



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

December 18, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-71

v.

Franklin Fire District # 1 (Somerset)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 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 this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 24, 2012 (via legal counsel) because the parties have 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 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 20, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-71

v.

**Franklin Fire District No. 1 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of the vendor list/roster as of January 24, 2011 used by the Franklin Fire District No.1's ("FFD") Commissioners for disbursement of public funds, to include at a minimum each vendor's name, address, telephone number and FFD assigned vendor identification number.

Request Made: January 24, 2011

Response Made: February 1, 2011

Custodian: Melissa Kosensky³

GRC Complaint Filed: March 22, 2011⁴

Background

June 26, 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. The current Custodian timely complied with the Council's June 26, 2012 Interim Order by providing access (via Counsel) to the requested records to the Complainant via e-mail and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. Although the GRC determined the special service charge proposed by the original Custodian was not reasonable and unwarranted pursuant to N.J.S.A. 47:1A-5.c. and The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002), at 203-204, the current Custodian timely complied with the Council's June 26, 2012 Interim Order. Additionally, the

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

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

³ The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

⁴ The GRC received the Denial of Access Complaint on said date.

evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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), 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 current Custodian provided the Complainant with the responsive vendor list in accordance with the Council's June 26, 2012 Interim Order. 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.

August 3, 2012

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

October 24, 2012

Letter from the Complainant's Counsel to the GRC. Counsel states that this complaint has been settled and is hereby withdrawn.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint via e-mail to the GRC dated October 24, 2012 (via legal counsel) because the parties have reached settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁵

⁵ 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.
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CHRIS CHRISTIE
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KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-71

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 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 original Custodian sought Mr. Cooper's aid in redacting the responsive vendor list, the Custodian cannot attempt to pass the cost of Mr. Cooper's services onto the Complainant because OPRA clearly requires "... that the *custodian* is responsible for asserting the privilege and making the redaction." The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002), at 203-204. Moreover, the current Custodian failed to prove that Counsel's expertise is required to review the vendor list and redact personal information. Thus, the proposed special service charge of \$375.00 to \$450.00 is not reasonable or warranted pursuant to N.J.S.A. 47:1A-5.c. Therefore, the current Custodian must redact and provide the responsive list to the Complainant at no charge.
2. **The current Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

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

circumstances pending the current Custodian's compliance with the Council's Interim Order.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-71

v.

**Franklin Fire District No. 1 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of the vendor list/roster as of January 24, 2011 used by the Franklin Fire District No.1's ("FFD") Commissioners for disbursement of public funds, to include at a minimum each vendor's name, address, telephone number and FFD assigned vendor identification number.

Request Made: January 24, 2011

Response Made: February 1, 2011

Custodian: Melissa Kosensky³

GRC Complaint Filed: March 22, 2011⁴

Background

January 24, 2011

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 indicates that the preferred method of delivery is e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

January 27, 2011

E-mail from the Custodian to the Complainant attaching the FFD's official OPRA request form. The Custodian acknowledges receipt of the Complainant's OPRA request. The Custodian requests that the Complainant fill out the attached form.

January 28, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he electronically submitted several OPRA requests to which the Custodian responded. The Complainant asks the Custodian to explain why he must fill out the official OPRA request form.

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

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

³ The current Custodian of Record is Tim Szyborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

⁴ The GRC received the Denial of Access Complaint on said date.

February 1, 2011

Custodian's response to the OPRA request. On behalf of the Custodian, Mr. William T. Cooper, III, Esq. ("Mr. Cooper"), previous FFD Counsel, responds in writing via letter to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Mr. Cooper states that the Complainant's OPRA request was forwarded to his office for review. Mr. Cooper states that access to the responsive records is granted; however, the 78 page list includes all volunteers within the FFD. Mr. Cooper requests that the Complainant verify whether he wants access to the entire list.

Mr. Cooper states that he will have to review the entire list to ensure that personal information is redacted, if necessary, which would delay disclosure of the list for one (1) week. Mr. Cooper notes that the period of time may be shortened if the Complainant limits his OPRA request.

February 1, 2011

E-mail from the Complainant to the Custodian. The Complainant agrees to an extension of time until February 8, 2011.

