. 47:1A-5(b); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

4. The Council's Interim Order required the Custodian to provide certified confirmation of compliance to the Executive Director within eight (8) business days from receipt of the Council's Interim Order. The evidence of record indicates that the Council's Order was disseminated to the parties on December 19, 2012 and further indicates that New Jersey City University was closed for business from December 24, 2012 to January 1, 2013; January 2, 2013 was the next day on which NJCU was open. Thus, the eighth (8th) business day after the Custodian's receipt of the Council's Interim Order was January 9, 2013. The Custodian transmitted his certification to the GRC on January 10, 2013, one (1) day beyond the required time period to submit certified confirmation of compliance. Thus, the Custodian did not fully comply with the Council's Interim Order;
5. Although the Custodian failed to respond in writing to the Complainant's April, 2011 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request, the Custodian bore his burden of proof under N.J.S.A. 47:1A-6 that he timely responded to the Complainant's May, 2011 OPRA request. Additionally, the Custodian bore his burden of proof that fulfilling the Complainant's OPRA requests would require an extraordinary expenditure of time and effort, which warranted a special service charge pursuant to 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), and the Council determined that the special service charge assessed by the Custodian was reasonable pursuant to N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(d) because the Custodian certified that the contract administrator is the only New Jersey City University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Finally, the Custodian certified that the Complainant failed to pay the special service charge of \$765 as required by the Council in its Interim Order dated December 18, 2012, although the Custodian failed to provide such certification within the time period prescribed by the Council. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not

rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared and
Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Fred U. Andes
Complainant

Complaint No. 2011-219

v.

NJ City University
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that fulfilling the Complainant’s OPRA requests dated April 2, 2011 and May 11, 2011 would require an extraordinary expenditure of time and effort, a special service charge is warranted pursuant to 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. Moreover, the special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c and N.J.S.A. 47:1A-5.d because the Custodian has certified that the contract administrator is the only University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator’s discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post, *supra*. Therefore, the Custodian shall disclose requested change orders for construction and renovation of the Gilligan Student building and Karnoutsos Hall to the Complainant upon the Complainant’s payment of the \$765 special service charge assessed by the Custodian.



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 \$765 for the records responsive to the Complainant's May 19, 2011 OPRA request, 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, 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.

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**

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

**Fred U. Andes¹
Complainant**

GRC Complaint No. 2011-219

v.

**New Jersey City University²
Custodian of Records**

Records Relevant to Complaint:

April 2, 2011 request:

1. Copies of public notices soliciting bids for the renovation of the Gilligan Student Union Building, including: names, addresses, and bids of all bidders; names of the individuals who reviewed these bids for New Jersey City University; scoring of the bids; criteria for scoring the bids; names of the individuals who selected the winning bids; names of the individuals who approved the winning bids;
2. Copies of public notices soliciting bids for the construction of Karnoutsos Hall, including: names, addresses and bids of all bidders; names of the individuals who reviewed these bids for New Jersey City University; scoring of the bids; criteria for scoring the bids; names of individuals who selected the winning bids; names of individuals who approved the winning bids; the name of the project manager and/or lead person employed by Terminal Construction Corporation for the construction of Karnoutsos Hall.

May 19, 2011 request:

Copies of all change orders made during the renovations of the Gilligan Student Union building and Karnoutsos Hall, including detail description, complete itemization of costs associated with each change order, names of individuals who requested the change orders, the reasons for the change orders, and the names of individuals who approved or authorized the change orders.

Request Made: April 2, 2011³ and May 11, 2011⁴

Response Made: April 19, 2011 and June 1, 2011

Custodian: Alfred E. Ramey, Esq.

GRC Complaint Filed: June 20, 2011⁵

¹ No legal representation listed on record.

² Represented by Sarah T. Darrow, DAG, on behalf of the New Jersey Attorney General's Office.

³ The Complainant asserts that he filed three (3) OPRA requests simultaneously on this date. The GRC will refer to these requests as a single request for administrative efficiency and ease of understanding.

⁴ The Complainant asserts that he filed two (2) separate OPRA request forms simultaneously on this date. The GRC will refer to these requests as a single request for administrative efficiency and ease of understanding.

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

Background

April 2, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint in a letter attached to three (3) official OPRA request forms.

April 15, 2011

Letter from the Complainant to the Custodian. The Complainant states that he has not yet received an answer to his OPRA request.

