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

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

February 18, 2025 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint No. 2014-137 and 2014-138

At the February 18, 2025, public meeting, the Government Records Council ("Council") considered the February 11, 2025, 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 the Council dismiss this consolidated complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on January 21, 2025. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 18th Day of February 2025

John A. Alexy, 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 20, 2025

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
February 18, 2025 Council Meeting

Jeff Carter[1]
Complainant

GRC Complaint Nos. 2014-137
and 2014-138[2]

v.

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

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through May 30, 2011, regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through June 30, 2011, regarding many audio recordings and videos referenced in a January 13, 2011 e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski[4]
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the February 19, 2020 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] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA) and Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrman & Knopf, LLP (Saddle Brook, NJ).
[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).
[4] The current Custodian of Record is Timothy Janho.

1. Since the Franklin Fire District No. 1 has failed to cure significant issues of contested facts addressed in Carter v. Franklin Fire Dist. No. 1 (Somerset), 2019 N.J. Super. Unpub. LEXIS 590 (App. Div. 2019), this consolidated complaint should be referred to the Office of Administrative Law for a fact-finding hearing to resolve: 1) the detailed search each individual engaged in to locate responsive records, inclusive of which e-mail accounts they searched and how they searched them; 2) whether each party identified responsive e-mails and how they transmitted them to the Custodian for review and disclosure; and 3) whether the individuals located e-mails that contained "Bcc" information and whether each was disclosed inclusive of that information to the Complainant. Once the contested facts are resolved, the Office of Administrative Law shall determine whether the previous and/or current Custodian unlawfully denied access to any additional e-mails and/or those containing "Bcc" information.

2. If applicable and for purposes of efficacy, the Office of Administrative Law should determine whether the previous or current Custodian, or any other searching parties knowingly and willfully violated OPRA. Finally, the Office of Administrative Law should address the issue of prevailing party attorney's fees as it relates to all actions after the Council's January 31, 2017 Final Decision.

Procedural History:

On February 27, 2020, the Council distributed its Interim Order to all parties. On September 2, 2020, this consolidated complaint was transmitted to the Office of Administrative Law ("OAL"). On January 21, 2025, Complainant's Counsel sent a letter to the OAL withdrawing the consolidated complaint based on a resolution between the parties. On February 7, 2025, the OAL returned the consolidated complaint back to the GRC marked "WITHDRAWAL."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this consolidated complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on January 21, 2025. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

February 11, 2025

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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 26, 2020 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint No. 2014-137 and 2014-138

At the February 26, 2020 public meeting, the Government Records Council ("Council") considered the February 19, 2020 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Since the Franklin Fire District No. 1 has failed to cure significant issues of contested facts addressed in Carter v. Franklin Fire Dist. No. 1 (Somerset), 2019 N.J. Super. Unpub. LEXIS 590 (App. Div. 2019), this consolidated complaint should be referred to the Office of Administrative Law for a fact-finding hearing to resolve: 1) the detailed search each individual engaged in to locate responsive records, inclusive of which e-mail accounts they searched and how they searched them; 2) whether each party identified responsive e-mails and how they transmitted them to the Custodian for review and disclosure; and 3) whether the individuals located e-mails that contained "Bcc" information and whether each was disclosed inclusive of that information to the Complainant. Once the contested facts are resolved, the Office of Administrative Law shall determine whether the previous and/or current Custodian unlawfully denied access to any additional e-mails and/or those containing "Bcc" information.

2. If applicable and for purposes of efficacy, the Office of Administrative Law should determine whether the previous or current Custodian, or any other searching parties knowingly and willfully violated OPRA. Finally, the Office of Administrative Law should address the issue of prevailing party attorney's fees as it relates to all actions after the Council's January 31, 2017 Final Decision.

Interim Order Rendered by the
Government Records Council
On The 26th Day of February 2020

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 28, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting

Jeff Carter[1]
Complainant

GRC Complaint Nos. 2014-137 and 2014-138[2]

v.

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

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through May 30, 2011, regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through June 30, 2011, regarding many audio recordings and videos referenced in a January 13, 2011 e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski[4]
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the 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, found 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] 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).
[4] The current Custodian of Record is Timothy Janho.

$1,080.00, representing 3.6 hours of service at $300.00 per hour, or a decrease of 1.2 hours totaling $360.00.

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 $6,720.00, representing the adjusted figure of 22.4 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.

Procedural History:

On February 3, 2017, the Council distributed its Final Decision to all parties.

On March 7, 2017, the Complainant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division.[5] On March 15, 2019, the court affirmed in part, reversed in part, and remanded in part. Carter v. Franklin Fire Dist. No. 1 (Somerset), 2019 N.J. Super. Unpub. LEXIS 590 (App. Div. 2019). In affirming the Council's decision, the court held that the Custodian properly provided responsive records in .pdf format because the Complainant did not specify that he sought e-mails in "native or original format." Id. at 17. However, the court reversed and remanded on the issue of whether there existed in the record sufficient detail as to Franklin Fire District No. 1's ("FFD") search for responsive records. The court reasoned that the Custodian did not certify that:

> [The Custodian] does not certify that he conducted the searches himself, was present during the searches or otherwise supervised the searches in a meaningful way . . . Further, the [Statement of Information] SOIs do not provide any detail as to the process and scope of the search for responsive e-mails.
>
> [Id. at 13-14.]

The court also noted that the certifications did not identify whether any of the e-mails contained "[B]ccs" and whether the FFD actually performed a search for them. The court held that instead, the Council "inferred" that none of the disclosed e-mails contained Bccs. Id. at 14. The court thus remanded back to the Government Records Council ("GRC") to obtain certifications "detailing the scope of its search for documents responsive" to the subject OPRA requests. Id. at 15.

On July 16, 2019, in accordance with the remand in Carter, 2019 N.J. Super. Unpub. LEXIS 590, the GRC sought additional information from the Custodian. Therein, the GRC requested that the Custodian provide the following:

[5] While on appeal, the court consolidated these complaints with an appeal filed in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint Nos. 2014-266 and 2014-267 (January 2017). Those complaints will be addressed separately in another adjudication.

