



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Michael Palkowitz
Complainant

Complaint No. 2014-302

v.

Borough of Hasbrouck Heights (Bergen)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council’s May 26, 2015, Interim Order. Although she provided certified confirmation with respect to the Complainant’s willingness or refusal to purchase the requested records, she did not do so within the prescribed time frame.
2. Although the Custodian unreasonably charged for one (1) hour of the Borough Administrator’s time and did not fully comply with the Council’s May 26, 2015, Order, the GRC determined that a majority of the special service charge was reasonable and warranted. 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.

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



Final Decision Rendered by the
Government Records Council
On The 30th Day of June, 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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael Palkowitz¹
Complainant**

GRC Complaint No. 2014-302

v.

**Borough of Hasbrouck Heights (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Copies of the following for the Mayor and Council, Department of Public Works (“DPW”), Police, Building Department, Borough Administrator, the Custodian, library staff, janitors, full and part-time employees, per diem employees and every other Borough of Hasbrouck Heights (“Borough”) employee (if any were not identified) during the time period January 1, 2014 through August 14, 2014:

1. Base pay and overtime pay, as well as vacation, personal, and sick days taken.
2. Expense account records for those who have same.
3. Cost of health benefits to the Borough for each employee as well as the cost of a family plan.
4. “Every [Borough] vehicles and purchase price, whoever has a personal vehicle paid by the [Borough], any employees who have a personal vehicle but the [Borough] pays for its gas.”
 - a. Cost of gas for each vehicle.
 - b. State and end mileage for the identified time period.
5. Legal fees paid out in lawsuits.

Custodian of Record: Rose Marie Sees

Request Received by Custodian: August 14, 2014

Response Made by Custodian: August 21, 2014

GRC Complaint Received: August 28, 2014

Background

May 26, 2015 Council Meeting:

During its public meeting on May 26, 2015, the Council considered the May 19, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ No legal representation listed on record.

² Represented by Ralph W. Chandless, Jr., Esq., of Chandless, Weller & Kramer (Hasbrouck Heights, NJ).

1. Although the Custodian has proven that a special service charge is warranted here, the inclusion of one (1) hour for the Borough Administrator to review the records and perform redactions is unreasonable. Specifically, the evidence does not support that the Borough Administrator was solely capable and required to redact home addresses, telephone numbers, dates of birth, and social security numbers. *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, 204 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). Thus, the Custodian is only obligated to grant access to the requested records once the Complainant has remitted payment of \$138.74 for same. *See* Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian: (a) payment in the amount of \$138.74, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of payment. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4³ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
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.

Procedural History:

On May 28, 2015, the Council distributed its Interim Order to all parties. On June 12, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that the Complainant did not respond to the Council's Order and did not pay the appropriate charge for copies of records. The Custodian noted that the Borough was prepared to provide all responsive records upon payment.

Analysis

Compliance

During its meeting on May 26, 2015, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Director with respect to the Complainant's willingness or refusal to purchase the requested records. On May 28, 2015, the Council distributed its Interim Order to all parties, providing the Custodian ten (10) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on June 11, 2015.

On June 12, 2015, one (1) business day after the expiration of the time frame to comply, the Custodian provided certified confirmation of compliance. Therein, the Custodian certified that the Complainant did not respond to the Council's Order and further did not remit payment for the responsive records.

Therefore, the Custodian did not fully comply with the Council's May 26, 2015, Interim Order. Although she provided certified confirmation with respect to the Complainant's willingness or refusal to purchase the requested records, she did not do so within the prescribed time frame.

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)).

Although the Custodian unreasonably charged for one (1) hour of the Borough Administrator's time and did not fully comply with the Council's May 26, 2015 Order, the GRC determined that a majority of the special service charge was reasonable and warranted. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's May 26, 2015, Interim Order. Although she provided certified confirmation with respect to the Complainant's willingness or refusal to purchase the requested records, she did not do so within the prescribed time frame.
2. Although the Custodian unreasonably charged for one (1) hour of the Borough Administrator's time and did not fully comply with the Council's May 26, 2015, Order, the GRC determined that a majority of the special service charge was reasonable and warranted. 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.