April 29, 2011

Custodian's response to the OPRA request.⁶ The Custodian responds in writing via letter on the twelfth (12th) business day following receipt thereof. The Custodian states that the name of the Terminal Project Manager for Karnoutsos Hall was Peyton Reilly.

The Custodian also states that the Complainant's request for records pertaining to the Gilligan Student Union Building and Karnoutsos Hall is granted; however, the Custodian estimates that it will cost \$335 to retrieve and then re-file 27 boxes from storage to locate the requested records. The Custodian also states that the Contracting Officer and a clerk must expend 30 hours of work related to identification of file boxes, retrieval and replacement orders, review of records from storage, review of in-house files and assembly of records. The Custodian states that five (5) hours of time will involve a clerk with a billing rate of \$20 per hour, for a total of \$100.00. The Custodian also states that the balance of the estimated time involves the work of the Contracting Officer with a billing rate of \$49 per hour, totaling \$1,225. The Custodian states that he will not have an estimate of copying charges until the responsive records are identified and retrieved. The Custodian states that he will advise the Complainant of those charges at that time. The Custodian requests that the Complainant provide a check for \$1,325.

May 11, 2011

Letter from the Complainant to the Custodian. The Complainant encloses a check for \$1,325.

May 19, 2011

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁷

June 1, 2011

Letter from the Custodian to the Complainant. The Custodian responds in writing to the Complainant's May 19, 2011 OPRA request on the eighth (8th) business day following receipt of the request. The Custodian acknowledges receipt of the Complainant's May 19, 2011 OPRA request. The Custodian states that he is in the

⁶ The Custodian provided two (2) letters to the Complainant on this date in response to the OPRA request; the GRC has consolidated these responses for administrative efficiency and ease of understanding.

⁷ The Complainant's request included two (2) OPRA request forms, however, the GRC considers these as a single request for administrative efficiency and ease of understanding.

process of locating responsive records and will contact the Complainant on June 13, 2011 regarding the status of the request.

June 13, 2011

Letter from the Custodian to the Complainant. The Custodian states that a special service charge of \$1,085 is required for retrieval and return of files and copying costs. The Custodian further states that in order to fulfill the Complainant's May 19, 2011 OPRA request, the following work will be required: Custodian review and administration (1 hour), Supervisor oversight of records collection (2 hours), conduct a review of Facilities Department Project files (18 hours), review of the system for change orders (8 hours), review of accounting files (10 hours), review of files retrieved from storage (8 hours), review of Controller Office files (8 hours), for 71 total estimated hours. The Custodian also states that the full reimbursement per hour rate for professional staff is \$49 per hour, but the University will only charge a discounted clerical rate of \$20 per hour. The Custodian states that the special service charge is therefore \$1,000, and that there is an additional \$85 charge for retrieval and return of files to storage. The Custodian states that copying charges will be extra.

June 20, 2011

Complainant's Denial of Access Complaint filed with the GRC, attaching:

- Complainant's OPRA request dated April 2, 2011 with attachments
- Letter from the Complainant to the Custodian dated April 15, 2011
- Letter from Custodian to Complainant dated April 29, 2011
- Letter from the Complainant to the Custodian dated May 11, 2011
- Complainant's OPRA request dated May 19, 2011 with attachments
- Letter from the Custodian to the Complainant dated June 1, 2011
- Letter from the Custodian to the Complainant dated June 13, 2011

The Complainant asserts that he was charged an excessive fee for the records requested. The Complainant asserts that he was charged a total of \$2,410 for retrieval and copying of the records sought. The Complainant further asserts that the construction projects that were the subject of the records requests were completed only a few years ago. The Complainant contends that the University is attempting to discourage him from requesting these records.

The Complainant agrees to mediate this complaint.

June 22, 2011

Letter from the Custodian to the Complainant. The Custodian states that he is in receipt of the Denial of Access Complaint. The Custodian states that he erred in the calculations provided to the Complainant by letter dated June 13, 2011. The Custodian states that he erroneously started with 71 hours as the amount of time estimated to retrieve the charge order records requested. The Custodian states that based upon that number, he deleted 3 hours for review and administrative and supervisor oversight, then multiplied the remaining 68 hours by \$49, the billing rate for the University Contracting Officer. The Custodian states that this resulted in a total bill of \$3,332.00.

