



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2013-281, 2013-282 and
2013-283

v.

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

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should find that the supplemental time expended for the request for reconsideration was not reasonable. The Council should thus adjust the total fee to \$1,080.00, representing 3.6 hours of service at \$300.00 per hour, or a decrease of 1.1 hours totaling \$330.00.
2. Having found the additional fee awarded for Complainant Counsel’s partially successful request for reconsideration, the Council should include the supplemental time in its total fee award. **Accordingly, the Council should amend its total fee award to \$11,580.00, representing the adjusted figure of 38.6 hours of service at \$300 per hour, or an increase of 3.6 hours for a total of \$1,080.00.**
3. As was the case with the Council’s initial adjudication on fees, no enhancement should be awarded because same was not requested.

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 31st Day of January, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Supplementary Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013

Response Made by Custodian: July 8, 2013, and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

December 13, 2016 Council Meeting:

At its December 13, 2016 public meeting, the Council considered the December 6, 2016 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, found that:

1. Regarding Complainant Counsel's first prevailing party point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. *See Courier News v. Hunterdon Cnty. Prosecutor's Office*, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should temporarily amend its fee award to Complainant's Counsel to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**
4. Because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of**

this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.

Procedural History:

On December 14, 2016, the Council distributed its Interim Order to all parties. On December 20, 2016, the Complainant's Counsel filed a Supplemental Fee Application Brief ("Brief") in support of his application for additional fees. Therein, Complainant's Counsel sought an additional \$1,980.00 representing 6.6 hours of work at \$300.00 per hour. The Complainant's Counsel also asked that the GRC consider the Brief in light of his previously filed Certification of Services on June 29, 2015.

On December 21, 2016, Custodian's Counsel filed an opposition to the Brief ("Opposition"). Therein, the Custodian's Counsel disputed six (6) entries totaling 2.6 hours wherein Complainant's Counsel sought reimbursement for reviewing the GRC's scheduling notices for this complaint (April 21, and December 6, 2016) and reviewing the Council's decisions and discussing with the Complainant (May 2, and December 14, 2016). The Custodian's Counsel argued that the Complainant's Counsel would have reviewed and discussed these documents regardless of the outcome. The Custodian's Counsel also disputed two (2) entries totaling 0.2 wherein the Complainant's Counsel sought reimbursement for seeking an extension of time to submit a request for reconsideration (May 13, 2016). The Custodian's Counsel contended that the FFD should not be required to pay fees for extension requests based on the Complainant's and/or Counsel's own circumstances. The Custodian's Counsel noted that, although extensions are granted routinely, any fees associated with them should not be considered as part of the prevailing party analysis. The Custodian's Counsel thus asserted that Complainant Counsel's requested fees should be reduced \$840.00, or from \$1,980.00 to \$1,410.00.

Analysis

Compliance

At its December 13, 2016 meeting, the Council ordered the Complainant and/or Counsel to submit an updated fee application. The Council also provided the Custodian an opportunity to submit opposition to the updated fee application. On December 14, 2016, the Council distributed its Interim Order to all parties, providing the Complainant five (5) business days to comply with the terms of said Order and the Custodian five (5) days beyond receipt of the updated fee application to submit opposition. Thus, the Complainant's response was due by close of business on December 21, 2016.

On December 20, 2016, the fourth (4th) business day after receipt of the Council's Order, the Complainant's Counsel submitted his Brief. On December 21, 2016, the first (1st) business day after receipt of the Brief, the Custodian's Counsel submitted his opposition. Thus, the parties both timely filed their respective submissions.

Prevailing Party Attorney's Fees

A. Evaluation of Supplemental Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking an additional fee award of \$1,980, representing 6.6 hours of work at \$300 per hour. This fee is in addition to the current awarded amount of \$10,500, representing the adjusted figure of 35 hours of service at \$300 per hour.

The GRC notes that Complainant Counsel's time sheet actually reflects 4.7 hours, and not 6.6 as he stated in the Brief. Thus, the total requested fees based on the actual time calculation present in the timesheet submitted total \$1,410.00 (at \$300.00 per hour).

The GRC notes that the Council has already determined that \$300 is a reasonable fee for attorneys of Complainant Counsel's experience representing clients before the GRC. *See Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2013-281, *et seq.* (Final Decision dated April 26, 2016). Accordingly, the GRC finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The New Jersey District Court, in *PIRG v. Powell Duffryn Terminals*, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff's trial preparation fee request by 50%. The *PIRG* court, noting that plaintiff's counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

In accordance with N.J.A.C. 105-2.13(b), Counsel's time sheet provides descriptions of the work performed. N.J.A.C. 105-2.13(b)(5); *See* Brief. Most of Counsel's entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. *Id.* The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel communicated. Similarly, the notations for reviewing and drafting of pleadings identify the specific document examined or drafted and the time spent on the task.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, the GRC must conduct a review of a fee application on a case-by-case basis. The GRC conducted a review of the Brief and considered each time entry. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). While the Council does not comment on the strategy of an

attorney's representation of his client, the Council indeed recognizes that that any fees awarded will be paid from public funds. *See, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 N.J. Super. 144, 167 (January 26, 1996).

The Brief supplements Complainant Counsel's previously filed Certification of Services to the requirements of N.J.A.C. 1:105-2.13(b). The Custodian's Counsel submitted objections to several of the entries. In reviewing the Brief and Opposition, the GRC finds the total supplemental hours excessive and the fee not reasonable, as set forth in the following table:

Date of time entry	Description of Service	Time Expended (in tenths of an hour)/ and Amount Billed at \$300/hour in dollars		Findings from Fee Application Review	Adjusted Entry: Time allowed and total Amount at \$300.00/hour	
4/21/2016	Receive and review GRC's e-mail scheduling consolidated matters for GRC's April 26, 2016 meeting.	0.1	\$30.00		0.1	\$30.00
5/02/2016	Receive and review GRC's April 26, 2016 Final Decision.	1.0	\$300.00		1.0	\$300.00
5/02/2016	Discuss Final Decision with Complainant.	0.2	\$60.00		0.2	\$60.00
5/13/2016	File a request for an extension of time to submit a request for reconsideration.	0.1	\$30.00	The GRC previously disallowed for this charge in <u>Carter v. Franklin Fire Dist. No. 1 (Somerset)</u> , GRC Complaint No. 2011-228 (March 2014) at 11, "the time expended requesting an extension is not chargeable to the Custodian." However, the Complainant needed an extension because he did not receive a copy of the table attached to the Council April 26, 2016 Final Decision. Thus, the Complainant's Counsel reasonably should be allowed to recoup cost for this extension request.	0.1	\$30.00
5/13/2016	Receive and review GRC's e-mail granting extension of time to submit a request for reconsideration.	0.1	\$30.00	See above.	0.1	\$30.00
5/20/2016	Legal research (limited to portion of reconsideration addressing attorney's fees): <u>New Jerseyans for Death Penalty Moratorium v. NJ Dep't of Corr.</u> , 185 <u>N.J.</u> 137 (2005) <u>R.M. v. Supreme Court of NJ</u> ,	N/C	\$0.00	Complainant's Counsel noted that he included a charge for this research as part of his supplemental fee brief in <u>Carter v. Franklin Fire Dist. No. 1 (Somerset)</u> , GRC Complaint No. 2013-328, <i>et seq.</i>	N/C	\$0.00

	190 N.J. 1 (2007) <u>Sitar Co. v. 222 Realty, Inc.</u> , 2005 N.J. Super. Unpub LEXIS 646 (App. Div. 2005)(<i>cert.</i> <i>denied</i> 186 N.J. 257 (2006))					
5/21/2016	Draft request for reconsideration brief – 3 pages (12-14).	0.6	\$180.00	Of the four (4) paragraphs addressing fees, just over half of was also present in the reconsideration submitted relevant to <u>Carter</u> , GRC 2013-328, <i>et seq.</i> , for which Counsel is receiving the full 0.6 hours of time. Based on this duplication of work, the Complainant’s Counsel should only receive fees for half of the proposed time, or 0.3.	0.3	\$90.00
5/23/2016	Draft GRC’s request for reconsideration form.	0.2	\$60.00		0.2	\$60.00
5/25/2016	File request for reconsideration.	0.1	\$30.00	Charging an attorney’s hourly rate to perform basic administrative functions is unreasonable. Thus, this action is not chargeable. The Council previously denied similar charges in <u>Carter</u> , GRC 2013-328, <i>et seq.</i> (Interim Order dated April 26, 2016) at 7 (“[The Complainant’s Counsel] also billed for . . . transmission of filings via e-mail. Those services are administrative and should be performed, if at all, by a para-professional charging far less than \$300.00 an hour.”).	0.0	\$0.00
12/6/2016	Receive and review GRC’s e-mail scheduling consolidated matters for GRC’s December 13, 2016 meeting.	0.1	\$30.00		0.1	\$30.00
12/14/2016	Receive and review GRC’s December 13, 2016 Interim Order.	1.0	\$300.00		1.0	\$300.00
12/14/2016	Discuss Interim Order with Complainant, including reply, reconsideration, and interlocutory options thereto.	0.2	\$60.00		0.2	\$60.00
12/17/2016	Draft six (6) page Brief, but only charging for 2 of 6 pages related to the fee award, consistent with the Council’s December 13, 2016 Interim	0.4	\$120.00	Of the six (6) pages, only one (1) page addresses fees. The rest rehash old arguments addressed on multiple occasions by the Council.	0.2	\$60.00

	Order.			For this reason, the Complainant's Counsel should only receive fees for that one (1) page, or half of 0.4.		
12/19/2016	Draft detailed time sheet.	0.5	\$150.00	The total charge is unreasonable because the Complainant's Counsel made few modifications to the time sheet he submitted in <u>Carter</u> , GRC 2013-328. A comparison of the time sheet from that complaint and here offers sufficient evidence, if not highlighted by the fact that the total hours and amount from <u>Carter</u> , GRC 2013-328 are mistakenly present at the end of the time sheet. Thus, only the minimum chargeable time is reasonable.	0.1	\$30.00
12/20/2016	File Brief and timesheet.	0.1	\$30.00	See 5/25/2016 entry.	0.0	\$0.00
Total:		6.6	\$1,980.00		--	--
Actual Total:		4.7	\$1,410.00		3.6	\$1,080.00

In sum, the GRC conducted a review of the Brief and found that the additional time spent on the file exceeds the allowable time in accordance with its prior decision in this matter. Initially, the Complainant's Counsel appeared to carry over the total hours and fee amount requested from Carter, GRC 2013-328, which led to an inflation of \$570.00 representing 1.9 hours at a rate of \$300.00. Moreover, some of Complainant Counsel's charges reflect administrative actions not reasonably performed at a rate of \$300.00 an hour. Further, the Complainant's Counsel included additional arguments in the Brief not relevant to the fee issue, which the Council has previously addressed multiple times. The Complainant's Counsel also misrepresented the page amount in the Brief addressing additional fees. Finally, the time allotted to prepare the timesheet was reduced due to the amount of work necessary to make minimal changes from the timesheet submitted in Carter, GRC 2013-328.