February 7, 2011

E-mail from Mr. Cooper to the Complainant. Mr. Cooper states that the responsive list appears to contain information that requires redaction. N.J.S.A. 47:1A-5.g. Mr. Cooper states that he will be required to review and redact the 78 page list. Mr. Cooper states that this task will involve an extraordinary expenditure of time and thus necessitate a special service charge. N.J.S.A. 47:1A-5.c.

Mr. Cooper states that review of the list will take approximately 2 ½ to 3 hours and that his hourly rate billed to the FFD is \$150.00. Mr. Cooper states that the estimated special service charge is between \$375.00 and \$450.00. Mr. Cooper requests that the Complainant advise whether he will agree to the proposed special service charge.

March 22, 2011

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

- Complainant's OPRA request dated January 24, 2011.
- E-mail from the Custodian to the Complainant dated January 27, 2011 (with attachment).
- E-mail from the Complainant to the Custodian dated January 28, 2011.
- Letter from Mr. Cooper to the Complainant dated February 1, 2011.
- E-mail from the Complainant to the Custodian dated February 1, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 7, 2011.

The Complainant's Counsel states that the Complainant submitted an OPRA request to the FFD on January 24, 2011. Counsel states that the Custodian acknowledged receipt of said OPRA request on January 27, 2011 via e-mail. Counsel states that Mr. Cooper responded on February 1, 2011, stating that the responsive record is 78 pages and may contain personal information. Counsel states that Mr. Cooper responded again on February 7, 2011, stating that he was assessing a special service charge of between

\$375.00 and \$450.00 to review and redact the responsive list. Counsel states that Mr. Cooper requested that the Complainant advise whether he agreed with the special service charge. Counsel states that the Complainant believes the estimated special service charge is unwarranted.

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 accorded [under OPRA], shall be construed in favor of the public's right of access.” Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that “[t]he purpose of OPRA is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel states that although OPRA allows public agencies to charge special service charges, no such charge is warranted in this instance. Counsel asserts that the vendor list is likely broken down into columns, thus allowing the Custodian to easily determine which categories of information should be redacted. Counsel notes that as an example, if the list contained phone numbers, social security numbers or taxpayer identification numbers, this information would clearly be exempt from disclosure and subject to redaction. Counsel asserts that the type of line item review Mr. Cooper has suggested is not necessary.

Counsel requests the following:

1. A determination that the Custodian violated OPRA by failing to provide the responsive list to the Complainant.
2. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.
3. A determination whether the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

April 29, 2011

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

May 3, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that the FFD recently retained him on April 15, 2011. Counsel requests an extension of fifteen (15) business days to submit the SOI. Counsel states that this extension is necessary to allow Counsel to familiarize himself with the complaint and obtain a sworn statement from the Custodian.

May 4, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until May 27, 2011 to submit the SOI for the reasons stated by Counsel.

May 24, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is working with the Complainant's Counsel to attempt to resolve the matter. Counsel thus requests an extension of time until July 1, 2011 to submit the SOI. Counsel states that this extension will allow for sufficient time to resolve this complaint and allow the FFD to approve any proposed settlement at its June meeting, which occurs on the fourth (4th) Monday of the month.

May 24, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that it will generally grant one (1) extension of five (5) business days to submit an SOI. The GRC states that it has already granted Counsel an extension of fifteen (15) business days. The GRC states that regardless of any pending settlement, the GRC declines to grant another extension of time. The GRC states that Counsel must submit the SOI by close of business on May 27, 2011.

May 24, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests that the GRC reconsider its denial of a second extension of time.

May 28, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 24, 2011.
- E-mail from the Custodian to the Complainant dated January 27, 2011 (with attachment).
- E-mail from the Complainant to the Custodian dated January 28, 2011.
- Letter from Mr. Cooper to the Complainant dated February 1, 2011.
- E-mail from the Complainant to the Custodian dated February 1, 2011.
- E-mail from Mr. Cooper to the Complainant dated February 7, 2011.

The Custodian certifies that her search for the requested records included obtaining the responsive list and forwarding same to Mr. Cooper for his review.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.