The Custodian then states that, in consideration of the Complainant's recent payment of \$1,325 for records responsive to the April 2, 2011 OPRA request, the Custodian attempted to find some way to reduce the \$3,332.00 total bill, and therefore recalculated the bill using a clerical rate of \$20 per hour, reducing the bill to \$1,360. The Custodian states that he then added an additional \$360 discount to provide further relief.

The Custodian states that the correct number of hours necessary to retrieve the responsive records is 55, and by subtracting 3 hours for review, administrative and oversight time, this is reduced to 52. By multiplying this number by the \$20 per hour clerical rate, the result is \$1,040.00. The Custodian states that he will honor the \$360 discount previously applied, bringing the amended special service charge to \$680 plus \$85 retrieval costs.

The Custodian states that the University has completed the work necessary to retrieve and copy the records responsive to the Complainant's April 2, 2011 OPRA request, and that such records have been available for pick up since June 20, 2011.

July 27, 2011

The Custodian agrees to mediation.

December 8, 2011⁸

The complaint is referred back to the GRC for adjudication.

December 8, 2011

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

December 12, 2011

E-mail from Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension to submit the SOI.

December 12, 2011

E-mail from the GRC to Custodian's Counsel, granting the requested five (5) business day extension to submit the SOI.

January 3, 2011

Custodian's SOI, attaching:

- Complainant's OPRA request dated May 19, 2011, with attachment
- Letter from the Custodian to the Complainant dated June 1, 2011
- Letter from the Custodian to the Complainant dated June 13, 2011
- Letter from the Custodian to the Complainant dated June 22, 2011

The Custodian states that the University has not denied the Complainant access to any of the records requested. The Custodian states that the Complainant's dispute surrounds his refusal to pay the special service charge determined by the University as a condition of the production of the requested records. The Custodian contends that the

⁸ It is unclear from the evidence in the record when this complaint was referred to mediation.
Fred U. Andes v. New Jersey City University, 2011-219 – Findings and Recommendations of the Executive Director

special service charge is necessary and appropriate due to the extraordinary expenditure of time and effort to accommodate the request and has been reasonably calculated.

The Custodian states that the special service charge is a cap on the estimated charge to the requestor. The Custodian states that the University is willing to accept a reasonable deposit of 25% with an agreement to pay the balance if the hours needed to accomplish the provision of records meets or exceeds the estimated time. The Custodian states that if the time required to respond to the request is less than the deposit, the excess will be returned to the Complainant. If the time required exceeds the deposit, the Complainant will not be charged.

The Custodian certifies that the Complainant has requested 60 construction change orders, estimated to be approximately 10 pages each, for a total of approximately 600 pages of responsive records. The Custodian further certifies that these records must be retained by the University for seven years after the disposal of the building. The Custodian further certifies that no change order records from project manager files have been provided to the Complainant because he declined to pay the special service charge assessed. The Custodian certifies that the University has provided to the Complainant copies of records of total project payments that include summary descriptions of change order items. The Custodian certifies that these payment summary records are part of the procurement office files and were readily available. The Custodian argues that the University has not denied access to the requested records and is permitted under OPRA to charge a special service charge where accommodation of a request requires an extraordinary expenditure of time and effort. The Custodian argues that the Complainant has declined to agree to the proposed charge.

The Custodian provided the following in response to the GRC’s 14 point analysis regarding the necessity of a special service charge.

| Questions | Custodian’s Response |
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| 1. What records are requested? | Copies of change orders relevant to the construction or renovation of Gilligan Student Union Building and Karnoutsos Hall. |
| 2. Give a general nature description and number of the government records requested. | The requested records document changes from the original planned work related to the construction or renovation of these buildings and document such things as the nature of the changes, the costs associated with the changes, persons involved in the request. The requested change orders are primarily in paper format although some are in electronic format. Review of the paper records requires identification and retrieval by hand. Review of electronic records requires knowledge and judgment at professional staff level. The request involves a comprehensive search of several likely storage locations and formats. |
| 3. What is the period of time over which the records extend? | From 2002 to 2008. |
| 4. Are some or all of the | Some records are archived in off-campus storage and |