With respect to Custodian Counsel's opposition, the GRC does not agree. The GRC elaborated above on its position that charges for communications regarding an extension of time were reasonable in this instance. However, awarding all other additional charges is consistent with the GRC's past evaluation of this consolidated complaint.

For the reasons set forth above, the Council should find that the supplemental time expended for the request for reconsideration was not reasonable. The Council should thus adjust the total fee to \$1,080.00, representing 3.6 hours of service at \$300.00 per hour, or a decrease of 1.1 hours totaling \$330.00.

Having found the additional fee awarded for Complainant Counsel's partially successful request for reconsideration, the Council should include the supplemental time in its total fee award. **Accordingly, the Council should amend its total fee award to \$11,580.00, representing the adjusted figure of 38.6 hours of service at \$300 per hour, or an increase of 3.6 hours for a total of \$1,080.00.**

2. Enhancement Analysis

As was the case with the Council's initial adjudication on fees, no enhancement should be awarded because same was not requested.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council should find that the supplemental time expended for the request for reconsideration was not reasonable. The Council should thus adjust the total fee to \$1,080.00, representing 3.6 hours of service at \$300.00 per hour, or a decrease of 1.1 hours totaling \$330.00.
2. Having found the additional fee awarded for Complainant Counsel's partially successful request for reconsideration, the Council should include the supplemental time in its total fee award. **Accordingly, the Council should amend its total fee award to \$11,580.00, representing the adjusted figure of 38.6 hours of service at \$300 per hour, or an increase of 3.6 hours for a total of \$1,080.00.**
3. As was the case with the Council's initial adjudication on fees, no enhancement should be awarded because same was not requested.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 24, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 13, 2016 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2013-281, 2013-282
and 2013-283

v.

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

At the December 13, 2016 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 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. Regarding Complainant Counsel’s first prevailing party point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 “new evidence” brief. Thus, these portions of the request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *See D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Regarding Complainant’s Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. *See Courier News v. Hunterdon Cnty. Prosecutor’s Office*, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. *D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).



3. The Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should temporarily amend its fee award to Complainant's Counsel to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**

4. Because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Interim Order Rendered by the
Government Records Council
On The 13th Day of December, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 14, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

*Reconsideration
Prevailing Party Attorney's Fees*
**Supplemental Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

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1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian's Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013.

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GRC Complaint Received: September 23, 2013.

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² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the April 19, 2016 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 Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the chart attached, the Council finds that the time expended was not reasonable. The Council finds that 31.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded

Procedural History:

On May 2, 2016, the Council distributed its Final Decision to all parties. On May 3, 2016, the Complainant sought a copy of "Exhibit A" from the Final Decision, which comprised a copy of the GRC's fee application table, because he did not receive same as part of the Final Decision. On May 13, 2016, the Complainant reiterated his request to obtain a copy of "Exhibit A," and requested additional time to weigh his options, either to seek reconsideration or appeal the decision. On the same day, the GRC provided the Complainant with a copy of "Exhibit A" and granted his request for an extension until May 27, 2016.

On May 25, 2016, the Complainant's Counsel filed a request for reconsideration of the Council's April 26, 2016 Final Decision based on illegality and a mistake.

Analysis

Reconsideration

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
Jeff Carter v. Franklin Fire District #1 (Somerset), 2013-281, 282, and 283 Reconsideration Prevailing Party Attorney's Supplemental Findings and Recommendations of the Executive Director

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).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's April 26, 2016 Final Decision on May 25, 2016, two (2) business days prior to the expiration of the extended deadline. Therefore, the request to reconsider the April 26, 2016 Final Decision was timely received.

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 unreasonable manner. D’Atria, 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant's Counsel submitted a sixteen (16) page brief as part of his request for reconsideration. However, he only addressed the Council's April 26, 2016 Final Decision awarding prevailing party attorney's fees over three (3) of the sixteen (16) pages. The remainder of Complainant Counsel's brief either rehashes previously submitted arguments or posits additional arguments from pending complaints currently before the Office of Administrative Law (“OAL”).⁴

Non-Prevailing Party Fee Issues

The Complainant's Counsel took issue with the fact that the GRC did not initially acknowledge his November 16, 2015 “new evidence” letter brief or address the arguments therein in its Final Decision. However, as noted in its Final Decision, the GRC's regulations simply did not provide for briefs contesting prior decisions beyond the time afforded either to

⁴ The Complainant's Counsel submitted as part of his brief an Initial Decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288, *et seq.* However, OAL has not returned that complaint to the GRC in order to determine whether it would accept, reject, or modify said decision.

request reconsideration or file an appeal. N.J.A.C. 5:105-2.10; N.J.A.C. 5:105-2.11. Here, the Council ordered the Custodian to disclose certain records on October 28, 2014; Complainant's Counsel received that Order on October 29, 2014. In its subsequent May 26, 2015 Interim Order, the Council found that the Custodian did not knowingly or willfully violate OPRA; Complainant's Counsel received that Order on May 28, 2015. Had the Complainant's Counsel wanted the Council to reconsider either of those decisions, the applicable regulations required him to file same within ten (10) business days of his receipt of the Orders. N.J.A.C. 5:105-2.10(a) - (e). Also, the Complainant's Counsel did not consider the fact that the Council has the discretion not to consider any attempted new arguments or briefs that are filed out of time and several months following a decision.

The Complainant's Counsel cited to NJ Court Rules R. 4:49-2 as legal basis to accept his November 16, 2015 brief. The Rule permits a motion for rehearing or reconsideration to those seeking to alter or amend a judgment or order. According to the Rule, assuming *arguendo* that it is applicable to OPRA and agency adjudications, a moving party is required to make such a motion within twenty (20) days after judgment or service on the parties. In Gilleran v. Rutherford Downtown Partnership Inc., 2014 N.J. Super. Unpub. Lexis 2188 (Law Div. 2014), the Appellate Division held that "in the interest of justice and in the exercise of sound discretion," the courts may consider new or additional information that the moving party "could not have provided on first application." Id. at 10 (*citing R. 4:49-2*). However, the Gilleran Court also denied defendants' motion for reconsideration.

Prevailing Party Fee Issues

The Complainant's Counsel raised only three instances where the Council denied a portion of his fee. First, the Complainant's Counsel provided a copy of a January 11, 2014 letter brief and the GRC's acknowledgement e-mail as proof that the GRC received the brief and that the awarded fee should be amended accordingly. The Complainant's Counsel also disputed the Council's decision denying fees generated from his various requests that the GRC acknowledge receipt of his initial filings. Second, Counsel disputed the denial of 1 hour for preparation of his fee application, noted on his May 17, 2015 entry in his statement of services

The GRC rejects the first point regarding the January 11, 2014 letter brief. First, the GRC was unable to locate the letter brief during review of Complainant Counsel's fee application because it was sent in regard to seventeen (17) complaints filed by the Complainant. However, the GRC did eventually locate the brief, based only on exhibits that Complainant Counsel had attached to the request for reconsideration.⁵ However, the letter brief did not factor into any one of those specific complaints but rather asked the GRC produce procedural guidelines for conflicts of interest; however, the Council already previously declined to do so here. Carter, GRC 2013-281, et seq. (Interim Order dated April 28, 2015) at 2. Thus, notwithstanding that the GRC's original reason for not awarding fees for this brief was in error, the decision was correct: the letter brief was not a contributing factor to the Complainant's status as a prevailing party here (or any other to which Counsel's brief referred). For this reason, the letter brief does not factor

⁵ In the letter brief, the Complainant's Counsel discussed his opinion that the FFD's actions in the complaints were similar to alleged OPRA disclosure issues raised by media outlets in connection with the "Bridgewater" matter. Jeff Carter v. Franklin Fire District #1 (Somerset), 2013-281, 282, and 283 Reconsideration Prevailing Party Attorney's Supplemental Findings and Recommendations of the Executive Director 4

into the casual nexus between these complaints and the relief ultimately achieved. Mason, 196 N.J. 51.

