



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 27, 2017 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2014-218 and 2014-219

v.

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

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 Supplemental Findings and Recommendations of the Executive Director 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. Complainant’s Counsel has failed to establish in his request for reconsideration of a portion of the Council’s February 21, 2017 Interim Order that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on illegality or a change in circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably by not applying the Office of Administrative Law’s Initial Decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284, *et seq.* (Interim Order dated March 25, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288, *et seq.* (Interim Order dated March 25, 2014). Thus, that portion of Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Counsel has established that the text message issue should be reconsidered based on a mistake. Thus, the portion of Counsel’s request for reconsideration pertaining to the text message issue should be granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).



3. Since the text message issue has borne a significant issue of contested facts, the consolidated complaint should be referred to the Office of Administrative Law for a fact-finding hearing to resolve: 1) how the Custodian omitted the responsive October 13, 2013 text message from his compliance response dated October 29, 2015; and 2) how the Custodian could have omitted a responsive text message after the parties were alerted to the issue on July 9, 2015, by Complainant Counsel's letter brief. Further, the Office of Administrative Law should perform an *in camera* review of the text message to determine whether the Custodian lawfully denied access under the attorney-client/work product privilege. N.J.S.A. 47:1A-1.1, Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. Because the Council is sending the complaint to the Office of Administrative Law, it should rescind its conclusion No. 3 of the February 21, 2017 Interim Order and defer analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of the Office of Administrative Law's fact-finding hearing.
5. Because the Complainant's Counsel has prevailed on the text message portion of his request for reconsideration regarding the text message issue, the Complainant is a prevailing party entitled to recoup the costs associated with additional litigation arising from this issue. N.J.S.A. 47:1A-6. However, the Council should defer analysis on those fees pending the conclusion of the Office of Administrative Law's fact-finding hearing. Additionally, the supplemental fee award shall not include any accrued fees prior to the filing of the request for reconsideration because Counsel advised the GRC in writing that the parties reached a fee agreement.

Interim Order Rendered by the
Government Records Council
On The 27th Day of June, 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: June 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting

Jeff Carter¹
Complainant

GRC Complaint Nos. 2014-218 and 2014-219²

v.

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

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of any and all correspondence, including but not limited to, e-mails, text messages, letters, memos, and/or fax transmittals regarding the Franklin Township Municipal Ethics Board (“Ethics Board”) and the State of New Jersey Local Finance Board (“LFB”), that was sent to and/or received by the Franklin Fire District No. 1 (“FFD”) or its agents (including all its commissioners, legal counsel, and Ms. Dawn Cuddy), including attachments, between June 4, 2013, and April 3, 2014, regarding the Ethics Board and LFB.

OPRA request No. 2: Electronic copies via e-mail of any and all correspondence, including but not limited to, e-mails, text messages, letters, memos, legal appeals, and/or fax transmittals, regarding an appeal of the Ethics Board’s “Resolution of Violation,” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01, that was sent to and/or received by the FFD and/or its agents (including all its commissioners, legal counsel, and Ms. Cuddy) including attachments, between July 2, 2013, and April 3, 2014, regarding the Board and LFB.

Custodian of Record: Tim Szyborski
Request Received by Custodian: April 3, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: June 2, 2014

Background

February 21, 2017 Council Meeting:

At its February 21, 2017 public meeting, the Council considered the December 6, 2016 *In Camera* Findings and Recommendations of the Executive Director and all related documentation

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

² The GRC has consolidated the 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).

submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council's April 26, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing all of the e-mail attachments that were responsive to the Complainant's requests and providing nine (9) copies of the unredacted e-mails for an *in camera* examination and accompanying "Vaughn Index." Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records as ordered by the Council.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian lawfully denied access to redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Here, the Custodian did not bear his burden of proving that the proposed special service charge was lawful. Further, the Custodian failed to comply timely with the Council's September 29, 2015 Interim Order by not supplying all responsive records by the second extended deadline. Moreover, the Custodian failed to supply all of the attachments to all the e-mails. Further, the Custodian failed to comply fully with the Council's April 26, 2016 Interim Order because he failed to provide nine (9) redacted copies of the e-mails required for an *in camera* review. Although the Custodian failed to bear his burden of proving a lawful denial by not disclosing the records when first ordered to do so, he ultimately disclosed all of the attachments. Further, the Custodian did not unlawfully deny access to the redacted portions of the fifteen (15) e-mails reviewed *in camera*. 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.
4. Pursuant to the Council's September 29, 2015 and April 26, 2016 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all responsive records, which the Custodian did in response to the Council's two (2) Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall

promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Procedural History:

On February 23, 2017, the Council distributed its Interim Order to all parties. On February 28, 2017, the Complainant's Counsel requested additional time to submit a request for reconsideration, noting that he anticipated that the parties would settle any fee issue to this point (and notwithstanding any reconsideration of the issues). On March 3, 2017, the GRC granted Complainant Counsel's request for an extension until March 23, 2017.

On March 22, 2017, the Complainant's Counsel filed a request for reconsideration of the Council's February 21, 2017 Interim Order based on a mistake, change in circumstances, and illegality. Counsel first noted that the parties successfully negotiated a fee settlement. Counsel further noted that he reserved the right to seek additional fees should the Complainant prevail on reconsideration and/or any necessary appeal.

Initially, Complainant's Counsel asserted that the Council did not address the relevance of the document index submitted as part of Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-266, *et seq.* (Interim Order dated September 29, 2015). Specifically, Counsel asserted that he submitted a letter brief for Carter, GRC 2014-266, on July 9, 2015, arguing that the index there revealed a text message dated October 11, 2013.⁴ Counsel contended that the text message, which appeared to be responsive here, directly refuted the Custodian's SOI certification that no text messages existed. Counsel contended that the existence of a responsive text message highlights the Council's contrary actions on sufficiency of search, which it previously sent to the Office of Administrative Law ("OAL") for a fact-finding hearing. *See 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). Counsel thus requested that the Council send the instant consolidated complaint to the OAL for a fact-finding hearing to develop the record for a future appeal, if necessary.