The Custodian certifies that she received the Complainant's OPRA request on January 24, 2011. The Custodian certifies that she acknowledged receipt of the OPRA request on January 27, 2011 via e-mail. The Custodian certifies that she then forwarded the request to Mr. Cooper for his review. The Custodian certifies that Mr. Cooper

responded on her behalf on February 1, 2011 seeking an extension of one (1) week to provide the responsive record to the Complainant.

The Custodian certifies that Mr. Cooper wrote to the Complainant on February 7, 2011, one (1) day before the expiration of the extended deadline, stating that he needed to review the 78-page record and perform redactions where necessary. The Custodian certifies that Mr. Cooper further advised that he was assessing a special service charge of \$375.00 to \$450.00 to perform the review. The Custodian certifies that Mr. Cooper requested that the Complainant respond stating whether he agreed to the proposed charge. The Custodian certifies that the Complainant did not respond to Mr. Cooper; thus, Mr. Cooper never reviewed and redacted the record.

The Custodian certifies that she was an unpaid, elected official for the FFD on a one (1) year term and did not maintain office hours. The Custodian certifies that as an elected official, she was required to utilize her limited free time in order to respond properly to OPRA requests filed on almost a daily basis. The Custodian further certifies that she did not have any full-time or part-time office hours to respond to OPRA requests.

The Custodian certifies that from January 10, 2011 through January 27, 2011, the FFD received 22 OPRA requests for various records, or two (2) OPRA requests per business day. The Custodian notes that prior to this point, the FFD routinely received between three (3) and five (5) OPRA requests on an annual basis. The Custodian certifies that in addition to running for re-election, the number of requests and breadth of records sought was overwhelming. The Custodian certifies that although the task of sufficiently responding to multiple OPRA requests became almost impossible, she attempted to ensure that either she or the FFD's legal counsel requested extensions of time to respond.

The Custodian certifies that she was able to obtain the responsive record; however, she believed that it was necessary to seek advice from Mr. Cooper based on her limited experience with OPRA. The Custodian certifies that Mr. Cooper believed that a thorough review of the record was necessary. The Custodian asserts that she was unavailable to make the redactions, thus the onus fell on Mr. Cooper to redact the record. The Custodian certifies that the Complainant never responded to Mr. Cooper and instead filed this complaint.

The Custodian asserts that her reliance on Mr. Cooper and the fact that the Complainant never responded to Mr. Cooper regarding the estimated special service charge does not constitute a knowing and willful violation of OPRA.

March 26, 2012

Letter from the GRC to the current Custodian. The GRC states that it is in need of additional information. The GRC states that the FFD has asserted a special service charge for providing access to the records requested by the Complainant. The GRC requests that the Custodian prepare a 14-point analysis answering the following:

1. What records were 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.

The GRC requests that the Custodian provide the 14-point analysis and legal certification by March 29, 2012.

March 28, 2012

E-mail from the Custodian's Counsel to the GRC. Counsel states that he has contacted the Complainant's Counsel regarding a potential settlement of this complaint. Counsel thus requests an extension of ten (10) business days to submit the 14-point analysis.

March 29, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until April 9, 2012 to submit the 14-point analysis.

April 9, 2012

Current Custodian's 14-point analysis attaching the following:

- E-mail from Mr. Cooper to the Complainant dated February 7, 2011.
- 14-point analysis chart.

The Custodian certifies that he has been the Custodian of Record for the FFD since March 2011. The Custodian certifies that the record at issue is a vendor list used by the FFD for disbursement of public funds as of January 24, 2011. The Custodian certifies that the list is maintained by the FFD and is updated as new vendors are utilized by the FFD. The Custodian certifies that the list was neither archived or in storage at the time of the Complainant's OPRA request.

The Custodian certifies that because the record was 78 pages, one (1) individual would be capable of fulfilling the OPRA request. The Custodian certifies that the FFD has one (1) full time employee (at approximately 30 hours a week) and one (1) part time employee only working in the office during the spring and summer months. The Custodian certifies that the FFD's position was that neither employee could accommodate the redaction of personal identifying information not subject to disclosure pursuant to N.J.S.A. 47:1A-5. The Custodian notes that the list may have included personal information of some volunteer firefighters. The Custodian certifies that Mr. Cooper was the person best suited to make the appropriate redactions given the FFD's small size.