The GRC also rejects the second point of Complainant Counsel's request for reconsideration. The standard for determining reasonableness of fees is the New Jersey Rules of Professional Conduct, which require an adjudicator to address, among other factors, "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." R.P.C. 1.5(a). In its Final Decision, the Council denied fees associated with the acknowledgement e-mails because they appeared to constitute unnecessary "make-work." Instead, the Complainant's Counsel requested that the GRC send an acknowledgement of receipt for each of the subject Denial of Access Complaints. The Complainant's Counsel billed 0.2 hours of time to review each e-mail. However, the Complainant's Counsel submitted no proof to support that the "time and labor required" to review and address receipt notifications was necessary. As an example of the unnecessary nature of this task and contrary to his letter brief arguments, Counsel could have utilized an e-mail program (such as Microsoft Outlook®) that generated an automated "received" notification. This would have negated his need to request and subsequently review acknowledgement correspondence.

The Complainant's Counsel also disputed the Council's denial of fees for the June 2, and June 9, 2015 entries noted in his statement of services. The June 2, 2015 entry was for "Attention to files, reconcile work in all three cases and consolidate billing where appropriate or courtesy." First, Complainant's Counsel did not properly seek payment by billing three times for the same work. Therefore, consolidating and reconciling his billing was a necessary correction of his own record keeping. Neither his client nor the FFD are responsible for internal record-keeping processes. As for the "attention to files" portion of the entry, such work is obviously too vague to compensate.

However, the GRC accepts the second point of Complainant Counsel's request for reconsideration. The Appellate Division determined in Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005), that prevailing party attorneys may be compensated for their time spent preparing fee applications so long as the amount charged is reasonable. *See also* Tanksley v. Cook, 360 N.J. Super. 63, 67 (App. Div. 2003); H.I.P. (Heightened Independence & Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 163 (Law Div. 1996); Robb v. Ridgewood Bd. of Educ., 269 N.J. Super. 394, 411 (Ch. Div. 1993); Council Enterps., Inc. v. Atlantic City, 200 N.J. Super. 431, 443 (Law Div. 1984)). Here, Complainant's Counsel's charge of 1.3 hours to prepare the prevailing party fee application is reasonable and therefore eligible for reimbursement. Accordingly, the Council shall revise its prior counsel fee award to include an additional \$390 as payment for 1.3 work hours in preparing the fee application.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384.

Regarding Complainant Counsel's first prevailing party point and remaining issues, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria, 242 N.J. Super. at 401. Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. See Courier News, 378 N.J. Super. at 547. Thus, this portion of the request for reconsideration should be accepted. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Accordingly, the Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should amend its fee award, pending Complainant's Counsel's new submission as discussed below, to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**

Additionally, because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Regarding Complainant Counsel's first prevailing party point, he failed to establish that the complaint should be reconsidered based on illegality or a mistake. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Counsel did not provide any evidence to support that the Council erroneously disallowed charges for acknowledgement notifications. Further, Counsel failed to support that the Council was required to accept and consider his November 16, 2015 "new evidence" brief. Thus, these portions of the request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of

Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Regarding Complainant's Counsel second point about the fee application charge, he has established that the complaint should be reconsidered based on a mistake (as opposed to illegality). Counsel showed, although partially, that the Council acted arbitrarily, capriciously, or unreasonably in not allowing for the fee application charge in accordance with precedential case law. *See Courier News v. Hunterdon Cnty. Prosecutor's Office*, 378 N.J. Super. 539, 547 (App. Div. 2005). Thus, this portion of the request for reconsideration should be accepted. *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of the Petition of Comcast Cablevision of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Council should amend its conclusion No. 2 to restore 1.3 hours at a rate of \$300.00 to the award. **Accordingly, the Council should temporarily amend its fee award to Complainant's Counsel to \$10,500.00, representing the adjusted figure of 35 hours of service at \$300 per hour, or an increase of \$390.00.**
4. Because the Complainant's Counsel prevailed on a portion of his May 25, 2016 request for reconsideration, the Complainant and/or Counsel is entitled to an award of minimally additional fees. **Thus, the Complainant and/or Counsel shall submit an updated fee application, based on the limited scope of prevailing fees associated with the original fee application, within five (5) business days following receipt of this Order. The Custodian shall have five (5) business days from the date of service of the updated fee application to object to the attorney's fees requested.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

December 6, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 26, 2016 Government Records Council Meeting

Jeff Carter
Complainant

v.

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

Complaint Nos. 2013-281, 2013-282 and
2013-283

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the chart attached, the Council finds that the time expended was not reasonable. The Council finds that 31.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 April, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013.

Response Made by Custodian: July 8, 2013, and August 11, 2013.

GRC Complaint Received: September 23, 2013.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

May 26, 2015 Council Meeting:

At its May 26, 2015 public meeting, the Council considered the May 19, 2015 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, found that:

1. The Custodian complied with the Council's April 28, 2015 Interim Order because he responded in the extended time frame, providing the responsive e-mails with redactions in accordance with the Council's *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council's October 28, 2014, January 30, 2015, and April 28, 2015 Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's October 28, 2014, and April 28, 2015 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. 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. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On May 27, 2015, the Council distributed its Interim Order to all parties. On June 12, 2015, the Complainant's Counsel John A. Birmingham Jr., Esq. ("Counsel") filed a Certification of Services in support of his application for fees.

On June 29, 2015, Counsel for the Custodian Dominic P. DiYanni, Esq. ("Mr. DiYanni") filed an opposition to the Application ("Opposition"), combining his arguments with those he made in opposition to Counsel's fees in another case, Carter v. Franklin Fire Dist. #2 (Somerset), GRC Complaint Nos. 2013-328, 329, 330, and 331 (May 2015) ("Carter 328-331").

Analysis

Compliance

At its May 26, 2015 meeting, the Council permitted the "Complainant, or his attorney . . . to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)." The Council further added that "[t]he Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the fees requested. N.J.A.C. 5:15-2.13(d)." On May 27, 2015, the Council distributed its Interim Order to all parties. Accordingly, the Complainant's application for fees was due by June 24, 2015. Counsel timely filed and served his application for fees on June 12, 2015.⁴

On June 29, 2015, the tenth (10th) business day following receipt of the Counsel's application for fees, Mr. DiYanni timely filed his opposition to the application for attorney's fees. Mr. DiYanni argued that the only issue in the consolidated case and Carter 328-331 was whether the Custodian was entitled to charge a special service charge. He argued that Counsel could have filed a single Complaint, as all matters concerned the same respondent, all claimed denial of access because of the Custodian's demand for a special service charge, and all involved similar or identical subject matter in several of the cases. Further, Mr. DiYanni argued that, owing to what he called Counsel's "lining up" seven separate complaints that could have been filed as one, Counsel was seeking to maximize his return on prevailing party attorney's fees, which Mr. DiYanni finds unreasonable. Mr. DiYanni also argued that, in addition to some of Counsel's arguments and briefs being duplicative, some work was connected to unnecessary ancillary issues, such as conflict of interest. Finally, he argued that none of Counsel's work for preparing his application for Counsel fees should be compensated.

Prevailing Party Attorney's Fees

Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections, ("NJDPM") 185 N.J. 137, 152 (2005)

⁴ Counsel sent his e-mail after normal business hours on Friday, June 12. Therefore, the GRC will assume that all parties received the e-mail on Monday, June 15, 2015.

(quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. *See generally* NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” *Id.* at 153. (quoting Courier News v. Hunterdon Cty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found that the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006). Further, the Council found that a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fees and directed the Complainant to file an application for attorney’s fees.

A. Standards for Fee Award

The starting point “. . . for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate,” a calculation known as the lodestar. NJDPM, 185 N.J. at 153. (quoting Rendine v. Pantzer, 141 N.J. 292, 324 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). The fee-shifting statutes do not contemplate that the losing party has to pay for the learning experience of attorneys for the prevailing party. *See*, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at

Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. See Walker, 415 N.J. Super. at 606 (citing Furst v. v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but cautioned that “[o]rdinarily the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying R.P.C. § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13(b) sets forth the information that counsel must provide in an application seeking fees in an OPRA matter. Providing the requisite information required

by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the Appellate Division has aptly noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded [must] serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$22,050, representing 73.5 hours of work at \$300 per hour. Counsel supports the hourly rate through a recitation of his experience and years in practice. Certification of John A. Bermingham, Esq., dated June 12, 2015 at ¶ 7 (Exhibit B).

The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from “September 2, 2013, through June 12, 2015” Counsel billed a total of 73.5 hours for work on the file.⁵ This time included reviewing the file, conducting legal research, drafting the complaint and accompanying briefs, reviewing e-mail correspondence to and/or from the GRC and/or the client, communicating with the client regarding the action, drafting a letter brief and request for reconsideration, drafting a separate brief alleging “new evidence,” and drafting a certification for the fee application.

In accordance with N.J.A.C. 105-2.13(b), Counsel’s time-sheets provide descriptions of the work performed. N.J.A.C. 105-2.13(b)(5); Certification of John Bermingham dated June 12, 2015. Most of Counsel’s entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. Id. The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel

⁵ The GRC notes that Complainant’s Counsel made a computation error in his favor. The total hours billed on GRC 2013-283 add to 11.1 hours, not the 11.3 hours listed by Complainant’s Counsel. The total amount therefore totals 73.3 hours, not 73.5.

communicated. Similarly, the notations for reviewing and drafting the pleadings identify the specific document examined or drafted and the time spent on the task.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, a review of a fee application must be conducted on a case-by-case basis. The GRC conducted a review of the fee application submitted. Each time entry was reviewed and considered. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). While the Council does not comment on the strategy of an attorney's representation of his client, the Council indeed recognizes that any fees awarded will be paid from public funds. *See*, HIP, 291 N.J. Super. at 167. The recommendations of the Executive Director following review of the application are set forth in the attached chart. Although the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the GRC finds the total hours excessive and the total fee not reasonable, as discussed below.