Complainant's Counsel additionally argued that the Council failed to address his November 16, 2015 arguments that no privilege extends to e-mails that violate the Open Public Meetings Act ("OPMA"). Specifically, Counsel noted that the OAL has decided that the e-mails at issue in Carter, GRC 2012-284, and Carter, GRC 2012-288, would have been exempt were they not sent to the FFD's "effective majority." Counsel contended that it is clear that several of the e-mails reviewed *in camera* were sent to or shared with the effective majority of the FFD. Counsel argued that he does not wish for the Council to rule on OPMA issues but instead asks that the Council apply the OAL's decision here and require disclosure of those e-mails shared by the effective majority. Counsel also argued that the Council's failure to address the OPMA issue is not consistent with its obligation to maintain a "sharp focus on the purpose of OPRA and resist attempts to limit its scope." Newark Morning Ledger, Co. v. NJ Sports & Exposition Auth., 423

⁴ Counsel admitted that, in preparing his July 9, 2015 supplemental brief, he wrongly identified the text message date as January 9, 2014. Counsel acknowledged that his error might have confused the Council.

N.J. Super. 140, 162-63 (App. Div. 2011). Counsel contended that the Council's failure to address the OAL decision flies in the face of its obligation. Further, Counsel noted that the FFD did not dispute the OAL's decision; rather, it disclosed unredacted e-mails in accordance with the decision. Counsel thus requested that the Council reverse its decision to be consistent with the OAL's determination in Carter, GRC 2012-284, and Carter, GRC 2012-288. Counsel contended that, should the Council not agree, it should state the reasons why and send this complaint to the OAL for a fact-finding hearing on contested facts, per the Complainant's repeated requests.

Counsel also contended that the Council erroneously determined that the Custodian did not knowingly and willfully violate OPRA. Counsel argued that the evidence of record provides clearly contested facts requiring a fact-finding hearing. Counsel accused the Council of "pick[ing] and choos[ing] what evidence" it considered in deciding this complaint. Counsel contended that the Supreme Court determined that an administrative agency must consider all evidence on the record to avoid an "arbitrary and unreasonable action." In Re: Eastwick College LPN-RN Bridge Prog., 225 N.J. 533, 545-46 (2016). Counsel contended that the Council's failure to send this consolidated complaint to OAL for a knowing and willful hearing is "destined for reversal" in the Appellate Division. Counsel also contended that the Council's failure to address a custodian's violation of NJ Court Rules R. 1:4-4 in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (June 2015),⁵ is further evidence of "the extent to which the Council goes to let *obstructionist* records custodians walk away unscathed" (emphasis in original). Counsel thus "implored" the Council to reverse its decision and send the complaint to the OAL for a knowing and willful hearing, based on the Custodian's failure to comply with the September 29, 2015 and April 26, 2016 Interim Orders and his alleged violation of R. 1:4-4.

Counsel also provided copies of e-mails between commissioners that contained "tirades" against the Complainant and his use of OPRA, which he asserted were previously provided as part of his November 16, 2015 letter brief. Counsel argued that those e-mails prove the FFD had a self-serving interest to deny lawful access for as long as possible in order to shield possible OPMA violations. Although Counsel acknowledges that the GRC has no authority over what he and the Complainant believed to be "non-civil, bullying, intimidating, harassing, humiliating, *etc.* treatment," he argued that the Council "audaciously" found no knowing and willful violation without an independent fact-finding hearing. Counsel further contended that the Council was constrained to address these e-mails but did not.

In closing, Counsel requested that the Council: 1) order disclosure of all records in violation of OPMA; 2) order disclosure of the October 11, 2013 text message, or alternatively conduct an *in camera* review; and 3) refer this consolidated complaint to the OAL for a fact-finding hearing regarding the Custodian's search and a possible knowing and willful violation.

⁵ Contrary to Complainant Counsel's assertion, the Council adopted with modifications the OAL's initial decision, which held that the custodian did not knowingly and willfully violate OPRA. Carter, GRC 2011-76, at 10.

Analysis

Reconsideration

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

In the matter before the Council, the Complainant's Counsel filed the request for reconsideration of the Council's February 21, 2017 Interim Order on March 22, 2017, the ninth (9th) business day of the extended time frame to do so.

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 request for reconsideration, citing a mistake, change in circumstances, and illegality. In his letter brief accompanying the request for reconsideration, Counsel argued that the Council's decision was arbitrary and capricious on a number of issues. Upon review of Counsel's arguments, the GRC finds no evidence to reconsider its decision based on a change in circumstances or illegality. All evidence provided did not prove that the Council's decision contained any “illegality,” nor did Counsel provide any evidence to suggest that there has been a change in circumstances since the last adjudication of this complaint.

First, the Council should reject Counsel's argument that it should have applied the OAL's Initial Decision in Carter, GRC 2012-284, and Carter, GRC 2012-288. The OAL has not

provided the alleged Initial Decision to the GRC in order to accept, reject, or modify it.⁶ The Council would obviously not apply an initial decision to the facts of another complaint when it has not had the benefit of ensuring that said decision was, among other things, “consistent with law.” See Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-141 (Interim Order dated April 26, 2016)(quoting N.J.A.C. 1:1-19.1 in rejecting the an initial decision). Counsel should have been aware of the above, considering that he was a party to Carter, 2013-281, and received the December 13, 2016 interim order, which briefly addressed the same argument, on or about December 14, 2016. For those reasons, the Council should decline to reconsider its determination on the disclosability of the responsive e-mails previously reviewed *in camera*.

However, the Council should reconsider the responsive text message issue based on a mistake. Specifically, the evidence submitted as part of Complainant Counsel’s brief on July 9, 2015, supports that the text message identified in Carter, GRC 2014-266, *et seq.* was likely responsive to the Complainant’s OPRA request No. 2. Complainant’s Counsel admits that he mistakenly identified the date of the e-mail in one of his briefs, and the GRC should have determined whether the message was subject to disclosure. The GRC notes that it did not conduct an *in camera* review of the text message in Carter, GRC 2014-266, *et seq.*, because that record was not responsive to the OPRA requests at issue there.