1. Please provide a detailed explanation of each individual's search for records responsive to the Complainant's March 19, 2014 OPRA requests. Each individual contacted to perform a search is required to submit a certification to include:
    a. A step-by-step accounting of the search conducted.
    b. Whether the individual identified responsive e-mails that included "Bccs" therein.
2. Should any e-mails including "Bccs" be identified, the Custodian shall provide a certification as to the date he disclosed them to the Custodian, with supporting documentation.

The GRC stated that the Custodian submit all requested legal certifications by close of business on July 31, 2019.

On July 24, 2019, Custodian's Counsel e-mailed the GRC seeking an extension of thirty (30) days to respond to the request for additional information. Counsel noted that he had to obtain legal certifications from a number of individuals both within and outside of the FFD and that those searches were conducted some time ago; thus, an extension would be necessary under the circumstances. On the same day, Complainant's Counsel objected to any extensions given the amount of time since the court's decision in Carter, 2019 N.J. Super. Unpub. LEXIS 590. Custodian's Counsel and Complainant's Counsel each submitted an additional e-mail arguing their position. On August 2, 2019, the GRC granted an extension through August 16, 2019 and provided a basis for its reasoning in not providing a full thirty (30) calendar days as requested.

On August 16, 2019, Custodian's Counsel's responded to the GRC's request for additional information attaching twelve (12) legal certifications. Counsel noted that three (3) certifications remained outstanding, which he would provide as soon as they became available. Counsel further stated that a fourth certification could not be obtained because the former commissioner was deceased.

On October 9, 2019, Complainant's Counsel stated that although Custodian's Counsel expressed that additional legal certifications would be forthcoming, he had yet to provide the additional responses. Counsel contended that the failure to provide all the required legal certifications resulted in a violation of the GRC's request for additional information. Counsel thus requested that the GRC provide an explanation as to its position on the missing certifications. On October 28, 2019, the GRC responded via e-mail advising that sufficient time had passed. The GRC thus provided a second and final notification to Custodian's Counsel to provide the outstanding legal certifications prior to October 31, 2019.

On October 31, 2019, Custodian's Counsel again responded to the GRC's request for additional information attaching two (2) legal certifications. Counsel noted that he was unable to obtain a certification from Melissa Kosensky.

On November 11, 2019, Complainant's Counsel submitted a letter brief addressing the FFD's response to the GRC's request for additional information. Therein, Counsel reiterated that the FFD failed to timely comply with the time frames set forth by the GRC. Further, Counsel argued that Ms. Kosensky was in "[c]ontempt of Council" because she failed to submit a legal

certification. Complainant's Counsel also argued that he identified several issues with the submitted legal certifications as follows:

- Szymborski Certification: Mr. Symborski's failure to identify whether e-mails from personal or FFD accounts were disclosed to the Complainant resulted in disputed material facts as to the number of responsive e-mails located, withheld, and/or disclosed.
- Danielsen Certification: Mr. Danielsen's insufficient certification through the use of "[a]ny responsive records" resulted in disputed material facts as to the number of responsive e-mails located, withheld, and/or disclosed.
- Pongratz Certification: Mr. Pongratz's failure to identify when the FFD contacted him to perform a search resulted in disputed material facts as to when he was contacted and whether he searched his personal or FFD e-mail account.
- Braslow and Cooper Certifications: Both Mr. Braslow and Mr. Cooper's failure to identify whether they provided any responsive records to the Custodian resulted in disputed material facts as to what search each actually performed.
- Goldberg Certification: Mr. Goldberg's failure to elaborate on the search undertaken or state whether he actually located responsive e-mails resulted in disputed material facts. Mr. Goldberg also was in "[c]ontempt of Council" for failing to respond prior to August 16, 2019.
- Nelson Certification: The FFD's failure to contact Ms. Nelson until October 9, 2019 proved that the FFD failed to try and obtain responsive records. The certification also indicates that FFD members utilized a second e-mail address but failed to certify whether they searched each account within their control. Ms. Nelson; however, should not be held culpable for a late response because she was not notified of the certification requirement until after the August 16, 2019 deadline expiration.

Counsel thus argued that the instant complaint should be sent for a fact-finding hearing based on the above.[6] Counsel further requested a "summary and expeditious adjudication" as provided for in OPRA and the GRC's regulations. N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.1(c). Counsel finally requested that the Council grant any additional relief it deemed appropriate here.

Analysis

Contested Facts

The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts has arisen from a custodian's compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. See Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

[6] Complainant's Counsel also argued that the GRC failed to address whether the FFD's "vilification" of the Complainant, mostly through Mr. Goldberg, precipitated the unlawful denial of access at issue here.

In remanding the instant consolidated complaint to the GRC, the Appellate Division reasoned that:

> It is undisputed that [the Complainant] explicitly requested [B]cc e-mails in his March 2014 requests, and "all" e-mails of a defined period and subject matter in this July 2014 requests. [The previous Custodian's] May 16, 2014 and August 11, 2014 certifications and SOIs make no specific mention of whether the e-mails contained [B]ccs and whether or not the [FFD] searched for those records.
>
> [The previous Custodian's] December 24, 2014 certification similarly contains no explanation regarding who searched for responsive documents or his role in that process. Nor can we glean from that certification if [the previous Custodian's] search differed from the delegated search described in his July 13, 2015 certification related to the July 2014 requests.
>
> [Id. at 14-15.]

The court thus held that "the record does not contain substantial credible evidence to support the GRC's inference that the [FFD] searched for, and provided, responsive [B]cc e-mails, at a minimum." Id. at 15. The court thus required the GRC to obtain supplemental certifications as to the "scope of the search for documents responsive" to the subject OPRA requests. Id.

Following the remand, on July 17, 2019, the GRC sought certifications in accordance with the court's decision. The GRC specifically sought from each individual identified in the subject OPRA requests a detailed explanation of the search conducted to include a step-by-step description, as well as an explanation as to whether the searching parties located any e-mails containing "Bccs." The GRC also required the searching parties to certify to whether they identified and disclosed any e-mails containing "Bcc" e-mails with supporting documentation. Custodian's Counsel initially sought and obtained an extension through August 16, 2019. On the final day of the extension, Counsel provided twelve (12) certifications, noted that three (3) remained outstanding and that one of the searching parties was deceased. Counsel stated that he would provide the outstanding certifications upon receipt.