The Custodian certifies that the FFD's position has not changed: Counsel is the only person suited to redact any highly sensitive information. The Custodian certifies that this is due to the unique setup of the FFD in that an elected Commissioner is designated as Custodian of Record and the designee could change on an annual basis. The Custodian certifies that the designee may have no OPRA training or experience.

The Custodian certifies that in an e-mail dated February 7, 2011, Mr. Cooper advised the Complainant in writing that he reviewed the record and determined that redactions were required. The Custodian further certifies that Mr. Cooper advised the Complainant that the redaction process constituted an extraordinary expenditure pursuant to N.J.S.A. 47:1A-5.c. and that an hourly rate of \$150.00 for 2.5 to 3 hours would apply. The Custodian certifies that the Complainant never responded to Mr. Cooper.

The Custodian certifies that if the Complainant came to the FFD offices to inspect the record, one (1) employee would be able to monitor the inspection at \$30.00 an hour; however, the Complainant would still be subject to the special service charge because the record would still need to be redacted. The Custodian further certifies that this complaint is not about whether the FFD has the capability to provide the responsive list to the Complainant, but how the FFD deals with redacting information contained in government records.

The Custodian further provides the following 14-point analysis chart:

Questions	Custodian's Response
1. What records are requested?	1. Vendor list as of January 24, 2011.
2. Give a general nature description and number of the government records requested.	2. Seventy-eight (78) pages.
3. What is the period of time over which the records extend?	3. The vendor list is a live document that is updated as new vendors contract with the FFD.
4. Are some or all of the records sought archived or in storage?	4. No.
5. What is the size of the agency?	5. 2 total employees 1 full time employee (approximately 30 hours per week)

	1 part time seasonal employee (spring and summer months)
6. What is the number of employees available to accommodate the records request?	6. None. The FFD does not employ anyone capable of accommodating the Complainant's OPRA request except for Counsel.
7. To what extent do the requested records have to be redacted?	7. The list must be reviewed and redacted for personal identifying information not subject to disclosure.
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?	8. Counsel would need to review and redact the vendor list. The FFD quoted the Complainant 2.5 to 3 hours at a cost of \$150.00 an hour on February 7, 2011.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records requested?	9. 1 employee at \$30.00 to monitor an inspection (if the Complainant were to inspect the responsive records). However, Counsel would still have to redact the record and thus the Complainant would still incur the special service charge.
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?	10. Not applicable.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. Counsel is the only person suited to redact any highly sensitive information. This is due to the unique setup of the FFD in that an elected Commissioner is designated as Custodian of Record and the designee could change on an annual basis. That designee could be an individual with no OPRA training or experience.
12. Who in the agency will perform the work associated with the records request and that person's hourly rate?	12. Mr. Cooper's rate was \$150.00 an hour. Counsel's rate is \$130.00 an hour.
13. What is the availability of information technology and copying capabilities?	13. Not applicable.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	14. 2.5 to 3 hours for Counsel to thoroughly review and redact the responsive vendor list.

Analysis

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

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

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

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

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

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁵ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

⁵ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

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

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

1. What records are requested?
2. Give a general nature description and number of the government records requested?
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

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

Questions	Custodian’s Response
1. What records are requested?	1. Vendor list as of January 24, 2011.
2. Give a general nature description and number of the government records requested.	2. Seventy-eight (78) pages.
3. What is the period of time over which the	3. The vendor list is a live document that is

records extend?	updated as new vendors contract with the FFD.
4. Are some or all of the records sought archived or in storage?	4. No.
5. What is the size of the agency?	5. 2 total employees 1 full time employee (approximately 30 hours per week) 1 part time seasonal employee (spring and summer months)
6. What is the number of employees available to accommodate the records request?	6. None. The FFD does not employ anyone capable of accommodating the Complainant's OPRA request except for Counsel.
7. To what extent do the requested records have to be redacted?	7. The list must be reviewed and redacted for personal identifying information not subject to disclosure.
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?	8. Counsel would need to review and redact the vendor list. The FFD quoted the Complainant 2.5 to 3 hours at a cost of \$150.00 an hour on February 7, 2011.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records requested?	9. 1 employee at \$30.00 to monitor an inspection (if the Complainant were to inspect the responsive records). However, Counsel would still have to redact the record and thus the Complainant would still incur the special service charge.
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?	10. Not applicable.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. Counsel is the only person suited to redact any highly sensitive information. This is due to the unique setup of the FFD in that an elected Commissioner is designated as Custodian of Record and the designee could change on an annual basis. That designee could be an individual with no OPRA training or experience.
12. Who in the agency will perform the work associated with the records request and that person's hourly rate?	12. Mr. Cooper's rate was \$150.00 an hour. Counsel's rate is \$130.00 an hour.
13. What is the availability of information technology and copying capabilities?	13. Not applicable.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the	14. 2.5 to 3 hours for Counsel to thoroughly review and redact the responsive vendor list.