The acceptance of this issue under reconsideration also requires the Council to reconsider the knowing and willful issue and determine any additional prevailing party attorney’s fees associated with this portion of the accepted reconsideration. For those issues, the Council should defer analysis until the text message issue is successfully adjudicated

As the moving party, the Complainant’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on illegality or a change in circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably by not applying the OAL’s Initial Decision in Carter, GRC 2012-284 and Carter, GRC 2012-288. Thus, that portion of Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); Comcast, 2003 N.J. PUC LEXIS at 5-6.

However, Counsel has established that the text message issue should be reconsidered based on a mistake. See D’Atria, 242 N.J. Super. at 401. Thus, this portion of Counsel’s request for reconsideration pertaining to the text message issue should be granted. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Contested Facts

The Administrative Procedures Act provides that the OAL “shall acquire jurisdiction

⁶ The Council previously addressed the same argument in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281 (Interim Order dated December 13, 2016).

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 have 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).

Based on the text message issue presented, as well as the implications of a false certification, it is clear that a fact-finding hearing will provide the most efficient and effective method for properly adjudicating the contested facts present in this complaint.

Specifically, the Custodian previously certified in the SOI that no text messages existed. However, the document index submitted as part of the Custodian’s May 15, 2015 compliance in Carter, GRC 2014-266, identified the October 11, 2013 e-mail as a responsive record that is exempt from disclosure under the attorney-client and work product privileges. Complainant’s Counsel addressed this issue in a letter brief filed in the instant consolidated complaint on July 9, 2015. Notwithstanding, in response to the Council’s September 29, 2015 Interim Order, the Custodian submitted another document index on October 29, 2015, that omitted the text message as a responsive record. The foregoing constitutes an issue of significant fact as to how the Custodian could certify that no text messages existed here, when he previously identified a responsive text message in Carter, GRC 2014-266. Such a discrepancy in a shortened time period further evidences that this consolidated complaint requires a hearing to resolve the facts.

Accordingly, since the text message issue has borne a significant issue of contested facts, the consolidated complaint should be referred to the OAL for a fact-finding hearing to resolve: 1) how the Custodian omitted the responsive October 13, 2013 text message from his compliance response dated October 29, 2015; and 2) how the Custodian could have omitted a responsive text message after the parties were alerted to the issue on July 9, 2015 by Complainant Counsel’s letter brief. Further, the OAL should perform an *in camera* review of the text message to determine whether the Custodian lawfully denied access under the attorney-client/work product privilege. N.J.S.A. 47:1A-1.1, Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

Knowing & Willful

Because the Council is sending the complaint to the OAL, it should rescind its conclusion No. 3 of the February 21, 2017 Interim Order and defer analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of the OAL’s fact-finding hearing.

Prevailing Party Attorney’s Fees

Because the Complainant’s Counsel has prevailed on the text message portion of his request for reconsideration regarding the text message issue, the Complainant is a prevailing party entitled to recoup the costs associated with additional litigation arising from this issue.

N.J.S.A. 47:1A-6. However, the Council should defer analysis on those fees, pending the conclusion of the OAL's fact-finding hearing. Additionally, the supplemental fee award shall not include any accrued fees prior to the filing of the request for reconsideration because Counsel advised the GRC in writing that the parties reached a fee agreement.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Complainant's Counsel has failed to establish in his request for reconsideration of a portion of the Council's February 21, 2017 Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on illegality or a change in circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably by not applying the Office of Administrative Law's Initial Decision in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284, *et seq.* (Interim Order dated March 25, 2014) and Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288, *et seq.* (Interim Order dated March 25, 2014). Thus, that portion of Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
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attorney-client/work product privilege. N.J.S.A. 47:1A-1.1, Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. Because the Council is sending the complaint to the Office of Administrative Law, it should rescind its conclusion No. 3 of the February 21, 2017 Interim Order and defer analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of the Office of Administrative Law's fact-finding hearing.
5. Because the Complainant's Counsel has prevailed on the text message portion of his request for reconsideration regarding the text message issue, the Complainant is a prevailing party entitled to recoup the costs associated with additional litigation arising from this issue. N.J.S.A. 47:1A-6. However, the Council should defer analysis on those fees pending the conclusion of the Office of Administrative Law's fact-finding hearing. Additionally, the supplemental fee award shall not include any accrued fees prior to the filing of the request for reconsideration because Counsel advised the GRC in writing that the parties reached a fee agreement.

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

June 20, 2017



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1. The Custodian did not fully comply with the Council’s April 26, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing all of the e-mail attachments that were responsive to the Complainant’s requests and providing nine (9) copies of the unredacted e-mails for an *in camera* examination and accompanying “Vaughn Index.” Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records as ordered by the Council.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian lawfully denied access to redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Here, the Custodian did not bear his burden of proving that the proposed special service charge was lawful. Further, the Custodian failed to comply timely with the Council’s September 29, 2015 Interim Order by not supplying all responsive records by the second extended deadline. Moreover, the Custodian failed to supply all of the attachments to all the e-mails. Further, the Custodian failed to comply fully with the Council’s April 26, 2016 Interim Order because he failed to provide nine (9) redacted copies of the e-mails required for an *in camera* review. Although the Custodian failed to bear his burden of proving a lawful denial by not disclosing the records when first ordered to do so, he ultimately disclosed all of the attachments. Further, the Custodian did not unlawfully deny access to the redacted portions of the fifteen (15) e-mails reviewed *in camera*. 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.

4. Pursuant to the Council's September 29, 2015 and April 26, 2016 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all responsive records, which the Custodian did in response to the Council's two (2) Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 21st Day of February, 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 23, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 21, 2017 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint Nos. 2014-218 and 2014-219²

v.

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

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, and/or fax transmittals regarding the Franklin Township Municipal Ethics Board (“Ethics Board”) and the State of New Jersey Local Finance Board (“LFB”), that was sent to and/or received by the Franklin Fire District No. 1 (“FFD”) or its agents (including all its commissioners, legal counsel, and Ms. Dawn Cuddy), including attachments, between June 4, 2013, and April 3, 2014, regarding the Ethics Board and LFB.

OPRA request No. 2: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, legal appeals, and/or fax transmittals, regarding an appeal of the Ethics Board’s “Resolution of Violation,” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01, that were sent to and/or received by the FFD and/or its agents (including all its commissioners, legal counsel and Ms. Cuddy) including attachments, between July 2, 2013, and April 3, 2014, regarding the Board and LFB.