Nearly two (2) months later, Complainant's Counsel sought a status update on the remaining certifications. The GRC provided the FFD a final date of October 31, 2019 to submit the final certifications. On the last day to respond, Custodian's Counsel submitted two (2) additional certifications and noted that he was unable to obtain a certification from one party: Ms. Kosensky. Complainant's Counsel subsequently submitted a response to the certifications. Therein, Counsel argued that the certifications were insufficient for several reasons and argued that the consolidated complaint was ripe for a fact-finding hearing.

After reviewing the court's decision in Carter, 2019 N.J. Super. Unpub. LEXIS 590, as well as the parties' submissions, the GRC agrees that this consolidated complaint should be referred to the OAL for a fact-finding hearing. In reaching this conclusion, the GRC recognizes that the passage of time could have been a hinderance to the searching parties' recollection of the search conducted. Notwithstanding, almost every certification contained vague details as to the

search conducted, which e-mail accounts were searched, and whether e-mails containing "Bcc" information was located. Further, no parties directly addressed the potential existence and disclosure of e-mails containing "Bccs", as required in both the Appellate Division's remand and GRC's July 17, 2019 request. Instead, they only certified generically that they included the "Bcc" field as part of their search. As noted by the court, the GRC cannot simply "infer[]" that the absence of an explanation supports that the individual searchers did not locate e-mails containing "Bcc" information responsive to the subject OPRA requests.

Further, Complainant Counsel's concern as it relates to Ms. Nelson's certification is justified. That Ms. Nelson certified she was not contacted prior to October 9, 2019 about the subject OPRA requests brings into question the full sufficiency of the FFD's search. Also, the absence of Ms. Kosensky's response (either voluntarily or otherwise) does not allow the GRC to accurately determine whether the FFD met is obligation to search for and provide responsive e-mails in total. For all these reasons, the GRC is persuaded that a fact-finding hearing is required to fully address the issues remanded by the court.

Accordingly, since the FFD has failed to cure significant issues of contested facts addressed in Carter, 2019 N.J. Super. Unpub. LEXIS 590, this consolidated complaint should be referred to the OAL for a fact-finding hearing to resolve: 1) the detailed search each individual engaged in to locate responsive records, inclusive of which e-mail accounts they searched and how they searched them; 2) whether each party identified responsive e-mails and how they transmitted them to the Custodian for review and disclosure; and 3) whether the individuals located e-mails that contained "Bcc" information and whether each was disclosed inclusive of that information to the Complainant. Once the contested facts are resolved, the OAL shall determine whether the previous and/or current Custodian unlawfully denied access to any additional e-mails and/or those containing "Bcc" information.

Further, if applicable and for purposes of efficacy, the OAL should determine whether the previous or current Custodian, or any other searching parties knowingly and willfully violated OPRA. Finally, the OAL should address the issue of prevailing party attorney's fees as it relates to all actions after the Council's January 31, 2017 Final Decision.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Since the Franklin Fire District No. 1 has failed to cure significant issues of contested facts addressed in Carter v. Franklin Fire Dist. No. 1 (Somerset), 2019 N.J. Super. Unpub. LEXIS 590 (App. Div. 2019), this consolidated complaint should be referred to the Office of Administrative Law for a fact-finding hearing to resolve: 1) the detailed search each individual engaged in to locate responsive records, inclusive of which e-mail accounts they searched and how they searched them; 2) whether each party identified responsive e-mails and how they transmitted them to the Custodian for review and disclosure; and 3) whether the individuals located e-mails that contained "Bcc" information and whether each was disclosed inclusive of that information to the Complainant. Once the contested facts are resolved, the Office of Administrative Law

shall determine whether the previous and/or current Custodian unlawfully denied access to any additional e-mails and/or those containing "Bcc" information.

2. If applicable and for purposes of efficacy, the Office of Administrative Law should determine whether the previous or current Custodian, or any other searching parties knowingly and willfully violated OPRA. Finally, the Office of Administrative Law should address the issue of prevailing party attorney's fees as it relates to all actions after the Council's January 31, 2017 Final Decision.

Prepared By: Frank F. Caruso
Executive Director

February 19, 2020

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

Complaint Nos. 2014 137 and 2014-138

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 1.2 hours totaling $360.00.

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 $6,720.00, representing the adjusted figure of 22.4 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 Carter[1]
Complainant

GRC Complaint Nos. 2014-137 and 2014-138[2]

v.

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

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through May 30, 2011, regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through June 30, 2011, regarding many audio recordings and videos referenced in a January 13, 2011 e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

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] 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).

1. Regarding Complainant Counsel's first 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 hour 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 $5,640.00, representing the adjusted figure of 18.8 hours of service at $300 per hour, or an increase of $300.00.**

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. On December 21, 2016, Custodian's Counsel filed an opposition to the Brief. Therein, Complainant's Counsel sought an additional

$1,440.00, representing 4.8 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 May 20, 2015.

On December 21, 2016, Custodian's Counsel filed an opposition to the Brief ("Opposition"). Therein, the Custodian's Counsel disputed five (5) entries totaling 2.5 hours wherein Complainant's Counsel sought reimbursement for reviewing the GRC's scheduling notices for this complaint (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 $810.00, or from $1,440.00 to $630.00.