For example, Counsel billed 22.2 hours for a fee of \$6,660.00. That billing represents approximately 30% of the total fee, which is applied to drafting the three Complaints and respective briefs, which were filed simultaneously on September 23, 2013. As set forth in the attached table, the GRC finds that the brief filed with Carter, GRC 2013-281, was largely copied and transplanted into the briefs filed with Carter, GRC 2013-282, and Carter, GRC 2013-283 (cited respectively as "2013-281," "2013-282," and "2013-283"). For example, the brief for 2013-281, from the middle of the page 18 through page 40, contains language that is strikingly similar to the brief for 2013-282, pages 11 through page 33. More than one half of the brief for 2013-282 is copied with the same language and sequence from the brief for 2013-281. Further, and as noted in the attached table, the briefs for 2013-282 and 2013-283 are virtual copies of each other. Accordingly, the fees for drafting the three Complaints and three briefs were unreasonable. Therefore, the fee for those services for 2013-282 is reduced from 7.0 hours to 3.0 hours, and the fee for those services for 2013-283, virtually identical to 2013-282, is reduced from 6.8 hours to 0.4 hours. Thus the total fee for drafting the three Complaints and the respective briefs is reduced from the 22.2 hours and \$6,660 down to 11.8 hours and \$3,540.

Counsel also chose to bill for legal research for which he billed in previous cases where counsel fees had been awarded. He also billed for reviewing standard forms, such as acknowledgements of receipts and for transmission of filings via e-mail. Those services are administrative and should be performed, if at all, by a para-professional charging far less than \$300.00 an hour. Counsel also billed for services which appear to serve no legitimate purpose, such as three separate discussions with his client concerning a standard form letter sent by the GRC to the Custodian – the letter in question merely asks the Custodian to fill out the SOI. Council's billing in that instance was also unreasonable, given that the substance of the GRC's letter did not change. Moreover, Counsel's client has filed approximately 70 prior Complaints and would therefore be reasonably familiar with both the procedure and the standard form letter. The GRC therefore disallows those charges.

In addition, between February 15, 2015, and March 19, 2015, Counsel billed 11.1 hours of services, totaling \$3,330.00 in fees that were connected to a request for reconsideration, filed with a 27 page brief, and a request to submit “new evidence,” supported with a 24 page brief. Counsel fees must be awarded for services that resulted in a prevailing party ruling – to wit, actions that brought about a change in the Custodian’s behavior. Thus, fees for services rendered in conjunction with a denied motion for reconsideration are not valid and are not chargeable to the Custodian. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Here the Council’s relief, granted to the Complainant after its initial finding on October 28, 2014, was entirely based on the *in-camera* review, and the Council granted no additional relief owing to the Reconsideration, which was denied contemporaneously with the relief granted after the *in-camera* review. There is no factual nexus between the results ultimately achieved, the motion for reconsideration, or the request to consider new evidence. Carter, 2013-228. Teeters, 387 N.J. Super. 432; Mason, 196 N.J. 51. Thus, while the Reconsideration motion was filed prior to the GRC’s ruling of prevailing party status, it was ultimately denied, therefore providing no further benefit to the Complainant and causing no change in the Custodian’s behavior.

Further, the GRC did not render any new findings or rulings after the “new evidence” was submitted but rather only considered compliance issues. Moreover, the submission by Counsel did not result in any change in the GRC’s decision or in the consequent behavior of the Custodian. Thus, fees billed in conjunction for same are also not chargeable to the Custodian. *See Teeters v. DYFS*. 387 N.J. Super. 423, 432 (App. Div. 2006).

Finally, Counsel billed for the cost of preparing the fee application. Although federal bankruptcy law might permit such charges, the GRC finds that charging for time spent preparing a fee application does not advance the purpose of OPRA. Applications for fees are submitted after the Council has ruled on the merits of a case and have no impact on the GRC’s ruling. The GRC is not persuaded that time spent preparing a fee application correlates to any action that brought about a change in the Custodian’s behavior. Additionally, the GRC notes that Counsel has previously prepared and filed a boilerplate certification of services that he uses in other cases pending before the GRC and that awarding a fee for preparing the application in every such case would clearly be unreasonable. The GRC therefore disallows those charges.

Accordingly the Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the attached chart, the Council finds that the time expended was not reasonable. The Council finds that 33.7 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter, GRC 2011-228. Teeters, 387 N.J. Super. 432; Mason, 196 N.J. 51. **Accordingly, the Council award fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**

2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and within the chart attached, the Council finds that the time expended was not reasonable. The Council finds that 31.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. Carter v. Franklin Fire Dist. #1 (Somerset), GRC 2011-228 (March 2014). Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Council awards fees to Mr. Bermingham, Counsel to the Complainant, in the amount of \$10,110.00 representing 33.7 hours of service at \$300 per hour.**
3. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Ernest Bongiovanni
Staff Attorney

April 19, 2016⁶

⁶ This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

May 26, 2015 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2013-281, 2013-282
and 2013-283

v.

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

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 28, 2015, Interim Order because he responded in the extended time frame providing the responsive e-mails with redactions in accordance with the Council’s *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council’s October 28, 2014, January 30, 2015, and April 28, 2015, Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s October 28, 2014, and April 28, 2015, Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. 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. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Interim Order Rendered by the
Government Records Council
On The 26th Day of May, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013, to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, and Bruce Padula from May 1, 2013, to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013, and August 2, 2013.

Response Made by Custodian: July 8, 2013, and August 11, 2013.

GRC Complaint Received: September 23, 2013.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

April 28, 2015, Council Meeting:

At its April 28, 2015, public meeting, the Council considered the April 21, 2015, *In Camera* and Reconsideration 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 complied with the Council's January 30, 2015, Interim Order because he responded in the extended time frame, providing the GRC all eight (8) e-mails for an *in camera* review and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Complainant's Counsel has failed to establish in his request for reconsideration of the Council's January 30, 2015, Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on mistake, new evidence, or illegality. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On April 29, 2015, the Council distributed its Interim Order to all parties. On May 4, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing eight (8) e-mails with redactions in accordance with the Council's *in camera* examination to all parties.

On May 5, 2015, the GRC advised the Custodian that he had not fully complied with the Council's Order because the redactions made to the e-mails were not visually obvious. Wolosky v. Vernon Twp. Bd. of Educ. (Sussex), GRC Complaint No. 2009-57 (Interim Order dated December 22, 2009); Wolosky v. Twp. of Randolph (Morris), GRC Complaint No. 2010-308 (Interim Order dated August 28, 2012). The GRC requested that the Custodian rectify his redactions prior to close of business on May 6, 2015, the last day to comply with the Council's Order. On the same day, the Custodian's Counsel sought an extension until May 8, 2015, to resubmit compliance, which the GRC granted.

On May 7, 2015, the Custodian resubmitted his compliance with the appropriate redactions and certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its April 28, 2015, meeting, the Council ordered the Custodian to provide to the Complainant eight (8) responsive e-mails in accordance with the Council's *in camera* examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2015.

On May 4, 2015, the third (3rd) business day after receipt of the Council's Order, the Custodian provided those records to all parties and simultaneously submitted certified confirmation of compliance to the Executive Director. However, the Custodian redacted by whiting out the exempt portions of the e-mails, which is not in accordance with OPRA and prior GRC case law. On May 5, 2015, the GRC advised the Custodian of this fact and required him to resubmit the e-mails with visually obvious redactions. On the same day, the Custodian's Counsel requested an extension until May 8, 2015, to respond, which the GRC granted. On May 7, 2015, the Custodian rectified the issue by resubmitting compliance with the appropriate redactions.

Therefore, the Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame providing the responsive e-mails with redactions in accordance with the Council's *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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 “. . . [i]f 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

Here, the Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council's October 28, 2014, January 30, 2015, and April 28, 2015, Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

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

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

OPRA itself contains broader language on attorney's fees than the former [Right to Know Law (“RTKL”)] did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring

access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

In the matter currently before the Council, the Complainant disputed the proposed special service charge and requested that the Council require disclosure of the responsive records. In its October 28, 2014, Interim Order, the Council determined that the proposed charge was unreasonable and required disclosure of all responsive records, as requested by the Complainant. The Custodian complied with this Order on December 2, 2014. However, the Custodian withheld access to eight (8) e-mails, to which the Complainant’s Counsel objected. The Council conducted an *in camera* review of said records and determined that the Custodian unlawfully denied access to portions of same. In its April 28, 2015, Interim Order, the Council ordered disclosure of the e-mails with redactions. The Custodian complied with this Order on May 7, 2015. Based on the forgoing, the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s October 28, 2014, and April 28, 2015, Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. 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. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 28, 2015, Interim Order because he responded in the extended time frame providing the responsive e-mails with redactions in accordance with the Council's *in camera* examination and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear his burden of proof that the proposed special service charge was reasonable and warranted. Further, he unlawfully denied access to portions of the eight (8) withheld e-mails. However, the Custodian timely complied with the Council's October 28, 2014, January 30, 2015, and April 28, 2015, Interim Orders. Also, the Custodian lawfully denied access to content within the eight (8) e-mails. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's October 28, 2014, and April 28, 2015, Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of records, in whole or part, through both Interim Orders. 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. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2013-281, 2013-282,
and 2013-283

v.