Custodian of Record: Tim Szymborski
Request Received by Custodian: April 3, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: June 2, 2014

Background

April 26, 2016 Council Meeting:

During its meeting on April 26, 2016, the Council considered the April 19, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the

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

² The GRC has consolidated the 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).

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parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council's September 29, 2015 Interim Order. Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (April 2015); Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009).
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. The GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt from disclosure under OPRA. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354-355 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History

On April 28, 2016, the Council distributed its Interim Order to all parties. On the same day, the Custodian's Counsel sought an extension of five (5) business days to comply with the

Council's Order, which the GRC granted on May 2, 2016.

On May 12, 2016, the GRC received the Custodian's compliance package, which included responsive e-mails and e-mail attachments records. The Custodian also submitted nine (9) copies of unredacted emails for *in camera* inspection with an applicable index of exemptions, as well as certified confirmation of compliance. However, the Custodian did not include nine (9) copies of the redacted records. The Custodian provided responsive records to the Complainant and a certification concerning the attachments that he did not provide as part of his response to the September 29, 2015 Interim Order.

Regarding the e-mail attachments, the Custodian's certified that he did not send them with the initial disclosure as part of his response to the Order because, "[i]t was evident" from his own records and notations that the attachments were documents "previously provided by the Complainant and/or [were] already in possession of the Complainant."

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to disclose the subject e-mails and attachments in accordance with Conclusion No. 1 of the Order. The Custodian was also required to provide redacted and unredacted copies of certain e-mails for an *in camera* review, including providing a detailed document index that explains the lawful basis for each redaction. The Custodian was also required to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 28, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 5, 2016.

On April 28, 2016, the same business day of receipt of the Council's Order, the Custodian's Counsel sought a five (5) business day extension to comply. On May 2, 2016, the GRC granted the requested extension. On May 12, 2016, the last day of the extended deadline, the Custodian disclosed the aforesaid e-mails and attachments to the Complainant, submitted to the GRC in a sealed envelope nine (9) copies of the unredacted records for the Council's *in camera* examination, and provided certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records, which the Council explicitly ordered to aid in properly conducting its *in camera* review.

Therefore, the Custodian did not fully comply with the Council's April 26, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing all of the e-mail attachments that were responsive to the Complainant's requests and providing nine (9) copies of the unredacted e-mails for an *in camera* examination and accompanying "Vaughn Index." Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records as ordered by the Council.

Unlawful Denial of Access

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

OPRA provides that a “government record” shall not include “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

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

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁴
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⁴ Unless expressly identified for redaction, everything in the record shall be disclosed. For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester. Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

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1 and 2	E-mail from Jason Goldberg to Custodian's Counsel, dated May 4, 2013 (7:43 p.m.), and another from Mr. Goldberg to Counsel, dated May 4, 2013 (7:45 p.m.) .	Client sought legal advice about a recent decision.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The redacted sections of the e-mails are exempt because they contain attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
3 and 4	E-mail from Custodian's Counsel, dated May 4, 2013 (7:45 p.m.) and Mr. Goldberg's reply via email May 5, 2013, 12:06 AM *Note: Record No 1, 2, 3, and 4 included in chain.	Counsel provides legal advice and direction about a recent decision, and Mr. Goldberg seeks further advice.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The redacted sections of the e-mails are exempt because they contain attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to those portions of the e-mail messages. <u>N.J.S.A.</u> 47:1A-6.
5 and 6	E-mail from James Wickman to Custodian's Counsel, dated May 16, 2013 (2:05 p.m.) and E-mail reply from Custodian's Counsel, May 16, 2013 (2:24 p.m.).	Mr. Wickman seeks legal advice from Counsel on a recent decision, and Counsel responds to same.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The redacted sections of the e-mails are exempt because they contain attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
7 and 8	E-mail from Mr. Goldberg to Custodian's Counsel, dated May 22, 2013 (6:42 p.m.), and e-mail reply by Counsel, dated May 25, (9:50 a.m.).	Mr. Goldberg seeks legal advice from Counsel on a recent decision, and Counsel provides legal advice in response to the request.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The redacted sections of the e-mail are exempt because they contain attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to these portions of the e-mail

				messages. <u>N.J.S.A.</u> 47:1A-6.
9 and 10	E-mail follow up by Mr. Padula, Special Counsel to the FFD, re yesterday's e-mail exchange, dated May 26, 2013 (5:38), and further E-mail from Mr. Goldberg to Counsel, dated May 26, 2013 (9:11 AM). *Note: Record Nos. 7, 8, 9, and 10 included in chain.	Special Counsel provides follow up legal advice to yesterday's e-mail exchanges, and Mr. Goldberg asks for additional legal advice.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The redacted sections of the e-mails are exempt because they contain attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
11	E-mail follow up questions from Mr. Goldberg to Counsel dated May 27 (8:17 p.m.), to Special Counsel, referencing yesterday's e-mail exchanges. *Note: Record Nos. 7, 8, 9, and 10 included in chain.	Mr. Goldberg asks follow up questions seeking advice and direction of Counsel.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
12 and 13	E-mail from Custodian's Counsel, dated July 2 (8:18 a.m.), to Mr. Goldberg and follow up e-mail by Mr. Goldberg to Counsel, dated July 2 (8:24 a.m.).	Counsel gives advice re pending OPRA request and Mr. Goldberg has follow up question seeking advice.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.

14	E-mail from Counsel to Mr. Goldberg, dated July 2 (5:01 p.m.), and follow up e-mail from Mr. Goldberg to Counsel, dated July 2 (6:01 p.m.). *Note: Record No. 13 included in chain.	Counsel provides legal direction and receives a follow up question.	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.
15	E-mail from Mr. Goldberg to Counsel, dated July 2 (6:07 p.m.). *Note: Record No. 13 included in chain.	Discussion of legal position re OPRA request	Attorney-client privileged material. <u>N.J.S.A.</u> 47:1A-1.1	The body of the e-mail is exempt because it contains attorney-client privileged discussions between the FFD and Counsel. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A.</u> 47:1A-6.

Accordingly, the *In Camera* Examination set forth in the above table reveals that the Custodian lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.