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 (4^{th}) business day after receipt of the Council's Order, the Complainant's Counsel submitted his Brief. On December 21, 2016, the first (1^{st}) 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 $1,440.00, representing 4.8 hours of work at $300 per hour. This fee is in addition to the currently awarded

amount of $5,640.00, representing the adjusted figure of 18.8 hours of service at $300 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	
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
5/03/2016	Receive and review Complainant's e-mail seeking a copy of "Table A" referenced in the Final Decision	0.1	$30.00		0.1	$30.00
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 Carter v. Franklin Fire Dist. No. 1 (Somerset), 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, which included a copy of "Table A."	0.2	$60.00	See above.	0.2	$60.00
5/20/2016	Legal research (limited to portion of reconsideration addressing attorney's fees): New Jerseyans for Death Penalty Moratorium v. NJ Dep't of Corr., 185 N.J. 137 (2005) R.M. v. Supreme Court of NJ, 190 N.J. 1 (2007) Sitar Co. v. 222 Realty, Inc., 2005 N.J. Super. Unpub LEXIS 646 (App. Div. 2005)(*cert. denied* 186 N.J. 257 (2006))	N/C	$0.00	Complainant's Counsel noted that he included a charge for this research as part of his supplemental fee brief in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328, *et seq*.	N/C	$0.00
5/21/2016	Draft request for reconsideration brief – 3 pages (16-18).	0.6	$180.00	Of the four (4) paragraphs addressing fees, just over half of was also present in the reconsideration submitted	0.3	$90.00

				relevant to Carter, GRC 2013-328, *et seq*, 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		
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 Carter, GRC 2013-328, *et seq*. (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 Order.	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. Moreover, the only change between the brief submitted in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281, *et seq*., and the instant complaint is the total fee. Based on this duplication of work, the Complainant's	0.1	$30.00

				Counsel should only receive fees for that time it took to alter the hours and total amount of fees sought, or 0.1.		
12/20/2016	Draft detailed time sheet.	0.5	$150.00	The total charge is unreasonable because the Complainant's Counsel made few modifications of the timesheets he submitted in Carter, GRC 2013-328, and Carter, GRC 2013-281. A comparison of those timesheets the one submitted here offers sufficient evidence of these minimal changes. 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:		4.8	$1,440.00		**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. Specifically, 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 performed duplicative work in both the May request for reconsideration and the Brief. 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 1.2 hours totaling $360.00.

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 $6,720.00, representing the adjusted figure of 22.4 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 1.2 hours totaling $360.00.

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 $6,720.00, representing the adjusted figure of 22.4 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
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint No. 2014-137 and 2014-138

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 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 hour 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 $5,640.00, representing the adjusted figure of 18.8 hours of service at $300 per hour, or an increase of $300.00.**

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 Carter[1]
Complainant

GRC Complaint Nos. 2014-137 and 2014-138[2]

v.

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

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through May 30, 2011, regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through June 30, 2011, regarding many audio recordings and videos referenced in a January 13, 2011 e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the April 19, 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, found that:

[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).

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 (May 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, the Council finds that the time expended was not reasonable. The Council finds that 17.8 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of $5,340.00, representing 17.80 hours of service at $300 per hour.**

3. Since Counsel did not request a lodestar adjustment, no enhancement is 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 the Council's 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 twenty (20) 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 twenty (20) pages. The remaining seventeen (17) pages of the brief either rehash previously submitted arguments or posit 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 July 9, 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 frame either to 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 November 18, 2014; Complainant's Counsel received that Order on November 19, 2014. In its subsequent April 28, 2015 Interim Order, the Council found that the Custodian did not knowingly or willfully violate OPRA; Complainant's Counsel received that Order on April 29, 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.

[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.

The Complainant's Counsel cited to NJ Court Rules R. 4:49-2 as legal basis to accept his July 9, 2015 brief. This 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 two instances where the Council denied a portion of his fee. First, the Complainant's Council 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 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 0.1 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.[5] 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.

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 hour to prepare the prevailing party fee

[5] The total amount in question is approximately $60.00 out of a total award of $5,340.00, or 1% of the total award.

application is reasonable and therefore eligible for reimbursement. Accordingly, the Council shall revise its prior counsel fee award to include an additional $300 as payment for 1 work hour 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 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 hour 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 $5,640.00, representing the adjusted figure of 18.8 hours of service at $300 per hour, or an increase of $300.00.**

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 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 hour 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 $5,640.00, representing the adjusted figure of 18.8 hours of service at $300 per hour, or an increase of $300.00.**

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
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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. 2014-137 and 2014-138

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the April 19, 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 (May 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, the Council finds that the time expended was not reasonable. The Council finds that 17.8 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of $5,340.00, representing 17.80 hours of service at $300 per hour.**

3. Since Counsel did not request a lodestar adjustment, no enhancement is 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 Carter[1]
Complainant

GRC Complaint Nos. 2014-137 and 2014-138[2]

v.

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

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through May 30, 2011, regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper III, and Richard Braslow from January 13, 2011, through June 30, 2011, regarding many audio recordings and videos referenced in a January 13, 2011 e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

Background

April 28, 2015 Council Meeting:

At its April 28, 2015 public meeting, the 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, found that:

[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).

1. The Custodian did not fully comply with the Council's November 18, 2014 Interim Order. Although he timely responded within the extended time frame by providing access to responsive records in an acceptable electronic format and simultaneously provided certified confirmation of compliance to the Executive Director, he failed to provide one (1) attachment as part of his disclosure. However, the GRC declines to order disclosure of same because the Custodian included this attachment as part of his April 13, 2015 response to the GRC's request for additional information.

2. The Custodian did not bear his burden of proving that the proposed special service charge was reasonable or warranted, and he failed to comply fully with the Council's November 18, 2014 Interim Order. However, the Custodian ultimately disclosed all responsive records. 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 November 18, 2014 Interim Order, 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 GRC determined that the proposed special service charge was unreasonable and ordered disclosure of all records. 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 April 28, 2015 the Council distributed its Interim Order to all parties. On May 20, 2015, the Complainant's Counsel, John A. Bermingham, Jr., Esq. ("Counsel"), filed a certification of services (Certification of John A. Bermingham, Jr., Esq., May 20, 2015 ("Certification") in support of his application for fees ("Application").

Analysis

Compliance

At its April 28, 2015 meeting, the Council permitted the Complainant "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)." Further, the Council provided that 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).

On May 20, 2015, the sixteenth (16th) business day after receipt of the Council's Order, Counsel filed an application for fees ("Application") in compliance with the Interim Order. Neither the Custodian of Franklin Fire District No. 1 nor Custodian's counsel filed opposition to the Application.

Counsel's Application

In his Certification, Counsel certifies that he "spent 35.1 hours working on [Complaint Nos. 137-138] before the GRC." Counsel certifies that before the cases were consolidated, which he editorializes as being "for the [GRC's] own convenience," he was required to review each matter separately; review various aspects of OPRA; prepare and file separate Denial of Access Complaints ("DOA") and various documents on the Complainant's behalf "separately *before* consolidation, and then combined *after* consolidation." Certification, pg. 4, ¶ 6. (emphasis in original). Counsel further states that he prepared the Certification. Finally counsel argues that "the time spent on these matters is certainly reasonable" and that he "consolidated some billing entries as a courtesy." Id.