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

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 30, 2015, Interim Order because he responded in the extended time frame, providing the GRC all eight (8) e-mails for an *in camera* review and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Complainant’s Counsel has failed to establish in his request for reconsideration of the Council’s January 30, 2015, Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant’s Counsel failed to establish that the complaint should be reconsidered based on mistake, new evidence, or illegality. The Complainant’s Counsel has also



failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of April, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera and Reconsideration*
Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters, memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel, and Ms. Dawn Cuddi) from April 12, 2013 to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula, and Joseph Danielsen from May 1, 2013, to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel and Bruce Padula from May 1, 2013 to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013 and August 2, 2013

Response Made by Custodian: July 8, 2013 and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Records Submitted for *In Camera* Examination:

- E-mail from Mr. Goldberg to Custodian's Counsel dated May 4, 2013.
- E-mail from the Custodian's Counsel to Mr. Goldberg dated May 4, 2013.
- E-mail from Mr. Goldberg to Custodian's Counsel and Mr. Danielsen dated May 5, 2013.
- E-mail from Mr. Wickman to Custodian's Counsel dated May 16, 2013.
- E-mail from Custodian's Counsel to Mr. Wickman dated May 16, 2013.
- E-mail from Custodian's Counsel to Mr. Padula dated May 22, 2013.
- E-mail from Mr. Padula to Custodian's Counsel dated May 22, 2013.
- E-mail from Custodian's Counsel to Mr. Padula dated May 22, 2013.

Background

January 30, 2015 Council Meeting:

At its January 30, 2015, public meeting, the Council considered the January 20, 2015, 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, found that:

1. The Custodian complied with the Council's October 28, 2014 Interim Order because he responded in the extended time frame, providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitting a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

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

Procedural History:

On February 3, 2015, the Council distributed its Interim Order to all parties.

On February 9, 2015, the Custodian's Counsel stated that the document index attached to the FFD's compliance package was actually sent to the Complainant on June 12, 2013 as part of a June 3, 2013 OPRA request not relevant to these complaints concerning a similar subject matter. The Custodian's Counsel offered to provide the eight (8) e-mails for an *in camera* review but requested an extension of ten (10) business days to do so.

On the same day, the Complainant's Counsel e-mailed the GRC, arguing that the eight (8) e-mails are absolutely related to the complaints and should be disclosed for an *in camera* review. Further, the Complainant's Counsel asserted that the FFD's request for an extension is unreasonable because they identified, redacted, and disclosed the e-mails on December 4, 2014.

On February 13, 2015, the Complainant's Counsel sought an update on whether the GRC intended to allow for an extension of time. On the same day, the GRC granted Custodian's Counsel an extension until February 25, 2015. On February 15, 2015, the Complainant's Counsel requested a ten (10) business day extension to submit a request for reconsideration, which the GRC granted on February 18, 2015.

On February 24, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he provided nine (9) copies of the responsive e-mails to the GRC for an *in camera* review in accordance with the Council's Order.

On February 26, 2015, the Custodian filed a request for reconsideration of the Council's January 30, 2015, Interim Order based on a mistake, new evidence, and illegality. The Complainant's Counsel stated that he is seeking reconsideration of the Council's Order based on the following:⁷

1. The Council's failure to consider conflicts of interest denied the Complainant his due process rights during the adjudication process;
2. The Council's decision that it would have been impossible to submit a document index without incurring the disputed special service charge has no basis in law and is inapposite to Appellate precedent; and

⁷ The Complainant's Counsel cites to numerous alleged violations of the Open Public Meetings Act ("OPMA") as incriminating evidence against the Custodian. However, the GRC has no authority over OPMA and will not address these allegations. N.J.S.A. 47:1A-7(b); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated March 25, 2014) at 6.

3. The Council's decision to allow the Custodian to provide all responsive records together unfairly hampered the Complainant's right to unfettered access consistent with how same were originally requested (in three separate OPRA requests).

The Complainant's Counsel argued that, if left uncorrected, these issues will have a severely negative impact on the public's right to access under OPRA. Further, the Complainant's Counsel argued that these complaints should be referred to the Office of Administrative Law for a fact-finding hearing consistent with the Council's prior decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq.* (Interim Order dated March 25, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated March 25, 2014).

Analysis

Compliance

At its January 30, 2015, meeting, the Council ordered the Custodian to submit nine (9) copies of the responsive e-mails and a document index for an *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 3, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 10, 2015.

On February 9, 2015, the Custodian's Counsel sought an extension of ten (10) business days, which the GRC granted. On February 25, 2015, the last business day of the extension, the GRC received the Custodian's compliance package, which included all eight (8) e-mails along with a document index and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's January 30, 2015, Interim Order because he responded in the extended time frame providing the GRC all eight (8) e-mails for an *in camera* review, a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such

communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC first notes that these eight (8) e-mails fall within the parameters of the Complainant’s July 1, and August 1, 2013 OPRA requests. The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Record	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination⁸
1.	E-mail from Mr. Goldberg to Custodian’s Counsel, dated May 4, 2013. *Note: Record No. 2 and 3 included in chain.	Mr. Goldberg seeks legal advice from Counsel on a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

2.	E-mail from the Custodian's Counsel to Mr. Goldberg, dated May 4, 2013. *Note: Record No. 1 and 3 included in chain.	Counsel provides legal advice and direction about a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
3.	E-mail from Mr. Goldberg to Custodian's Counsel and Mr. Danielsen, dated May 5, 2013. *Note: Record No. 1 and 2 included in chain.	Mr. Goldberg seeks additional legal advice from Counsel on a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
4.	E-mail from Mr. Wickman to Custodian's Counsel, dated May 16, 2013. *Note: Record No. 5 included in chain.	Mr. Wickman seeks legal advice from Counsel on a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
5.	E-mail from Custodian's Counsel to Mr. Wickman, dated May 16, 2013. *Note: Record No. 4 included in chain.	Counsel provides legal advice in response to Mr. Wickman's request.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
6.	E-mail from Custodian's	Counsel discusses litigation and	Attorney-client privileged	The body of the e-mail is exempt because it

	Counsel to Mr. Padula, dated May 22, 2013. *Note: Record No. 7 and 8 included in chain.	appeal strategy with Mr. Padula, special counsel to the FFD.	material. <u>N.J.S.A.</u> 47:1A-1.1.	contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
7.	E-mail from Mr. Padula to Custodian's Counsel, dated May 22, 2013. *Note: Record No. 6 and 8 included in chain.	Mr. Padula discusses litigation and appeal strategy with Counsel.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
8.	E-mail from Custodian's Counsel to Mr. Padula, dated May 22, 2013. *Note: Record No. 6 and 7 included in chain.	Counsel provides directive and legal advice to Mr. Padula.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the eight (8) responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Reconsideration

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).

In the matter before the Council, the Complainant's Counsel filed the request for reconsideration of the Council's Order dated January 30, 2015, on February 26, 2015, two (2) business days prior to the expiration of the extended time frame to submit same.

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 unreasonable manner. D'Atria, . . . 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake, new evidence, or illegality. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 30, 2015, Interim Order because he responded in the extended time frame, providing the GRC all eight (8) e-mails for an *in camera* review and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied access to the bodies of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian must disclose all other portions of the eight (8) requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Complainant's Counsel has failed to establish in his request for reconsideration of the Council's January 30, 2015, Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on mistake, new evidence, or illegality. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel failed to submit any compelling arguments to refute the Council's analysis on the issues presented. Thus, the Complainant's Counsel request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990);

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Jeff Carter
Complainant
v.

Complaint Nos. 2013-281, 2013-282
and 2013-283

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

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the January 20, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's October 28, 2014 Interim Order because he responded in the extended time frame providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitted a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.*
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."

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

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 3, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2013-281,
2013-282 and 2013-283²**

v.

**Franklin Fire District No. 1 (Somerset)³
Custodial Agency**

Records Relevant to Complaint:

July 1, 2013 OPRA request: Electronic copies via e-mail of correspondence (including but not limited to e-mails, text messages, letters memoranda, legal appeals, and/or facsimile transmissions) sent or received by Franklin Fire District No. 1 (“FFD”) and/or its agents (including all commissioners, legal counsel and Ms. Dawn Cuddi) from April 12, 2013 to July 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01.

August 1, 2013 OPRA requests:

1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula and Joseph Danielsen from May 1, 2013 to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in Wickman.
2. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel and Bruce Padula from May 1, 2013 to August 1, 2013, regarding The Palace at Somerset, Somerset, NJ.

Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013 and August 2, 2013

Response Made by Custodian: July 8, 2013 and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Background

October 28, 2014 Council Meeting:

At its October 28, 2014 public meeting, the Council considered the October 21, 2014 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 has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch.*, 360 N.J. Super. 191, 199 (Law Div. 2002); *Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. *See Blau v. Union Cnty.*, GRC Complaint No. 2003-75 (January 2005).
2. **The 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 1:4-4,⁴ to the Executive Director.⁵**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 29, 2014, the Council distributed its Interim Order to all parties. On November 3, 2014, the Custodian's Counsel sought a thirty (30) day extension due to the voluminous nature of the request and the time it would take the FFD to coordinate retrieval. On November 6, 2014, the GRC granted an extension until December 4, 2014.

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

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

On December 2, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that attached to his response are the records responsive to the Complainant's three (3) OPRA requests. The Custodian certified that eight (8) e-mails were withheld as attorney-client privileged material. N.J.S.A. 47:1A-1.1.

The Custodian further noted that he believed some type of charge should have been passed to the Complainant because it took two (2) hours to retrieve and review the responsive e-mails. Additionally, the Custodian reiterated from the Statement of Information ("SOI") that he did not knowingly and willfully violate OPRA; rather, the FFD took a legal stance based on OPRA and prior GRC decisions.

On December 4, 2014, the Complainant's Counsel stated that he received responsive records in hard copy, which was contrary to the Complainant's preferred method of delivery (via e-mail). The Complainant's Counsel thus objected to the FFD's deliberate and intentional failure to disclose records electronically and argued that the Custodian failed to comply with the Council's Interim Order. On the same day, the Custodian's Counsel responded via e-mail advising that the FFD would provide the responsive records via e-mail. The Custodian's Counsel noted that he was concerned that the file would be too large to e-mail, but he would attempt to send the records, whether in whole or in multiple files. Subsequent to this e-mail, the Custodian's Counsel forwarded to the Complainant and Complainant's Counsel all records via e-mail (and copied the GRC).