The GRC next addresses the attachments and the Custodian’s reasons for not disclosing same in accordance with the Council’s September 29, 2015 Interim Order.

The Appellate Division has held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, (App. Div. 2008). The Appellate Division noted that “requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry.” Bart, 403 N.J. Super. at 618 (citations omitted). The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Court stated it was “undisputed that Bart at all times had within his possession a copy of [the requested record] Indeed, he attached a copy to the compliant he filed with the Council.” Id. (emphasis in original).

Similarly, the GRC has held that when a complainant admits that he was in possession of the requested record at the time he made the request, it is not a denial of access if the custodian did not provide another copy. See Rodriguez v. Kean Univ., GRC Complaint No. 2014-121 (October 2014); Owoh (on behalf of O.R.) v. West-Windsor Reg’l Sch. Dist. (Mercer), GRC

Complaint No. 2012-330 (February 2013). In addition, “[a]ny limitations on the right of access accorded by [OPRA] as amended and supplemented shall be construed in favor of the public’s right of access[.]” Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

In its April 26, 2016 Interim Order, the GRC also ordered that the e-mail attachments previously not disclosed in accordance with the Council’s September 29, 2015 Interim Order be disclosed to the Complainant. The Custodian disclosed those e-mail attachments to the Complainant on May 12, 2016 along with certified confirmation of compliance. Therein, the Custodian averred that he did not intend to deny access when he initially failed to disclose the attachments as part of his compliance with the Interim Order. Specifically, the Custodian certified that he believed that the Complainant was already in possession of some of the records “and/or the Complainant had provided copies of the same records” to the Custodian.

However, the Custodian’s reason for the failure to provide the attachments as part of his last compliance is inapposite to Bart and its progeny. First, OPRA does not provide for an explicit limitation on the number of times a requestor may seek access to the same record. Second, prior disclosure is not a suitable threshold for not providing access to a record; the Bart standard requires unmitigated proof that the requestor is already in possession of the record(s) sought. See Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-124, *et seq.* (Interim Order dated October 28, 2011). The Custodian failed to state when he previously disclosed the attachments; nor did he specify which documents were disclosed, as opposed to those he claimed the Complainant had provided to the Custodian. The notations on each attachment say “Complainant already in possession.” However, his Certification states that “those documents . . . [had] been provided by the [Complainant] through his counsel and/or he was already in possession of them.” The Custodian fails to state with specificity that he knows that the records were specifically disclosed, warranting not disclosing them a second time. Each denial of access must be specifically explained and justified. O’Shea v. Twp. of West Milford, GRC Complaint No. 2004-17 (April 2005)

Thus, since the Custodian did not establish that all of the attachments were in the possession of the Complainant when he made his request, the Custodian failed in his burden to prove a lawful denial of those records. O’Shea, GRC 2004-17; Carter, GRC 2011-124.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian did not bear his burden of proving that the proposed special service charge was lawful. Further, the Custodian failed to comply timely with the Council's September 29, 2015 Interim Order by not supplying all responsive records by the second extended deadline. Moreover, the Custodian failed to supply all of the attachments to all the e-mails. Further, the Custodian failed to comply fully with the Council's April 26, 2016 Interim Order because he failed to provide nine (9) redacted copies of the e-mails required for an *in camera* review. Although the Custodian failed to bear his burden of proving a lawful denial by not disclosing the records when first ordered to do so, he ultimately disclosed all of the attachments. Further, the Custodian did not unlawfully deny access to the redacted portions of the fifteen (15) e-mails reviewed *in camera*. 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 complaint disputing the proposed special service charge and requested that the GRC order disclosure of all responsive records. In its April 28, 2015 Interim Order, the Council determined that the charge was unreasonable and ordered disclosure of all records. The Custodian also initially failed to comply fully and timely with the Council’s Interim Order and unlawfully denied access to the attachments to the e-mails, notwithstanding his belief that some of the e-mails were already in the Complainant’s possession or that the Complainant may have provided the same records to him. The Custodian eventually provided all of the responsive records after the Council’s Interim Orders. Accordingly, the Complainant is a prevailing party, who is entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s September 29, 2015 and April 26, 2016 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all responsive records, which the Custodian did in response to the Council’s two (2) Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s April 26, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing all of the e-mail attachments that were responsive to the Complainant’s requests and providing nine (9) copies of the unredacted e-mails for an *in camera* examination and accompanying “Vaughn Index.” Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records as ordered by the Council.

2. **The *In Camera* Examination set forth in the above table reveals the Custodian lawfully denied access to redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Here, the Custodian did not bear his burden of proving that the proposed special service charge was lawful. Further, the Custodian failed to comply timely with the Council's September 29, 2015 Interim Order by not supplying all responsive records by the second extended deadline. Moreover, the Custodian failed to supply all of the attachments to all the e-mails. Further, the Custodian failed to comply fully with the Council's April 26, 2016 Interim Order because he failed to provide nine (9) redacted copies of the e-mails required for an *in camera* review. Although the Custodian failed to bear his burden of proving a lawful denial by not disclosing the records when first ordered to do so, he ultimately disclosed all of the attachments. Further, the Custodian did not unlawfully deny access to the redacted portions of the fifteen (15) e-mails reviewed *in camera*. 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.
4. Pursuant to the Council's September 29, 2015 and April 26, 2016 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that the proposed special service charge was unreasonable and ordered disclosure of all responsive records, which the Custodian did in response to the Council's two (2) Orders. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

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

December 6, 2016⁵

⁵ This consolidated complaint was prepared for adjudication at the Council's December 13, 2016 and January 31, 2017 meetings but could not be adjudicated due to lack of quorum.

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2014-218 and 2014-219 – Supplemental Findings and Recommendations of the Executive Director



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2014-218 and 2014-219

v.

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

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

1. The Custodian did not fully comply with the Council’s September 29, 2015 Interim. Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a “final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure.” Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (April 2015); Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009).
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.¹**
3. The GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt

¹ 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.

from disclosure under OPRA. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354-355 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver² to the Council in a sealed envelope nine (9) copies of the unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁴ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. 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 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: April 28, 2016

² The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

³ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint Nos. 2014-218 and 2014-219²

v.