Counsel, referring to much of what is in his résumé (Exhibit A), seeks an hourly rate of $300 per hour. Certification, pg. 5, ¶ 7. In support of his hourly request, Counsel argues that a New Jersey Court found $350 per hours to be reasonable. *Citing*, DePalma v. Building Inspection Underwriters, 350 N.J. Super. 195, 217-18 (App. Div. 2002). He notes that the Council now determines fee applications, as opposed to the Office of Administrative Law, and requests that the Council find $300 as a reasonable rate. In support of his position, Counsel cites to three fairly recent GRC cases: Deloy v. Twp. of Lyndhurst (Bergen), GRC Complaint No. 2012-128 (November 19, 2013); Tamara White v. Monmouth Cnty. Reg'l High School, GRC Complaint No. 2013-218 (January 28, 2014); and Nevin v. N.J. Dep't of Health and Human Services, GRC Complaint No. 2013-18 (February 25, 2014). In addition, Counsel notes that the GRC awarded Counsel fees at $300 per hour in Carter v. Franklin Fire Dist. #2 (Somerset), GRC Complaint No. 2011-228, and Carter v. Franklin Fire Dist. #2 (Somerset), GRC Complaint No. 2011-262.

Prevailing Party Attorney Fee Award

"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) (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 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 fee 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). What the fee-shifting statutes do not contemplate is 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 (Law Div. 1996) (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)). Nor do they contemplate redundancy. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983) (*citations omitted*).

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 loadstar 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 which counsel must provide in his or her 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 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 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 combined matters, Counsel is seeking a fee award of $10,530.00, representing 35.1 hours of work at $300 per hour. Counsel supports this hourly rate through a recitation of his experience and years in practice. Certification at ¶ 6, Exhibit B.

The Council finds that $300.00 per hour is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Verry v. Borough of S. Bound Brook, GRC Complaint No. 2012-153 (August 2013) ("The rate of $300 is reasonable for [an OPRA] practitioner . . . in this geographical area.") *See also* Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (August 2013); Carter, GRC Complaint No. 2011-262 . Accordingly, the Council finds that Counsel's hourly rate should be assessed at $300.00 an hour 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, 461 U.S. at 434. 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.

With his Certification, Counsel attached as Exhibit B a five (5) page chart itemizing his hours and expenses ("Time Log"). The Time Log contained time entries for the period from March 20, 2014, through May 20, 2015 (the "fee period"). Counsel billed a total of 35.1 hours for a fee of $10,530.00 for services during the fee period. Counsel's description of services included: drafting the Denial of Access Complaint and supporting brief; researching OPRA provisions and other law; drafting, reviewing, and filing brief rebutting the Custodian's Statement of Information and a brief concerning Custodian's compliance with the Interim Order; preparing other correspondence and filing other documents with the GRC; exchanging e-mails and conferences with the Complainant; and exchanging e-mails with the GRC.

Here, Counsel certifies that he has represented the Complainant in many matters before the GRC. Certification, pg. 3 ¶ 6. Notwithstanding, the GRC notes that Counsel expended a

considerable amount of time on basic research. For example, Counsel bills for researching the OPRA statute and administrative code sections, namely N.J.S.A. §§ 47:1A-5(g); 47:1A-6; 47:1A-11 and N.J.A.C. 5:105-2.4 et. sec. Certification, pg. 4, ¶ 6, Exhibit B. These are some of the same statutory sections researched by Counsel in prior matters. *See* Carter GRC Complaint No. 2011-228 (March 25, 2014) and Carter GRC Complaint No. 2011-262 (March 25, 2014). Similarly, Counsel bills for researching O'Shea v. Paff v. Borough of Emerson, No. 9008-07, slip op. at 11-12 (2008) WL 2328239, N.J. Super. (Law Div., June 3, 2008), which he reviewed in the aforementioned Carter, GRC 2001-228, and Carter, GRC 2001-262. Certification, pg. 4, ¶ 6, Exhibit B. Counsel found it necessary to review seminal cases with which even a novice OPRA counsel should be familiar. Finally, Counsel billed to review several cases, involving the same parties and often in almost identical circumstances, some of which he reviewed multiple times in other pending GRC matters. In those cases, the research of same was sometimes within weeks or months of each other. Because of block billing, it is difficult, if not impossible, to know how much time Counsel spent on reviewing which cases; however, the GRC will award attorney's fees for some research in each matters. What is not contemplated by OPRA, however, is awarding attorney's fees to Counsel for reviewing and re-reviewing the same cases over and over, some of which are basic in nature and unaltered by practice. Therefore, it is not recommended that these fees be awarded unless reasonably reduced, as provided for in the attached Table, Exhibit A.

Even if Counsel truly needed to re-review the same cases and research seminal and elementary matters for OPRA practitioners, fee shifting statutes do not contemplate that the losing party be required to pay for the learning curve of the prevailing party's counsel. Planned Parenthood of Central New Jersey, et. al. v. the Attorney General of the State of NJ. et. al., 297 F.3d 253, 271 (3rd Cir. 2001). HIP v. K. Hovnanian, 291 N.J. Super. at 160 (*citations omitted*). "A fee applicant cannot demand a high hourly rate – which is based on his experience, reputation, and a presumed familiarity with the applicable law – and then run up an inordinate amount of time researching that same." Microsoft Corp. v. United Computer Res. of N.J., Inc., 216 F. Supp. 2d 383, 392 (D.N.J. May 23, 2002) (*citations omitted*). "The higher the allowed hourly rate commanded based upon skill and experience, the shorter the time it should require an attorney to perform a particular task." HIP v. K. Hovnanian, 291 N.J. Super. at 160.