requested documents.	
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In this matter, Mr. Cooper proposed a special service charge of \$375.00 to \$450.00 (\$150.00 an hour for 2.5 to 3 hours) to provide access to the requested records with redactions. The Complainant subsequently argued that said charge was unreasonable. The Complainant's Counsel further argued that the vendor list is likely broken down into columns, thus allowing the Custodian to determine easily which categories of information should be redacted.

In deciding whether the FFD's proposed special service charge was warranted, the GRC must determine whether the FFD could rely on Mr. Cooper to review and redact the responsive records and then pass the cost onto the Complainant.

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, *supra*, 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 responses in the 14-point analysis reveal the FFD asserts that Counsel must review a 78 page vendor list and make appropriate redactions. The Custodian certified that because the FFD was a small agency in which an elected Commissioner is designated as custodian on an annual basis and could have no OPRA training or experience, Counsel is the only person qualified to redact the records. The Custodian certified that according to Mr. Cooper, review and redaction would only take 2.5 to 3 hours.

The Court's holding in Courier Post, *supra*, is clear: the Custodian is specifically required to review and redact records. The current Custodian certified that the FFD employs a full time and part time employee; however, the Custodian failed to prove that neither employee had the ability to reasonably identify personal information in the responsive list and redact same. Further, the Custodian failed to adequately prove that Counsel was the only person with the expertise to locate and redact personal information that may be contained in a list. Finally, the current Custodian failed to prove that even if

he 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, although the original Custodian sought Mr. Cooper’s aid in redacting the responsive vendor list, the Custodian cannot attempt to pass the cost of Mr. Cooper’s services onto the Complainant because OPRA clearly requires “... that the *custodian* is responsible for asserting the privilege and making the redaction.” Courier Post, supra, at 203-204. Moreover, the current Custodian failed to prove that Counsel’s expertise is required to review the vendor list and redact personal information. Thus, the proposed special service charge of \$375.00 to \$450.00 is not reasonable or warranted pursuant to N.J.S.A. 47:1A-5.c. Therefore, the current Custodian must redact and provide the responsive list to the Complainant at no charge.

The GRC further notes that the Custodian acknowledged receipt of the Complainant’s OPRA request on January 27, 2011 and requested that the Complainant complete an official OPRA request form. The Complainant responded on January 28, 2011 disputing the requirement that he complete the form. The GRC further notes that there is no evidence in the record that the Complainant ever completed and submitted his request on the FFD’s official form as requested by the Custodian. However, the GRC notes that the Custodian’s request that the Complainant complete an official Township OPRA request form is an impermissible limitation on access under OPRA pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant’s e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

Whether the original 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 original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current 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 current Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the original Custodian sought Mr. Cooper’s aid in redacting the responsive vendor list, the Custodian cannot attempt to pass the cost of Mr. Cooper’s services onto the Complainant because OPRA clearly requires “... that the *custodian* is responsible for asserting the privilege and making the redaction.” The Courier Post v. Lenape Regional High School, 360 N.J.

Super. 191, 199 (Law Div. 2002), at 203-204. Moreover, the current Custodian failed to prove that Counsel's expertise is required to review the vendor list and redact personal information. Thus, the proposed special service charge of \$375.00 to \$450.00 is not reasonable or warranted pursuant to N.J.S.A. 47:1A-5.c. Therefore, the current Custodian must redact and provide the responsive list to the Complainant at no charge.

2. **The current Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
3. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

⁶ "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 Satisfactory compliance requires that the Custodian deliver the record to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the records have been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.