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

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, and/or fax transmittals regarding the Franklin Township Municipal Ethics Board (“Ethics Board”) and the State of New Jersey Local Finance Board (“LFB”) that was sent to and/or received by the Franklin Fire District No. 1 (“FFD”) or its agents (including all its commissioners, legal counsel, and Ms. Dawn Cuddy), including attachments, between June 4, 2013, and April 3, 2014, regarding the Ethics Board and LFB.

OPRA request No. 2: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, legal appeals, and/or fax transmittals, regarding an appeal of the Ethics Board’s “Resolution of Violation,” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01, that were sent to and/or received by the FFD and/or its agents (including all its commissioners, legal counsel and Ms. Cuddy) including attachments, between July 2, 2013, and April 3, 2014, regarding the Board and LFB.

Custodian of Record: Tim Szymborski
Request Received by Custodian: April 3, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: June 2, 2014

Background

September 29, 2015 Council Meeting:

During its public meeting on September 29, 2015, the Council considered the September 22, 2015 Findings and Recommendations of the Executive Director and all related

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

² The GRC has consolidated the 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).

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2014-218 and 2014-219 – Supplemental Findings and Recommendations of the Executive Director

documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has not borne his burden of proof that the payment of a special service charge was reasonable and warranted. Specifically, the evidence does not support that Network Blade was solely capable and required to respond to the OPRA requests. Nor does the evidence show that an extraordinary amount of time and effort would be required. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'1 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); *Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014); *Verry v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2013-287 (Interim Order dated July 29, 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. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History

On October 1, 2015, the Council distributed its Interim Order to all parties. On October 2, 2015, the Custodian's Counsel sought an extension of five (5) business days to comply with the Council's Order, which extension was granted. On October 19, 2015, the Custodian's Counsel sought an additional extension of five (5) business days, citing unspecified "exceptional circumstances" for the extension. On October 20, 2015, the Complainant's Counsel objected to the additional extension, arguing that the Custodian already had one five (5) day extension and that the initial OPRA request was made eighteen (18) months earlier. However, the GRC did allow for an extension until October 26, 2015. On October 30, 2015, the Custodian provided responsive records to the Complainant, which contained several redactions for attorney-client privileged material. Several e-mails, which were contained in the responsive records, had attachments that were not disclosed. The Custodian offered no explanation for the

nondisclosure, although several records contained a handwritten note that reads: “Complainant already in possession” or some variation thereof.

On November 16, 2015, Complainant’s Counsel submitted a brief, arguing that in several respects the Custodian had not complied with the Interim Order. He argued that, regarding the redacted material containing attorney-client privileged material, there was an insufficient basis or description of the material to ensure that all the redacted material was privileged. He also argued that e-mails in which an “effective majority” of the Fire Commissioners was copied are not protected under the privilege, as that would subvert the intent of the Open Public Meeting Act.

Analysis

Compliance

At its meeting on September 29, 2015, the Council ordered the Custodian to provide to the Complainant records responsive to his OPRA requests, identify any records that were redacted and the specific lawful basis for said redactions, and to submit a detailed explanation of the search undertaken to locate all forms of responsive correspondence. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 1, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on October 8, 2015.

On October 2, 2015, the Custodian’s Counsel sought an extension of five (5) business days to comply with the Council’s Order, which was granted. On October 19, 2015, the GRC granted a second requested extension until October 26, 2015. On October 30, 2015, the Custodian provided responsive records to the Complainant, which contained several redactions for attorney-client privileged material. Several e-mails, which were contained in the responsive records, had attachments that were not disclosed. No explanation for the nondisclosure was given by the Custodian, although several contained a handwritten note that read: “Complainant already in possession.”

Regarding nondisclosed attachments, Complainant’s Counsel noted that the Complainant does not seek copies of any attachment that the Complainant provided to the Fire District. However, several of the e-mails with attachments do not have a handwritten notation to indicate that the “Complainant [is] already in possession” of the document. Nor do the descriptions in the headings of the e-mails appear to provide any reason to believe that the documents are in the Complainant’s possession.

The Complainant’s Counsel argued that the GRC previously addressed the issue of providing attachments to requested e-mails in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint Nos. 2012-284 *et seq.* and 2012-288 *et seq.* (Interim Orders dated March 25, 2014). The Complainant’s Counsel contended that the Custodian, who is also the custodian of record in Carter, cannot legitimately claim that he was unaware of his obligation to provide attachments. The Complainant’s Counsel thus argued that the Custodian’s failure to provide

attachments represents additional proof that he is intentionally withholding responsive records. Moreover, the OPRA request specifically requested all attachments to the e-mails. Finally, the Custodian had an opportunity but failed to claim that the emails were not subject to disclosure.

A review of the e-mails, including those with the handwritten notations, yields multiple e-mails with attachments. The Council's prior decision in Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009), supports Counsel's argument that the Custodian was required to disclose attachments as part of the e-mails. The Council also briefly addressed disclosability of e-mail attachments 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 Council again addressed attachments to e-mails in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order, dated April 28, 2015). There, the GRC determined, pursuant to Lewin, when the Custodian disclosed the requested e-mail records, but not the attachments, that the Custodian be given a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry, GRC 2013-287 at 5-6.

Therefore, the Custodian did not fully comply with the Council's September 29, 2015 Interim Order. Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry, GRC 2013-287; Lewen, GRC 2008-211.

Unlawful Denial of Access

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

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

⁴ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2014-218 and 2014-219 – Supplemental Findings and Recommendations of the Executive Director

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

Id. at 355.

Further, the Court found that:

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

Id.

Here, the Custodian disclosed several redacted e-mails. The Custodian also provided a document index of redacted material. However, other than stating to whom the e-mails were addressed and the dates of the material, there are no details upon which the Council could validate the asserted privilege. To that end, the GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 354-355; N.J.S.A. 47:1A-1.1.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's September 29, 2015 Interim Order. Specifically, he failed to supply all responsive records by the second extended date; instead, he provided the records on October 30, 2015. Further, the Custodian failed to supply attachments to several e-mails that the Complainant specifically sought but did not already have. Moreover, the Custodian gave no reason for his failure to supply same. Therefore, as to all e-mail attachments, other than those the Complainant himself gave to the Custodian, the GRC is now providing the Custodian a "final opportunity to disclose the attachments and/or provide comprehensive arguments as to why same are not subject to disclosure." Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (April 2015); Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009).
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.⁵**
3. The GRC must conduct an *in camera* examination of all redacted e-mails to determine whether the records are attorney-client privileged and therefore exempt from disclosure under OPRA. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354-355 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁵ 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.