Counsel admits that "the same arguments outlined in [the seventeen other matters]" are set forth "in their entirely herein." Currently, the GRC has twelve (12) pending applications, including the within matters. The GRC notes, as Counsel candidly acknowledges, pages of identical arguments, including block quotes, in the numerous filings. Despite their length, the briefs do little to advance Plaintiff's cases; the facts contained in the briefs are adequately set forth in the Complaint, and the legal analysis provides little more than well-settled law. The briefs filed in opposition to the Custodian's SOI provide similar concerns. For example, Counsel seeks a total of five (5) hours to draft and file DOA complaints with supporting briefs, which are strikingly similar. Bermingham Letter Briefs Complaint Nos. 2014-137 and 2014-138, dated May 22, 2014. Similarly, Counsel's two separate briefs in rebuttal of the Custodian's identical SOI are nearly identical, as were the briefs he filed separately. On two occasions, the purpose of the brief was to argue that the Custodian failed to comply with the Interim Order. Finally, the record reveals unnecessary discussions between client and his seemingly well-informed client

(who has filed and litigated approximately seventy other GRC Complaints), concerning such matters as informing the client that the GRC sent a request for an SOI to the Custodian. Additional unnecessary billing for matters of slight importance to the client is included in the attached Table.

By necessity, the review of an application for fees must be conducted on a case-by-case basis. 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). Although the Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), it finds the total time excessive

The GRC conducted a review of the fee application submitted. In so doing, the GRC found that the time spent on the file exceeds that which an experienced OPRA attorney should ordinarily require. Further, much of what Counsel filed was unnecessary and/or redundant. The recommendations of the Executive Director following that review are set forth in the table attached as Exhibit A. For the reasons set forth therein, the Council finds that the time expended was not reasonable. The Council finds that 17.8 hours at $300.00 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of $5,340.00, representing 17.80 hours of service at $300.00 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 (May 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, the Council finds that the time expended was not reasonable. The Council finds that 17.8 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of $5,340.00, representing 17.80 hours of service at $300 per hour.**

3. Since Counsel did not request a lodestar adjustment, no enhancement is awarded.

Prepared By: Ernest Bongiovanni
Staff Attorney

April 19, 2016

State of New Jersey
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CHRIS CHRISTIE
Governor

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CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint Nos. 2014-137 and 2014-138

At the April 28, 2015 public meeting, the Government Records Council ("Council") considered the April 21, 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 did not fully comply with the Council's November 18, 2014, Interim Order. Although he timely responded within the extended time frame by providing access to responsive records in an acceptable electronic format and simultaneously provided certified confirmation of compliance to the Executive Director, he failed to provide one (1) attachment as part of his disclosure. However, the GRC declines to order disclosure of same because the Custodian included this attachment as part of his April 13, 2015, response to the GRC's request for additional information.

2. The Custodian did not bear his burden of proving that the proposed special service charge was reasonable or warranted, and he failed to comply fully with the Council's November 18, 2014, Interim Order. However, the Custodian ultimately disclosed all responsive records. 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 November 18, 2014 Interim Order, 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 GRC determined that the proposed special service charge was unreasonable and ordered disclosure of all records. 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 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

Supplemental Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2014-137 and 2014-138**[2]
Complainant

v.

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

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper, III and Richard Braslow from January 13, 2011, through May 30, 2011, regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper, III, and Richard Braslow from January 13, 2011, through June 30, 2011, regarding "many audio recordings and videos" referenced in a January 13, 2011, e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

Background

November 18, 2014 Council Meeting:

At its November 18, 2014, public meeting, the Council considered the November 10, 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

[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).

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). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014). 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.

2. **The Custodian shall comply with item No. 2 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 November 19, 2014, the Council distributed its Interim Order to all parties. On November 25, 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 26, 2014, the Complainant's Counsel objected to the request for an extension. On December 12, 2014, the GRC granted an extension until December 26, 2014.

On December 24, 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 two (2) OPRA requests.

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

[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.

did not knowingly and willfully violate OPRA; rather, the FFD took a legal stance based on OPRA and prior GRC decisions.

On January 6, 2015, the Complainant's Counsel objected to the Custodian's compliance. First, Complainant's Counsel contended that the Custodian failed to comply because: 1) he provided records in .pdf format as opposed to their original electronic state; and 2) he failed to include all attachments. The Complainant's Counsel asserted that the GRC already addressed the fact that attachments to an e-mail are considered part of the e-mail record itself thus subject to disclosure. *See* Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). The Complainant's Counsel asserted that the Custodian previously failed to disclose attachments as part of his compliance responses 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). The Complainant's Counsel argued that the April 28, 2011, e-mail included an attachment named "image001.jpg" that was not disclosed. The Complainant's Counsel contended that the Custodian continued to delay access to attachments, notwithstanding that the GRC had previously ordered disclosure of same and the Custodian had knowledge that attachments are part of an e-mail record. Id. at 4-5.

The Complainant's Counsel further contended that some records disclosed contained incriminating evidence relevant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-120 (Interim Order dated December 16, 2014). The Complainant's Counsel argued that disclosure only after the Council's Interim Order here represents the Custodian's deliberate and intentional attempt to withhold e-mails when viewed in light of the facts present in Carter, GRC 2014-120.[6]

Finally, the Complainant's Counsel argued that the Custodian deliberately 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). The Complainant's Counsel contended that this issue is exacerbated by the fact that the Custodian attempted to impose a special service charge and obtained a thirty (30) day extension for compliance only to provide eleven (11) total e-mails.

On April 8, 2015, the GRC sought additional information from the Custodian. Specifically, the GRC stated that the Complainant's Counsel argued that the Custodian failed to provide access to all e-mail attachments and pointed to an attachment entitled "image001.jpg" in an April 28, 2011 e-mail to support his argument. The GRC thus requested that the Custodian submit a legal certification to respond to the following:

1. What is the nature of the content in "image001.jpg," attached to the April 28, 2011, e-mail?

[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.

2. Was this attachment provided as part of the compliance package? Regardless of whether it was provided, the GRC requires supporting documentation as part of the response.

The GRC required the Custodian to provide the requested legal certification by close of business on April 13, 2015.

On April 13, 2015, the Custodian responded to the GRC's request for additional information. The Custodian certified that "image001.jpg" attached to the April 28, 2011, e-mail was a "virtual business card" that was attached to an e-mail from Mr. Danielsen and enclosed a copy of same. The Custodian affirmed that he is not aware of whether the Complainant already has this image. He further asserted that the Complainant likely received the image in prior e-mail records, which contain the same image. The Custodian certified that he did not believe the image was responsive or necessary to this OPRA request.