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| records sought archived or in storage? | some are located on campus. |
| 5. What is the size of the agency (total number of employees)? | The University employs approximately 940 regular employees including clerical staff, groundskeepers, custodial staff, professional staff, faculty and administrators (approximately 280 full-time faculty and approximately 500 adjunct faculty). |
| 6. What is the number of employees available to accommodate the records request? | One employee at the executive management level that coordinates OPRA request responses on a part-time basis. A procurement operational manager and a procurement subordinate will incorporate into their regular work duties the task of locating, retrieving, reviewing and copying the records. When the records are pulled, a review will be conducted. |
| 7. To what extent do the requested records have to be redacted? | Unknown. Consultation with the Attorney General's Office will be necessary if redactions are required. |
| 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 part-time OPRA officer is at executive management level and the time of this employee is not being charged. The operational manager is the head of the procurement department and the time for this employee is also not being charged. The subordinate professional staff that will perform the location, retrieval, assembly and copying function is a contract administrator. Her hourly rate is \$49. |
| 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? | A contract administrator must have a primary role in retrieving and reviewing files because the records requested are not stored in one place and are mixed in with other University records. The number of pages of backup documentation maintained in storage related to each approved change order is not currently known. The University estimates on average approximately 10 pages per change order, for an approximate total of 600 pages for 60 change orders. |
| 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? | \$49 per hour for the contract administrator assigned to this task. No charge for employee time associated with restoring files for return to off campus storage. The University is recovering its costs paid to the vendor for retrieval and return of the records, which is \$85. |
| 11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request? | The change order files are not filed or stored with the bidding and procurement records that were provided to the Complainant under prior OPRA requests. Such records were made or maintained by the University procurement office and sent to storage by that office. Documentation of change orders during construction were maintained by the University project manager in the |

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| | <p>Department of Facilities and Construction Management offices. However, after project completion in 2006 and 2008, project files were sent to storage by the Department of Facilities and Construction Management. Some files may also remain in facilities Department offices. Due to loss or transfer of personnel, current staff lacks knowledge of the organization of the relevant project files on or off campus, in storage. Due to the number of change orders locating all 60 change orders for these two projects is expected to be time consuming. Investigation will be required to locate all of the change order records for each project. A certain degree of knowledge and judgment will be needed to identify and separate the requested records. We believe that a contract administrator has the necessary level of knowledge and judgment for this task.</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>Dorene Williams, Contract Administrator. Although her regular rate is \$49 per hour, the University is only applying a clerical rate of \$20 for her time.</p> |
| <p>13. What is the availability of information technology and copying capabilities?</p> | <p>The University has computers and printers for electronic records. Records in paper form must be located and copied by hand.</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>55 hours of work to respond to this request, as follows: OPRA Office review and administration – est. 1 hour Operations supervisor oversight of records collection – est. 2 hours Review of Facilities Department project files – est. 18 hours Review of PeopleSoft system for change orders – est. 8 hours Review of accounting files – est. 10 hours Review of files retrieved from off campus storage – est. 8 hours Review of Controller Office files – est. 8 hours. The University has discounted the contract administrator's professional rate to \$20 per hour and is subtracting 3 hours for supervisor and OPRA officer time. Thus, billing is limited to 52 hours. The total charge would be \$2,548 at the contracting officer's regular rate, but applying the discounted rate results in a charge of \$1,040. This charge (52 hours at \$20 per hour) was further adjusted by adding \$85 representing vendor costs for retrieval and return of records stored off campus and subtracting \$360 (discretionary discount) for a final special service charge of \$765.</p> |

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| | The University has not yet identified the copying charge but advised the Complainant that when the records are pulled and copied there will be an additional charge for copying. |
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The Custodian’s Counsel states that the University’s answers to the GRC’s 14 point analysis establish that a special service charge is warranted in this case. Counsel states that as required by N.J.S.A. 47:1A-5.c., the Complainant was provided with the opportunity to review and object to the proposed charge before the costs had been incurred by the University. Counsel further states that the University has both recalculated its estimated charge and discounted the charge in response to objections from the requester. Counsel also states that the University proposes to accept 25% of the estimated special service charge as a deposit in advance and to bill the Complainant for the actual balance after the actual costs of identification and retrieval of the requested records are known.