On December 10, 2014, the Complainant's Counsel again objected to the Custodian's compliance. First, Counsel stated that the Complainant filed three (3) separate OPRA requests; however, the Custodian disclosed all records in one file. Thus, it prevented the Complainant from conducting a meaningful review because he had no idea which records corresponded to each of the three (3) OPRA requests. Counsel asserted that the matters were complicated because responsive records relevant to GRC 2013-281 and 2013-282 were disclosed under one (1) divider page. Counsel argued that disclosing the records in this manner is further evidence of a knowing and willful violation. Counsel requested that the GRC require immediate disclosure of the records separately as requested. Counsel asserted that ordering such an action is consistent with the Council's decision in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that custodian must respond to each request item individually), which the Custodian and Custodian's Counsel were aware of because Paff, was cited in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012). Counsel further requested that, as a matter of public policy, the GRC should, in similarly consolidated matters, order disclosure of records separately to ensure that the complainant can identify those records responsive to the corresponding OPRA requests.

Second, the Complainant's Counsel objected to the eight (8) e-mails for which access was denied because the Custodian failed to provide an adequate document index in the SOI per Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Counsel noted that he previously argued this point in briefs filed for each complaint. Counsel argued that any asserted privilege at this point is grossly inappropriate because it further delays the disclosure of

responsive records, even with redactions due to a lawful denial.⁶ Counsel contended that the GRC's longstanding precedent requiring an *in camera* review under particular circumstances to determine the validity of the asserted exemptions exacerbates the Custodian's deliberate and intentional efforts to delay disclosure of records that may be unfavorable to the FFD.

Analysis

Compliance

At its October 28, 2014 meeting, the Council ordered the Custodian to disclose all records responsive to the Complainant's three (3) OPRA requests, identify those records with redactions and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 5, 2014.

On November 3, 2014, the third (3rd) business day after receipt of the Council's Order, the Custodian's Counsel sought an extension of thirty (30) days to respond, which the GRC granted until December 4, 2014. On December 2, 2014, the Custodian sent hardcopies of the responsive records to the Complainant and provided certified confirmation of compliance to the GRC. On December 4, 2014, following Complainant Counsel's objection to paper copies of the records (the Complainant's preferred method of delivery was electronic via e-mail) the Custodian submitted electronic copies of same to the Complainant and GRC.

Thereafter, the Complainant's Counsel argued that the Custodian did not comply because he produced all records without providing sufficient clarity as to which records corresponded with each OPRA request at issue. He further argued that the Custodian inappropriately exempted access to eight (8) e-mails unlawfully by failing to submit a document index in the SOI.

The GRC rejects the Complainant Counsel's first assertion. The GRC reviewed the compliance packet and found that it was easily able to identify the manner in which the records were provided. Specifically, the Complainant filed three (3) complaints with each corresponding to one (1) of the three (3) OPRA requests at issue, at which point the GRC consolidated same based on the commonalty of parties and issues. In complying with the Council's Order, the Custodian grouped the records for the first two (2) OPRA requests under the divider page "Responsive Records for GRC 2013-281 & 2013-282." The GRC notes that both of these OPRA requests sought correspondence between similar individuals regarding the same subject for an overlapping time frame of April 12, 2013 to August 1, 2013.⁷ The responsive e-mails are

⁶ The Complainant's Counsel also objected to the Council's declination of conflict of interest issues based on N.J.S.A. 47:1A-7(b). He further requested that the Council reverse its opinion and adjudicate such issues. However, Complainant Counsel's request to reconsider this issue is deficient because same was not submitted as a request for reconsideration per the GRC's regulations. N.J.A.C. 5:105-2.10. Further, the Council has already declined to this address based on a plain reading of OPRA.

⁷ The GRC notes that in instances where OPRA requests for the same records overlapped in time, the GRC has not required a custodian to produce duplicate copies of the same records for each request. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013) at 6.

provided in reverse chronological order from August 1, 2013 to May 4, 2013. The Custodian attached the records responsive to the third (3rd) OPRA request under the divider page “Responsive Records for GRC 2013-283.” Thus, the GRC is satisfied that the Custodian provided the Complainant with the responsive records in an appropriate manner.

Notably, the Complainant’s Counsel argued that requiring the Custodian to separate responsive records by request in an identifiable way was consistent with the Council’s holding in Paff, 2007-272. The Council’s decision in Paff, however, considered a custodian’s failure to address all items in their written response. Further, the GRC has not applied Paff to the disclosure of records in response to an OPRA request containing multiple items. Nor is the GRC inclined to do so here because it is satisfied that the records were provided in an appropriate manner.

Additionally, the GRC rejects the Complainant Counsel’s second assertion. The evidence of record is clear that the Custodian did not perform a search for responsive records because the Complainant objected to the special service charge; thus, it would have been impossible to submit a document index without incurring the costs that the FFD was attempting to charge. That the Custodian did not submit a document index in the SOI did not prohibit him from asserting that certain records are exempt once he located same. In fact, the Council’s Order specifically allowed for the possibility that the Custodian may assert that certain redactions apply to the records by requiring him to “identify any records that are redacted and state the basis for redacting same.”

Therefore, the Custodian complied with the Council’s October 28, 2014 Interim Order because he responded in the extended time frame providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitted a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

⁸ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian submitted compliance to include a document index identifying eight (8) e-mails that he argued were exempt under the attorney-client privilege exemption. The Complainant's Counsel only contended that the denial of access was inappropriate because the Custodian did not assert such exemptions in the SOI. Further, Counsel argued that the denial was meant to intentionally delay access to the e-mails because the GRC would be required to conduct an *in camera* review. To this end, it is necessary for the GRC to conduct an *in camera* examination of the eight (8) e-mails.

Therefore, the GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 28, 2014 Interim Order because he responded in the extended time frame providing responsive records to the Complainant via his preferred method of delivery (e-mail), submitted a document index of the e-mails for which the Custodian asserted exemptions applied, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The GRC must conduct an *in camera* review of the eight (8) responsive e-mails to determine the validity of the Custodian's assertion that the same are attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

January 20, 2015

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2013-281, 2013-282, and 2013-283

v.

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

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 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 has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. *See* Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005).
2. **The 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 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.

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

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

Interim Order Rendered by the
Government Records Council
On The 28th Day of October, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 29, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint No. 2013-281, 2013-282
and 2013-283²**

v.

**Franklin Fire District No 1 (Somerset)³
Custodial Agency**

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1. Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Dawn Cuddy, the Custodian’s Counsel, Bruce Padula and Joseph Danielsen from May 1, 2013 to August 1, 2013, regarding an appeal of the Franklin Township Municipal Ethics Board’s “Resolution of Violation” issued on April 12, 2013 in Wickman.
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Custodian of Record: Tim Szymborski

Request Received by Custodian: July 2, 2013 and August 2, 2013

Response Made by Custodian: July 8, 2013 and August 11, 2013

GRC Complaint Received: September 23, 2013

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director

Background⁴

Request and Response:

July 1, 2013 OPRA request

On July 1, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 8, 2013, the Custodian responded in writing seeking an extension of time until July 19, 2013 to gather information. On July 9, 2013, the Complainant granted the extension provided that the Custodian include e-mails coming into existence through July 19, 2013. On July 17, 2013, the Custodian’s Counsel sought a second extension of time until July 29, 2013 to allow the FFD’s IT contractor to retrieve possibly responsive records and perform redactions, if necessary. On July 18, 2013, the Complainant granted the extension provided that the Custodian includes e-mails coming into existence through July 29, 2013. Further, the Complainant noted that his agreement to the extension includes the following conditions due to obvious conflicts of interest:

1. Identify the name(s) of the IT vendor(s) performing the actual search.
2. Advise if the search is being conducted under Counsel’s supervision.

On July 28, 2013, the Custodian’s Counsel responded advising the Complainant that the FFD has determined that utilizing its IT vendor, Network Blade, LLC, warrants the imposition of a special service charge. N.J.S.A. 47:1A-5. Counsel stated that Network Blade would spend approximately three (3) hours at the FFD rate of \$120.00 per hour and that Counsel’s supervision would similarly cost \$120.00 per hour. Counsel further noted that he would impose a charge for one (1) additional hour to review and perform redactions where necessary. Counsel stated that the FFD could alternatively provide its employee to supervise the search for \$20.00 an hour; however, Counsel’s one (1) hour charge for review and redaction would still apply. Counsel requested that the Complainant advise whether he objected to the proposed charge.

On July 29, 2013, the Complainant objected to the proposed fee, arguing that the special service charge is an attempt to delay disclosure of the responsive records. Further, the Complainant stated that he never insisted that Custodian’s Counsel supervise the search; however, the Complainant maintained that he certainly would not pay a charge for Counsel’s time. The Complainant stated that he had been more than accommodating with extensions and was well aware of the FFD’s frustration for having to comply with OPRA without being able to charge requestors for access in a majority of cases. The Complainant stated that he had no desire to pursue the matter unless the FFD failed to comply with OPRA.

On the same day, the Custodian’s Counsel requested a third extension of ten (10) days to meet with the FFD to work out a compromise. Counsel further requested that the Complainant provide some options that he may be considering in coming to said compromise. The Complainant responded rejecting an extension for non-email records (*e.g.* legal appeals, letters,

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director

memos, fax transmittals, *etc.*) and requested a legitimate reason for another extension to search for e-mails. Subsequently, the Custodian's Counsel responded providing all responsive non-email records and further noted that the special service charge for Network Blade's three (3) hours of time at \$120.00 still applied to for e-mail records. Counsel noted that he would not be supervising the search or charging for review and redaction; thus, the special service charge will only apply to Network Blade's time. Counsel requested that the Complainant advise whether he would pay the amended charge.