On April 14, 2015, the Complainant's Counsel objected to the Custodian's April 13, 2015, legal certification. The Complainant's Counsel argued that the certification is factually untrue, given that he has already established that attachments to an e-mail are considered part of the e-mail record and must be disclosed. *See* Lewen, GRC 2008-211. The Complainant's Counsel disputed that "image001.jpg" was not responsive or necessary to be disclosed, arguing that the attachment was part of a responsive e-mail and should have been disclosed. The Complainant's Counsel argued that the GRC should immediately order disclosure of the e-mails in their original electronic state based on the Complainant's plain wording of his OPRA request.

Analysis

Compliance

At its November 18, 2014 meeting, the Council ordered the Custodian to disclose the responsive records falling within the specified time frame and identify any records that are redacted (including the basis for the redactions). Additionally, the Custodian was required to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 19, 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 26, 2014.

On November 25, 2014, the Custodian's Counsel sought an extension of thirty (30) business days to respond. Notwithstanding Complainant Counsel's objections, the GRC granted an extension until December 26, 2014. On December 24, 2014, prior to the expiration of the extended time frame to comply, the Custodian provided access to responsive records and submitted certified confirmation of compliance to the Executive Director.

Thereafter, on January 6, 2015, the Complainant's Counsel argued that the Custodian failed to comply with the Council's Order because: 1) he did not disclose records in their original electronic state; and 2) he did not include all attachments. On April 8, 2015, the GRC sought additional information about the attachment that the Complainant's Counsel asserted was not provided. The Custodian timely responded, certifying to the nature of the attachment and that he

believed a virtual business card was not responsive to the OPRA request and not necessary for disclosure. The Complainant's Counsel disputed the Custodian's certification and argued that the attachment should have been disclosed. The Complainant's Counsel also requested that the GRC require disclosure of all e-mails and attachments in their original electronic state.

The GRC rejects the argument that the Custodian did not comply because he did not disclose the e-mails and attachments in their original electronic state. Requiring a public agency to disclose e-mails in their original electronic state would expose the disclosed records to alterations, thus adversely affecting the integrity of those records. Simply put, Complainant's Counsel has not advanced a reasonable argument for disclosure of a record in its original, writable form. Nor did he establish that disclosing the records in .pdf format offers limited access to same. Further, there is no evidence to suggest that disclosing the responsive records in .pdf format, in fact, limited the Complainant's right of access.[7]

However, the GRC accepts the Complainant Counsel's argument that the Custodian should have disclosed the attachment "image001.jpg." Recently, both the Appellate Division and Council have determined that a custodian unlawfully redacted records when those redacted portions were assumed to be "not responsive" to the subject OPRA request. *See* ACLU v. NJ Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014)(holding that OPRA does not provide a custodian the authority to "unilaterally determine what sections of an indisputably public document falls within the scope of a request"); Hyland v. Twp. of Lebanon (Hunterdon), GRC Complaint No. 2012-227 *et seq.* (Interim Order dated June 24, 2014)(holding that redacting information "not relevant to" an OPRA request was not a lawful basis to deny access to redacted material). Withholding an e-mail attachment as not responsive or unnecessary is comparable to redacting parts of a record for the sole reason that the information is "unresponsive" to a particular request. Thus, the Custodian's April 13, 2015, statement that he did not believe disclosure was necessary or that the attachment was unresponsive to the Complainant's OPRA requests is not a sufficient basis to deny access to same.

Therefore, the Custodian did not fully comply with the Council's November 18, 2014, Interim Order. Although he timely responded within the extended time frame by providing access to responsive records in an acceptable electronic format and simultaneously provided certified confirmation of compliance to the Executive Director, he failed to provide one (1) attachment as part of his disclosure. However, the GRC declines to order disclosure of same because the Custodian included this attachment as part of his April 13, 2015, response to the GRC's request for additional information.

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

[7] It should also be noted that the Complainant was a recipient of some of the responsive e-mails and may still possess same in the original electronic state

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 did not bear his burden of proving that the proposed special service charge was reasonable or warranted, and he failed to comply fully with the Council's November 18, 2014, Interim Order. However, the Custodian ultimately disclosed all responsive records. 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 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.

The Complainant filed the instant complaints to dispute the Custodian's proposed special service charge. The Complainant requested that the Council order disclosure of all records responsive to his two (2) OPRA requests. In its November 18, 2014, Interim Order, the Council granted that relief by holding that the proposed charge was unreasonable and ordering the Custodian to disclose the responsive records. For this reason, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's November 18, 2014, Interim Order, 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 GRC determined that the proposed special service charge was unreasonable and ordered disclosure of all records. 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 did not fully comply with the Council's November 18, 2014, Interim Order. Although he timely responded within the extended time frame by providing access to responsive records in an acceptable electronic format and simultaneously provided certified confirmation of compliance to the Executive Director, he failed to provide one (1) attachment as part of his disclosure. However, the GRC declines to order disclosure of same because the Custodian included this attachment as part of his April 13, 2015, response to the GRC's request for additional information.

2. The Custodian did not bear his burden of proving that the proposed special service charge was reasonable or warranted, and he failed to comply fully with the Council's November 18, 2014, Interim Order. However, the Custodian ultimately disclosed all responsive records. 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 November 18, 2014 Interim Order, 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 GRC determined that the proposed special service charge was unreasonable and ordered disclosure of all records. 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: Joseph D. Glover
Executive Director

April 21, 2015

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 18, 2014 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

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and 2014-138

At the November 18, 2014 public meeting, the Government Records Council ("Council") considered the November 10, 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). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014). 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.

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[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."

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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 18th Day of November, 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: November 19, 2014

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of all e-mails between Deborah Nelson, Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper, III and Richard Braslow from January 13, 2011 through May 30, 2011 regarding the Open Public Meetings Act ("OPMA") and/or effective majority.

OPRA request No. 2: Electronic copies via e-mail of all e-mails between Donald Bell, Todd Brown, Jason Goldberg, the Custodian, James Wickman, Joseph Danielsen, Melissa Kosensky, Louis L. Hajdu-Nemeth, Jr., Bernard Louie Pongratz, William T. Cooper, III and Richard Braslow from January 13, 2011 through June 30, 2011 regarding many audio recordings and videos" referenced in a January 13, 2011 e-mail from Mr. Danielsen.