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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

Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2014-218 and 2014-219 – Supplemental Findings and Recommendations of the Executive Director

6. 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: Ernest Bongiovanni
Staff Attorney

April 19, 2016⁹

⁹ This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2014-218 and 2014-219

v.

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

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian 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. Nor does the evidence show that an extraordinary amount of time and effort would be 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); *Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014); *Verry v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2013-287 (Interim Order dated July 29, 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. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September, 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: October 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint Nos. 2014-218 and 2014-219²

v.

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

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, and/or fax transmittals regarding the Franklin Township Municipal Ethics Board (“Ethics Board”) and the State of New Jersey Local Finance Board (“LFB”) that was sent to and/or received by the Franklin Fire District No. 1 (“FFD”) or its agents (including all its commissioners, legal counsel, and Ms. Dawn Cuddy), including attachments, between June 4, 2013, and April 3, 2014, regarding the Ethics Board and LFB.

OPRA request No. 2: Electronic copies via e-mail of any and all correspondence, including but not limited to e-mails, text messages, letters, memos, legal appeals, and/or fax transmittals, regarding an appeal of the Ethics Board’s “Resolution of Violation,” issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01, that were sent to and/or received by the FFD and/or its agents (including all its commissioners, legal counsel and Ms. Cuddy) including attachments, between July 2, 2013, and April 3, 2014, regarding the Board and LFB.

Custodian of Record: Tim Szymborski
Request Received by Custodian: April 3, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: June 2, 2014

Background⁴

Request and Response:

On April 3 2014, the Complainant submitted two (2) Open Public Records Act (“OPRA”)

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

² The GRC has consolidated the 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.

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requests to the Custodian seeking the above-mentioned records. On April 8, 2014, the Custodian's Counsel responded in writing to both OPRA requests.

Regarding OPRA request No. 1, Counsel requested a two (2) week extension, owing to the number of parties that would have to be contacted to determine what responsive text messages existed. The Complainant replied by granting the extension upon condition that the Custodian provide the Complainant with the names of those conducting the search, the dates the searches were conducted, and which communication carriers were searched. Later the same day, Custodian's Counsel responded again, stating that the FFD has determined that utilizing its IT vendor, Network Blade, LLC, warrants the imposition of a special service charge. N.J.S.A. 47:1A-5. Counsel stated that Network Blade would spend approximately one (1) to two (2) hours at the FFD hourly rate of \$120.00 to retrieve e-mails and that payment for one (1) hour is required to begin the search. Counsel further requested that the Complainant advise the FFD 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 similarly noted 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.

On the same day, Complainant responded and objected to both charges, 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 June 2, 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.

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, and Carter, GRC 2012-288; however, neither case involved the imposition of a special service charge.

Additionally, the Complainant requested that the GRC take judicial notice of all filings in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated August 28, 2012), to show that the Complainant has used e-mails to provide competent, credible evidence to refute certifications of FFD custodians. The Complainant alleged that the FFD's new special service charge policy is nothing more than another means to deny him access because of the potentially negative information that may be contained in the responsive records. The Complainant alleged that the proposed special service charge is nothing more than retaliation against him for previous OPRA requests seeking e-mails, several of which were the subject of complaints filed with the GRC. The Complainant argued that because his requests contained the requisite criteria and because he explicitly noted the Custodian's obligation to search for responsive e-mails in correspondence prior to the filing of these complaints, the imposition of a special service charge here is unreasonable and unwarranted. The Complainant also noted that the Council's decision in Verry 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.

Additionally, the Complainant argued that the Custodian's denial also extended to other types of correspondence. The Complainant contended that although the Custodian's Counsel stated that no other types of correspondence beyond e-mails exist, the Complainant received from the LFB a letter dated April 21, 2014, regarding Mr. Wickman.⁷ The Complainant contended that this letter is clearly responsive to his OPRA requests and that any response sent by an "agent" of the FFD to the LFB would also be responsive and disclosable. The Complainant noted that he attached a letter from the LFB dated April 21, 2014, regarding Mr. Wickman.

The Complainant alleged that the proposed special service charge is nothing more than retaliation against him for previous OPRA requests seeking e-mails, several of which were the subject of complaints filed with the GRC. The Complainant argued that because his requests contained the requisite criteria, and because he explicitly noted the Custodian's obligation to search for responsive e-mails in correspondence prior to the filing of these complaints, the imposition of a special service charge here is unreasonable and unwarranted. The Complainant also noted that the Council's decision in Verry 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.

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

⁷ The Complainant noted that it is unnecessary for the GRC to order disclosure; however, the Complainant holds out the letter as an example of FFD's deliberate attempt to deny the existence of responsive records. The GRC notes that the LFB addressed this letter to both the Complainant and Bruce W. Padula, Esq., Cleary, Giacobbe, Alfieri, Jacobs, LLC. Based on the evidence on record, the relationship between the FFD and Mr. Padula is unclear.

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 June 12, 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 Custodian certified that, in this case, he followed FFD's protocol and determined a special service charge was warranted based on the following:

1. What records are requested?

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

OPRA request No. 2: E-mail communication between nine (9) individuals.

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

OPRA request No. 1: Complainant sought, amongst other correspondence, electronic mail communications regarding the Ethics Board and the LFB.

OPRA request No. 2: Complainant sought, amongst other correspondence, electronic mail communications regarding the "Appeal of the Ethics Board's Resolution of Violation issued on April 12, 2013, in the matter of James Wickman, Docket No. 11-01 (including any other reasonably construed variation thereof)."

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

OPRA Request No. 1: From June 4, 2013, through April 3, 2014.

OPRA Request No. 2: From July 2, 2013, through April 3, 2014.

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

All electronic records would be held electronically on the FFD's server or held privately by the individual if on their own personal computer(s).

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

One (1) employee for the entire agency, who also performs all other administrative office functions 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, as 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, since the content concerns potential ethics complaint matters which could still be pending.