On July 30, 2013, the Complainant again objected to the amended charge, noting that the FFD did not charge for non-email records and has not previously charged for similar e-mail requests. The Complainant noted that the FFD uses Microsoft Outlook®, which facilitates a simple process for searching, identifying and providing responsive e-mails. On the same day, the Custodian's Counsel stated that the FFD instituted a policy of having Network Blade retrieve e-mails. Counsel acknowledged that OPRA and GRC case law requires special service charges to be levied on a case-by-case basis. Counsel stated that although the FFD has not imposed a special service charge on past OPRA requests for e-mails, the FFD determined that same was warranted here.

On August 3, 2013, the Complainant sought the criteria the FFD used to impose the special service charge. The Custodian's Counsel responded stating that the FFD relied on the GRC's criteria.⁵ On August 5, 2013, the Complainant again objected to the charge, arguing that the FFD could not pass the cost of utilizing Network Blade to search for responsive e-mails onto a requestor. The Complainant stated that prior to August 2012, searches for responsive e-mails were conducted by individuals named in the request, and that the convenience of having Network Blade conduct such a search does allow the FFD to impose a charge for same. On August 10, 2013, the Custodian's Counsel reiterated that special services charges are imposed on a case by case basis. Counsel noted that one of the factors is the size of an agency and the number of employees, and that an agency cannot be any smaller than the FFD, which employs one (1) person.

August 1, 2013 OPRA requests

On August 1, 2013, the Complainant submitted two (2) OPRA requests to the Custodian seeking the above-mentioned records. On August 11, 2013, the Custodian responded in writing advising that the FFD has determined that utilizing its IT vendor, Network Blade, LLC, to retrieve e-mails responsive to both requests warrants the imposition of a special service charge. N.J.S.A. 47:1A-5. Counsel stated that Network Blade would spend approximately three (3) hours at the FFD rate of \$120.00 per hour. Further, the Custodian advised that if the Complainant require supervision for the retrieval process, an hourly rate of \$20.00 would apply. The Custodian requested that the Complainant advise whether he objected to the proposed charge.

On August 12, 2013, the Complainant objected to the proposed fee as unreasonable. The Complainant further argued that despite his attempts to compromise on past requests, he believed the proposed charge was retaliation for previous objections to proposed fees. The Complainant

⁵ A copy of the 14-point analysis for determining special service charges is posted to the GRC's website. <http://www.state.nj.us/grc/pdf/OPRASpecialServiceCharge.pdf>.

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also alleged that the proposed fee was little more than an attempt to deliberately withhold government records. The Complainant stated that if he did not receive the responsive records by close of business, he would pursue the denial of access with the appropriate venue.

On August 20, 2013, the Custodian sought an extension of fourteen (14) business days to respond due to a recent personal issue and the fact that FFD has one (1) employee assisting with all FFD business, which has received a consistent amount of daily OPRA requests. On August 21, 2013, the Complainant objected to the extension arguing that the Custodian already had fourteen (14) business days to respond providing records. The Complainant also alleged that the Custodian previously sought extensions in bad faith by waiting until the last day to deny access to records by way of special service charge.

Denial of Access Complaint:

On September 23, 2013, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant first noted that at no point prior to this complaint did the Custodian either indicate if a search was conducted or provide a 14-point analysis proving that the proposed fees were warranted. The Complainant noted that this fact is evidenced by the Custodian’s response that there would be a proposed charge for labor involved in searching for responsive records and advising that records would be provided “if they exist.”

The Complainant stated that in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012), the Council confirmed a custodian’s obligation to search for and disclose responsive e-mails based on the criteria required to be included in a request for e-mails. *Id.* at 11. Further, the Complainant stated that the time frame in Verry was a five (5) period, which yielded only 309 e-mails without any contemplation of a special service charge. The Complainant noted that his requests sought e-mails over a period of three (3) months or less, which would in no way be burdensome to the FFD. The Complainant asserted that his requests here were more closely related to the request in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-234 (Interim Order dated January 29, 2013), where the Council ordered disclosure of e-mails for a 63 day period. Also, the Complainant contended the FFD’s choice to utilize its IT vendor to perform the search out of convenience does not allow the FFD to pass said cost onto the Complainant. *See* Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-154 (June 2008)(holding that a special service charge including a fee for staff IT training was unreasonable and unwarranted).

The Complainant alleged that the proposed special service charge is nothing more than retaliation against him for previous OPRA requests seeking e-mails; several of which were the subject of complaints filed with the GRC. The Complainant argued that because his requests contained the requisite criteria, and because he explicitly noted the Custodian’s obligation to search for responsive e-mails in correspondence prior to the filing of these complaints, the imposition of a special service charge here is unreasonable and unwarranted. The Complainant also noted that the Council’s decision in Verry was cited on multiple occasions in decisions the Council rendered against FFD prior to the submission of these requests; thus, the Custodian and Counsel cannot claim that they were unaware of the Council’s established precedent.

Further, the Complainant argued that prevailing case law supports that the proposed charge is unreasonable, unwarranted and was imposed to deliberately stonewall access to the responsive records. For example, the Council previously held that a custodian cannot charge for records already in electronic format. Wolosky v. Twp. of Randolph (Morris), GRC Complaint No. 2010-186 (September 2012). Further, in Wolosky v. Sparta Bd. of Educ. (Sussex), GRC Complaint No. 2009-56 (April 2010), the Council held that a custodian could charge actual cost “. . . which ordinarily should not include a charge for labor.” Id. at 7.

Additionally, the Complainant requested that the GRC take judicial notice of all filings in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated August 28, 2012)⁶ to show that the Complainant has used e-mails to provide competent, credible evidence to refute certifications of FFD custodians.⁷ The Complainant alleged that Carter, GRC 2011-76, is one of a long history of attempts by the FFD to impede him access to the very records that he has successfully used to advance the “bedrock principles” of OPRA as stated in Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009). Finally, the Complainant requested that the Council: 1) determine that the Custodian violated OPRA by failing to provide the responsive records within seven (7) business days; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive record under the totality of the circumstances; and 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On October 23, 2013, the Custodian filed Statements of Information (“SOI”) for each complaint.

July 21, 2013 OPRA request

The Custodian certified that he received the Complainant’s OPRA request on July 2, 2013 and responded on July 8, 2013 (seeking an extension) and on July 28, 2013 (advising of a proposed special service charge).

The Custodian certified that in August 2012, the FFD decided that it would utilize its IT vendor to handle the retrieval of e-mail from FFD accounts. The Custodian affirmed that this policy was meant to curtail scrutiny over allegations of withholding e-mails and because the FFD is run by elected officials employing one (1) full time position. Thus, the FFD would provide OPRA requests to the vendor, who would estimate the amount of time necessary to search for and retrieve all response e-mails. The Custodian affirmed that once the IT vendor advised of the

⁶ The GRC notes that the issue in Carter, GRC 2011-76 was the existence of financial disclosure statements and not a special service charge or disclosability of e-mails.

⁷ The Complainant also requested that, in light of the FFD’s “ethical shortcomings,” the GRC develop reasonable guidelines/procedures on how custodians must deal with searching for records when compelling conflicts of interest exist. The GRC notes that in its decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-228 *et seq.* (Interim Order dated March 25, 2014), adjudicated during the pendency of this complaint, it declined to adjudicate any possible conflict of interest issues as OPRA does not expressly afford the GRC the opportunity to do so. N.J.S.A. 47:1A-7(b).

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amount of time necessary to perform a search, he would utilize the 14-point analysis to determine whether a special service charge was warranted. The Custodian certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. What records are requested?

E-mail communications and correspondence between eight (8) individuals.

2. Give a general nature description and number of the government records requested.

See above. The subjects of the e-mails and correspondence regard an appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01. The Custodian stated that after Network Blade began their search, it was determined that there was potential for voluminous records. Further, because of the variations present in the request, all records would need to be reviewed individually to determine responsiveness.

3. What is the period of time over which the records extend?

From April 12, 2013 through July 1, 2013.

4. Are some or all of the records sought archived or in storage?

All records would be electronically maintained on the FFD's server or located in the FFD offices.

5. What is the size of the agency (total number of employees)?

One (1) employee for the entire agency.

6. What is the number of employees available to accommodate the records request?

One (1), which is the only employee. However, this employee is also responsible for performing all other administrative duties of the FFD.

7. To what extent do the requested records have to be redacted?

Not sure, all potentially responsive records would have to be reviewed. The Custodian noted that he could foresee certain records needing redactions for attorney-client privileged information.

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?

FFD's only employee makes \$20.00 an hour. Network Blade, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take three (3) hours to locate, retrieve, group and convert the records. These three (3) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

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?

FFD's only employee could monitor inspection at \$20.00 an hour, but any examination would need to be conducted by Counsel.⁸ This cost would have been passed to the Complainant.

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?

N/A.

11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?

FFD felt it best to utilize Network Blade to respond to OPRA requests seeking e-mails for several reasons. As noted, the Custodian is an elected official with a full-time job and limited time for requests. Further, all officials are elected to three (3) year terms and job duties could change almost annually. Further, given the recent history of OPRA requests and the fact that FFD employs one (1) full time person, FFD felt it best to utilize the IT vendor as it was most qualified for these requests.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

Network Blade, LLC at an hourly rate of \$120.00.

13. What is the availability of information technology and copying capabilities?

Full availability.