Counsel states that the University’s response to the OPRA request herein requires an extraordinary expenditure of time and effort because the of the volume of storage boxes from 2002 to 2009 that must be searched to locate the 60 responsive change order files, and because the search requires extra duties and extensive effort by a University staff member reasonably familiar with the University’s construction contracting records who can readily identify and select the approved change orders for these two projects. Counsel states that the records responsive to this request are not anticipated to contain any significant amount of deliberative, confidential or privileged material that would require attorney review, selection and redaction before copying. Counsel states that the University has amply demonstrated that the special service charge is warranted here and that the proposed amount of the charge is reasonable.

Analysis

Whether the Custodian timely responded to the Complainant’s OPRA requests?

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁹ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In this complaint, the evidence of record discloses that the Complainant submitted his first OPRA request on April 2, 2011 and further discloses that the Custodian responded in writing thereto on April 29, 2011, 12 business days after receipt of the Complainant’s first OPRA request. The evidence of record further discloses that the Complainant submitted the second OPRA request on May 11, 2011 and that the Custodian responded in writing thereto on June 1, 2011, 8 business days after receipt thereof.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*.

Whether the Custodian’s proposed special service charge 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,

⁹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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;¹⁰ 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

¹⁰ The court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

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 that 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.

The evidence of record establishes that the Complainant’s first request seeking public bid notices for the Gilligan Student building and Karnoutsos Hall required the Custodian to retrieve and then re-file 27 boxes from storage to locate the requested records and further required the Contracting Officer and a clerk to expend 30 hours of work related to identification of file boxes, retrieval and replacement orders, review of records from storage, review of in house files and assembly of records. The Custodian stated that five (5) hours of time will involve a clerk with a billing rate of \$20 per hour, for a total of \$100.00. The Custodian also stated that the balance of the estimated time involved the work of the Contracting Officer with a billing rate of \$49 per hour, totaling \$1,225, for a total special service charge of \$1,325.

The evidence of record further establishes that the Complainant’s second request, seeking detailed change orders made during the renovations of the Gilligan Student Union building and Karnoutsos Hall, will require 55 hours of work to locate 60 change orders of approximately 10 pages each, a total of approximately 600 pages of responsive records and that such change orders are located both on- and off-campus and require the services of a contract administrator to locate, identify, retrieve, assemble and copy both electronic and hard-copy records responsive to the request. The Custodian certified in the SOI that the Complainant will not be charged for the services of a part-time OPRA officer at executive management level nor the time for the operational manager, who is the head of the procurement department. The Custodian further certified that although the contract administrator’s normal hourly rate is \$49, the University is charging the Complainant a clerical rate of \$20 per hour for this function. The Custodian also certified that in addition to the discounted contract administrator’s rate of \$20 per hour, the University is subtracting 3 hours for supervisor and OPRA officer time, for a total billing limit of 52 hours. The Custodian certified that the total charge would be \$2,548 at the contracting officer’s regular rate, but applying the discounted rate results in a charge of \$1,040. The Custodian certified that this charge (52 hours at \$20 per hour) was further adjusted by adding \$85 representing vendor costs for retrieval and return of records stored off campus and subtracting \$360 in a discretionary discount for a final special service charge of \$765.

Because the Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that fulfilling the Complainant’s OPRA requests dated April 2, 2011 and May 11, 2011 would require an extraordinary expenditure of time and effort, a special service charge is warranted pursuant to 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. Moreover, the special service charge

assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the contract administrator is the only University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post, *supra*. Therefore, the Custodian shall disclose the requested change orders for construction and renovation of the Gilligan Student building and Karnoutsos Hall to the Complainant upon the Complainant's payment of the \$765 special service charge assessed by the Custodian.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that fulfilling the Complainant's OPRA requests dated April 2, 2011 and May 11, 2011 would require an extraordinary expenditure of time and effort, a special service charge is warranted pursuant to 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. Moreover, the special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the contract administrator is the only University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of \$20 per hour and the actual direct cost of \$85 attributable to the vendor costs for retrieval and return of records stored off campus. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post, *supra*. Therefore, the Custodian shall disclose requested

change orders for construction and renovation of the Gilligan Student building and Karnoutsos Hall to the Complainant upon the Complainant's payment of the \$765 special service charge assessed by the Custodian.

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 \$765 for the records responsive to the Complainant's May 19, 2011 OPRA request, 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, 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.

Prepared By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012¹¹

¹¹ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.
Fred U. Andes v. New Jersey City University, 2011-219 – Findings and Recommendations of the Executive Director