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, who 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, not inclusive of review, redaction, preparation, and disclosure. The estimate is not inclusive of review for redactions or preparation of/and disclosure which FFD would not include in the charge.

9. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?

FFD's only employee could monitor inspection at \$20.00 an hour, but any examination would need to be conducted by Counsel.⁸ Review and potential redaction would not be charged, but monitoring the inspection of the documents, as requested by the Complainant, would have to be absorbed by him.

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.

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

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 for them and the Records Custodian position could face a rapid turnover. 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 “the only experienced personnel” to retrieve the records responsive to these types of OPRA 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, who 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. Additionally, the Custodian rejected the Complainant’s novel contention that the GRC somehow has the authority to adjudicate conflicts of interest regarding who should be in charge of collecting records to determine whether they are responsive to a complaint.

The Custodian stated that the actual cost for each request was expected to be 1-2 hours at \$120.00 per hour to pay the IT service to perform the search, locate the records, and convert same to the District for review and possible redaction. The Custodian certified that he did not believe was seeking any monitoring of the request.

The Custodian also certified, regarding OPRA Request No. 1, that to obtain the requested text messages, he contacted all persons listed in Complainant’s requests to determine if any of those persons were in possession of the requested records and that all those persons responded they had no such records. Accordingly he reported that no responsive text records existed. Regarding other records that were not part of the requested e-mails, such as resolutions, correspondence, and similar documents, he attached to the SOI as EXHIBIT “A” a total of

seventeen (17) pages of responsive documents. He stated his failure to disclose same until the date of the SOI was “inadvertent.” He stated that Special Counsel for the FFD possessed all the records and noted that the Complainant had refused to give him an extension of time.

Regarding OPRA Request No. 2, the Custodian certified that to obtain the requested text messages, he contacted all persons listed in Complainant’s requests to determine if any of those persons were in possession of the requested records and that all those persons responded they had no such records. Accordingly he reported that no responsive text records existed. Regarding other records that were not part of the requested e-mails, such as resolutions, correspondence, and similar documents, he attached to the SOI as EXHIBIT “A” another seventeen (17) pages of responsive documents. He stated that his failure to disclose same until the date of the SOI was “inadvertent.” He stated that a Special Counsel for the FFD possessed all the records and noted that the Complainant had refused to give him an extension of time. Finally, the Custodian certified that these documents were the same as those responsive to OPRA Request No. 1.

Additional Submissions:

On July 1, 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 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 the 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 of FFD to staff the agency appropriately 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 that the subject OPRA requests do not warrant a special service charge. Further, Counsel asserted that there should be no need to “convert” any e-mails because they are, by their very nature, already in the Complainant’s preferred medium of electronic format. Counsel further argued that since e-mails are stored electronically, they can and are required to be “provided free of charge” (*citing N.J.S.A. 47:1A-5 (b)*). Moreover, in the present complaints, the Custodian admitted that he asked the individuals involved if they had any responsive text messages in their possession, yet the Custodian could have at the same time inquired of those persons if they had responsive e-mails. The Complainant also argued that the Custodian admitted that in August 2012, the FFD decided it would use the IT Vendor Consultant to handle retrieval of emails, which directly contradicts the individual case by case analysis required by the GRC’s 14 point analysis. Counsel reiterated the Complainant’s argument that the Custodian continued to seek a special service charge, notwithstanding the Council’s decision in Carter, GRC 2012-288, *et seq.*

On July 9, 2015, Complainant’s Counsel submitted a Supplemental brief. He argued that in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint Nos. 2014-266 *et seq.* (April 2015), the Custodian’s Counsel filed a Vaughn index for dates June 3, 2013, through February

14, 2014. He argued that here the date range for OPRA Request No. 1 is June 4, 2013, through April 3, 2014, and for OPRA Request No 2 the range is July 2, 2013, through April 3, 2014. Therefore, he argued, the Vaughn Index filed in Carter GRC 2014-266 *et seq.*, “may be responsive to either or both” of these instant cases. In the Vaughn Index, the Counsel for the District asserted a privilege for a January 9, 2014, text message. Accordingly, Complainant’s Counsel argued that the Custodian certified untruthfully that there were no responsive text messages in the present case.

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 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).

Regarding this complaint, the Council recently adjudicated a similar issue in Carter, GRC 2013-281 *et seq.*, Carter, GRC 2013-328 *et seq.*, and Carter, GRC 2014-137 *et seq.* There, the Council consolidated multiple complaints and found that the evidence provided therein did not support the necessity of Network Blade to search for responsive e-mails. *See also* Verry, GRC 2013-287. 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.

Notwithstanding the case-by-case nature of complaints involving disputed special service charges, both the facts and holdings in Carter, GRC 2013-281 *et seq.*, Carter, GRC 2013-328 *et seq.*, and Carter, GRC 2014-137 *et seq.*, are on point with these complaints. Specifically, the Custodian provided nearly identical answers to his 14 point-analysis here as were submitted in Carter, GRC 2013-281 *et seq.*, Carter, GRC 2013-328 *et seq.*, and Carter, GRC 2014-137 *et seq.* Further, the requests at issue here are extremely similar to those in Carter, GRC 2014-266 *et seq.* In the absence of any additional compelling arguments, the GRC is satisfied that the proposed special service charge was unreasonable and unwarranted.

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. Nor does the evidence show that an extraordinary amount of time and effort would be 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.*; Carter, GRC 2013-328 *et seq.*; Verry, GRC 2013-287. 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. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.

The GRC notes that the Complainant alleges that the Custodian should have provided a document index, citing Verry, GRC 2013-287. In Carter, GRC 2014-266 *et seq.*, the GRC noted that while a contention of a special service charge could result in a custodian's inability to submit a document index with his SOI, in those cases, the Custodian had already acknowledged receipt of Verry, GRC 2013-287. However here, the Custodian's SOI was submitted June 12, 2014, and preceded his knowledge of Verry.

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.

Nor does the evidence show that an extraordinary amount of time and effort would be 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); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 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. Moreover, the Custodian must provide a detailed explanation of the search conducted to locate all forms of responsive correspondence to the OPRA requests.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁹ to the Executive Director.¹⁰**
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: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

September 22, 2015

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ 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.

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