⁸ The GRC notes that the Custodian included arguments for charging a monitoring fee by Counsel. The evidence of record indicates that a monitoring fee was not included.

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

The IT vendor, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take three (3) hours to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge multiple times, but did not attempt to reach a compromise on the fee. Further, the Custodian asserted that because the Complainant failed to agree to the proposed special service charge, he had no choice but to deny the Complainant access to the responsive records.

August 1, 2013 OPRA requests

The Custodian certified that he received the Complainant's OPRA requests on August 2, 2013 and responded on August 11, 2013 advising the Complainant of a proposing special service charge. The Custodian certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. What records are requested?

OPRA Request No. 1: E-mail communications between nine (9) individuals.

OPRA Request No. 2: E-mail communications between eight (8) individuals.

2. Give a general nature description and number of the government records requested.

OPRA Request No. 1: The subjects of the e-mails and correspondence are about an appeal of appeal of the Franklin Township Municipal Ethics Board's "Resolution of Violation" issued on April 12, 2013 in the matter of James Wickman, Docket No. 11-01.

OPRA Request No. 2: The subjects of the e-mails and correspondence are about The Palace at Somerset, Somerset, NJ.

The Custodian stated that after Network Blade began their search, it was determined that there was potential for voluminous records. Further, because of the variations present in the request, all records would need to be reviewed individually to determine responsiveness.

3. What is the period of time over which the records extend?

From May 1, 2013 through August 1, 2013.

4. Are some or all of the records sought archived or in storage?

All records would be electronically maintained on the FFD's server or located in the FFD offices.

5. What is the size of the agency (total number of employees)?

One (1) employee for the entire agency.

6. What is the number of employees available to accommodate the records request?

One (1), which is the only employee. However, this employee is also responsible for performing all other administrative duties of the FFD.

7. To what extent do the requested records have to be redacted?

Not sure, all potentially responsive records would have to be reviewed. The Custodian noted that he could foresee certain records needing redactions for attorney-client privileged information.

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?

OPRA request No. 1: Network Blade has estimated it will take three (3) hours to locate, retrieve, group and convert the records. These three (3) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

OPRA request No. 2: Network Blade has estimated it will similarly take three (3) hours to locate, retrieve, group and convert the records. These three (3) hours are not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.

FFD's only employee makes \$20.00 an hour. Network Blade, whom is definitely qualified to perform the search charges \$120.00 an hour.

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?

FFD's only employee could monitor inspection at \$20.00 an hour, but any examination would need to be conducted by Counsel.⁹ This cost would have been passed to the Complainant.

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?

N/A.

⁹ The GRC notes that the Custodian included arguments for charging a monitoring fee by Counsel. The evidence of record indicates that a monitoring fee was not included.

11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?

FFD felt it best to utilize Network Blade to respond to OPRA requests seeking e-mails for several reasons. As noted, the Custodian is an elected official with a full-time job and limited time for requests. Further, all officials are elected to three (3) year terms and job duties could change almost annually. Further, given the recent history of OPRA requests and the fact that FFD employs one (1) full time person, FFD felt it best to utilize the IT vendor as it was most qualified for these requests.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

Network Blade, LLC at an hourly rate of \$120.00.

13. What is the availability of information technology and copying capabilities?

Full availability.

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

The IT vendor, whom is definitely qualified to perform the search charges \$120.00 an hour and has estimated it will take three (3) hours per OPRA request to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge, but did not attempt to reach a compromise on the fee. Further, the Custodian asserted that because the Complainant failed to agree to the proposed special service charge, he had no choice but to deny the Complainant access to the responsive records.

Regarding the request for an extension, the Custodian certified that due to the number of requests received around the time of the subject OPRA requests, he accidentally sent the Complainant a request for an extension on August 20, 2013. This was because the Custodian was making an effort to avoid past situations where the FFD failed to respond to OPRA request within seven (7) business days.

Additional Submissions:

On November 11, 2013, the Complainant's Counsel, via letter, first noted that the Custodian failed to submit a document index to the GRC in accordance with Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007). Counsel further argued that although the Custodian attempted to paint FFD as an overburdened agency, it does not fall within the limits provided for in OPRA allowing for limited OPRA hours. N.J.S.A. 47:1A-5(a).

Counsel contended that the Custodian, who chose to run for office, is paid a \$5,000 stipend and is by no means “virtually volunteer.” Counsel also asserted that any inability for FFD to appropriately staff their agency should not affect the Complainant’s ability to request and receive records as provided for in OPRA.

Finally, Counsel contended that the Custodian’s 14-point analysis was flawed and the subject OPRA requests do not warrant a special service charge. Further, Counsel asserted that there should be no need to “convert” any e-mails because they are, by their very nature, already in the Complainant’s preferred medium of electronic format.

On December 28, 2013, the Custodian’s Counsel requested, via letter, that the GRC expedite this complaint based on the Appellate Division’s denial of FFD’s motion for leave to appeal in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 *et seq.* (Interim Order dated October 29, 2013) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013). Counsel asserted that the GRC should immediately order disclosure of all records because the Custodian has not disclosed same. Counsel further argued that it is now undeniable that the Custodian knowingly and willfully violated OPRA by knowingly denying access to this request in spite of being aware of the Council’s holdings in Carter.

Analysis

Special Service Charge

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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

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 the variety of factors discussed in The Courier Post v. Lenape Reg’l High Sch., 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: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Here, the Custodian has provided a response to questions posed by the GRC that reflect the analytical framework outlined in the Courier Post regarding the proper assessment of a special service charge. The Custodian argued the necessity of Network Blade’s hourly cost of \$120.00 being passed onto the Complainant in order to perform:

1. Two (2) hours of work to disclose records responsive to the Complainant’s July 1, 2013 OPRA request.
2. Three (3) hours of work to disclose records responsive to the Complainant’s August 1, 2013 OPRA request No. 1.
3. Three (3) hours of work to disclose records responsive to the Complainant’s August 1, 2013 OPRA request No. 2.

The current issue is similar in principle to one issue contemplated by Court in Courier Post. There, the Court 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. In reaching this decision, the Court reasoned that “[t]he 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 [redactions].” Id. at 203-204. *But see* Fisher v.

Div. of Law, 400 N.J. Super. 61 (App. Div. 2008)(affirming the Council’s decision that the custodian could charge for deputy attorney general time spent retrieving and redacting records based on special circumstances).

The Council later applied the Court’s decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). There, the custodian sought to charge the attorney’s hourly rate of \$150.00 for 2.5 to 3 hours for reviewing 78 pages of invoices. The Council, citing to Courier Post, and noting that OPRA does not prohibit a public agency’s use of an attorney to advise, supervise or even to perform such redactions, determined that:

[A]lthough 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 . . . 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.

Id. at 13. *See also* Nummermacker v. City of Hackensack, 2014 N.J. Super. Unpub. LEXIS 1287 (May 27, 2014).

In the matter currently before the Council, the GRC first notes that the Complainant’s three (3) OPRA requests, submitted a month apart, seek e-mails over a limited time frame of approximately three (3) months. The Custodian has proposed passing the cost of utilizing Network Blade to search for and retrieve a relatively unknown number of responsive records between as many as nine (9) people that would take roughly eight (8) hours total if the time for all three (3) requests is added together.

In part, this action is not any different from passing the cost of utilizing an attorney to retrieve and redact invoices. A custodian’s duties under OPRA include complying with “a request to inspect, examine, copy, or provide a copy of a government record.” N.J.S.A. 47:1A-5(g). As in Carter, although OPRA does not prohibit assistance from other employees, officials, vendors, *etc.*, this does not necessarily mean that a custodian may charge for the assistance any time it is utilized. *See also* Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014).

The evidence here indicates that a search for records responsive to the Complainant’s OPRA request could be adequately performed by the employee and/or persons identified in the request. As in both Courier Post, and Carter, and notwithstanding both parties’ arguments on the number of persons able to accommodate OPRA requests, the GRC is not satisfied that utilizing Network Blade falls within an extraordinary amount of time or effort, or that no other person is capable of searching for the responsive records. Further, although utilizing Network Blade might

be the most succinct way to search for all responsive e-mails, the evidence of record does not support that doing so is such a necessity that the Custodian had no other option. Also, given current programs such as Microsoft Outlook®, searching for e-mails/electronic correspondence does not take an IT professional level of expertise. Thus, the proposed fee is unwarranted here and the Custodian should disclose the responsive records.

The GRC notes that, for the July 1, 2013 OPRA request, the Complainant conditioned his granting of extensions on the Custodian providing access to records beyond the date of the OPRA request. However, such a condition resulted in an on-going request for records. The GRC has previously decided that on-going requests are not valid under OPRA. *See Blau v. Union Cnty.*, GRC Complaint No. 2003-75 (January 2005) and *Paff v. Neptune Twp. Hous. Auth. (Monmouth)*, GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). Accordingly, the Custodian will not be required to disclose records created either beyond the time frame specified in each of the subject OPRA requests or beyond the date on which the Complainant submitted each OPRA request.

Therefore, the Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post*, 360 *N.J. Super.* at 199; *Carter*, GRC 2011-71. Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. *See Blau*, GRC 2003-75.

Knowing & Willful

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests, and that an extraordinary amount of time and effort was required. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch.*, 360 *N.J. Super.* 191, 199 (Law Div. 2002); *Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC

Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian shall disclose the records responsive to each of the Complainant's OPRA requests that fall within the specified time frame and must identify any records that are redacted and state the basis for redacting same. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005).

2. **The 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 1:4-4,¹⁰ to the Executive Director.¹¹**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2013-281, 2013-282 & 2013-283 – Findings and Recommendations of the Executive Director