Custodian of Record: Tim Szymborski
Request Received by Custodian: March 19, 2014
Response Made by Custodian: March 20, 2014
GRC Complaint Received: March 24, 2014

Background[4]

Request and Response:

On March 24, 2014, the Complainant submitted two (2) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. On March 20, 2014,

[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).
[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.

on behalf of the Custodian, the Custodian's Counsel responded in writing to both OPRA requests.

Regarding OPRA request No. 1, Counsel stated that the Franklin Fire District No. 1 ("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 one (1) to two (2) hours at the FFD rate of $120.00 per hour to retrieve e-mails. Counsel stated that payment for one (1) hour is required to begin the search. Further, Counsel requested that the Complainant respond advising whether he objected to the charge.

Regarding OPRA request No. 2, Counsel similarly stated that Network Blade estimated approximately one (1) to two (2) hours of time at the FFD rate of $120.00 per hour. Counsel also reiterated that payment of one (1) hour would be required to begin the search and that the Complainant must advise the FFD whether he objected to the charge.

The Complainant responded by e-mail objecting to both charges and arguing that the FFD was defying precedential GRC case law. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-234 (February 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-284 *et seq.* (Interim Order dated October 29, 2013); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-288 (Interim Order dated October 29, 2013). The Complainant also argued that these denials further evidence the FFD's policy of unlawfully denying him access to e-mails that require a simple search to locate.

Denial of Access Complaint:

On March 24, 2014, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council ("GRC"). 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)[5] to show that the Complainant has used e-mails to provide competent, credible evidence to refute certifications of FFD custodians. The Complainant also noted that he already filed several complaints regarding the FFD's attempts to impose a special service charge. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014).[6] The Complainant alleged that the instant complaints display yet another example of FFD's continued bad faith denials.

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

[5] 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.
[6] The Complainant also cited to Carter, GRC 2012-284 *et seq.* and Carter, GRC 2012-288 *et seq.*; however, none of those cases involved the imposition of a special service charge.

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 v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012), 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.

Regarding OPRA request No. 2, the e-mails there referred to records possibly in the possession of Mr. Danielsen[7] based on January 13, 2011 he sent to members of the FFD, including the Custodian. The Complainant also took issue with Mr. Danielsen being the individual searching for e-mails about audio and video he purported to have in his possession.[8]

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 May 16, 2014, the Custodian filed Statements of Information ("SOI") for each complaint. The Custodian certified that he received both OPRA requests on March 19, 2014 and that Custodian's Counsel responded on his behalf on March 20, 2014.

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 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 Complainant 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 twelve (12) individuals.
   OPRA request No. 2: E-mail communication between eleven (11) individuals.

[7] The audio and video records are currently the subject of Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-120, which is currently undergoing adjudication.

[8] The Complainant also requested that the GRC take notice of arguments made in Carter 2012-228 *et seq*., regarding alleged ethical and conflict of interest issues. There, the Council "decline[d] 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)."

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

   OPRA request No. 1: The subjects of the e-mails in regard OPMA and "the effective majority." Further, because of the variations present in the request, all records would need to be reviewed individually to determine responsiveness.
   OPRA request No. 2: The subjects of the e-mails in regard "many audio recordings and videos."

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

   OPRA Request No. 1: From January 13, 2011 through May 30, 2011.
   OPRA Request No. 2: From January 13, 2011 through June 30, 2011.

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 held by the individuals on their personal computers.

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.

   OPRA request No. 1: Network Blade has estimated it will take one (1) to two (2) hours to locate, retrieve, group and convert the records. The estimate is not inclusive of review for redactions or preparation of/and disclosure, which FFD would not include in the charge.
   OPRA request No. 2: Similarly, Network Blade has estimated one (1) to two (2) hours no inclusive of review, redaction, preparation and disclosure.

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.

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, 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 one (1) to two (2) hours per OPRA request to locate, retrieve, group and convert the records.

The Custodian certified that the Complainant rejected the proposed special service charge for each OPRA request, 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.

[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.

Additional Submissions:

On May 28, 2014, the Complainant's Counsel submitted rebuttals to the SOIs.

Counsel 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 noted that the Custodian also failed to properly submit a document index in Carter, GRC 2012-284 *et seq.* and Carter, GRC 2012-288 *et seq.*

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.

Counsel contended that the Custodian's 14-point analysis was flawed and the subject OPRA requests do no 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. Counsel reiterated the Complainant's Denial of Access Complaint argument that the Custodian continued to attempt to impose a special service charge notwithstanding the Council's decision in Carter, GRC 2012-288, *et seq.*

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. One (1) to two (2) hours of work to disclose records responsive to the Complainant's OPRA request No. 1.
2. One (1) to two (2) hours of work to disclose records responsive to the Complainant's OPRA request No. 2.

The Council recently adjudicated this issue in Carter, GRC 2013-281 *et seq*., and Carter, GRC 2013-328 *et seq*. The facts there are similar enough to apply the Council's holding in those complaints here. Specifically, in those complaints, the Council consolidated multiple complaints and found that the evidence provided there did not support the necessity of Network Blade to search for responsive e-mails. *See also* Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014). In coming to their decision, the Council factored in the time frame for the requests, time period over which same were submitted, number of individuals identified, and the estimated amount of time to search and disclose

records. Further, the Council noted that the evidence did not support that an IT level of expertise was necessary to complete the search for responsive records.

Here, the Complainant's two (2) OPRA requests, submitted on the same day, seek e-mails over a limited time frame of approximately five (5) and six (6) months, respectively. 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 twelve (12) and eleven (11) people that would take roughly two (2) to four (4) hours total if the time for both requests is added together.

As was the case in Carter, GRC 2013-281 *et seq*., and 2013-328 *et seq.*, 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. 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.

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. *See also* Carter, GRC 2013-281 *et seq*. and Carter, GRC 2013-328 *et seq*. 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.

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). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 *et seq.* (Interim Order dated October 28, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq*. (Interim Order dated October 28, 2014). 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.

2. **The Custodian shall comply with item No. 2 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

November 10, 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.