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

Approved By: Joseph D. Glover
Executive Director

June 23, 2015



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

May 26, 2015 Government Records Council Meeting

Michael Palkowitz
Complainant

Complaint No. 2014-302

v.

Borough of Hasbrouck Heights (Bergen)
Custodian of Record

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

1. Although the Custodian has proven that a special service charge is warranted here, the inclusion of one (1) hour for the Borough Administrator to review the records and perform redactions is unreasonable. Specifically, the evidence does not support that the Borough Administrator was solely capable and required to redact home addresses, telephone numbers, dates of birth, and social security numbers. *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, 204 (Law Div. 2002); *Janney v. Estell Manor City (Atlantic)*, GRC Complaint No. 2006-205 (December 2007). Thus, the Custodian is only obligated to grant access to the requested records once the Complainant has remitted payment of \$138.74 for same. *See Paff v. City of Plainfield*, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall, within five (5) business days from receipt of the Council’s Interim Order, deliver to the Custodian: (a) payment in the amount of \$138.74, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of payment. The Complainant’s failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide certified confirmation of compliance in**



accordance with N.J. Court Rule 1:4-4¹ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.

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.

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 28, 2015

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael Palkowitz¹
Complainant**

GRC Complaint No. 2014-302

v.

**Borough of Hasbrouck Heights (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Copies of the following for the Mayor and Council, Department of Public Works (“DPW”), Police, Building Department, Borough Administrator, the Custodian, library staff, janitors, full and part-time employees, per diem employees and every other Borough of Hasbrouck Heights (“Borough”) employee (if any were not identified) during the time period January 1, 2014 through August 14, 2014:

1. Base pay and overtime pay, as well as vacation, personal, and sick days taken.
2. Expense account records for those who have same.
3. Cost of health benefits to the Borough for each employee as well as the cost of a family plan.
4. “Every [Borough] vehicles and purchase price, whoever has a personal vehicle paid by the [Borough], any employees who have a personal vehicle but the [Borough] pays for its gas.”
 - a. Cost of gas for each vehicle.
 - b. State and end mileage for the identified time period.
5. Legal fees paid out in lawsuits.

Custodian of Record: Rose Marie Sees

Request Received by Custodian: August 14, 2014

Response Made by Custodian: August 21, 2014

GRC Complaint Received: August 28, 2014

Background³

Request and Response:

On August 14, 2014, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ No legal representation listed on record.

² Represented by Ralph W. Chandless, Jr., Esq., of Chandless, Weller & Kramer (Hasbrouck Heights, NJ).

³ 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.

request to the Custodian seeking the above-mentioned records. On August 21, 2014, on behalf of the Custodian, the Custodian's Counsel responded in writing to extend the deadline until September 1, 2014, due to the voluminous nature of the request.

On August 22, 2014, on behalf of the Custodian, the Custodian's Counsel responded in writing stating that, due to the extraordinary amount of time and effort expended to respond to the Complainant's OPRA request, the Borough is requiring payment of a special service charge. Counsel stated that, in accordance with N.J.S.A. 47:1A-5(c), the Borough has calculated that 4.5 of the 16 hours⁴ spent represents services beyond the ordinary retrieval and copying for a total of \$210.92. Counsel requested that the Complainant notify the Borough whether he will accept or reject the proposed charge.

On August 22, 2014, the Complainant stated that he should not be charged and that the responsive records should be sent to him via e-mail, as the Borough has previously sent similar records. The Complainant averred that the Borough has until August 25, 2014, to provide the responsive records. The Complainant also advised the Custodian's Counsel that, if forced to pay, he would "show up with everything in unwrapped pennies 1 minute before closing." On the same day, the Custodian's Counsel advised the Complainant that the Borough had complied with OPRA and N.J.S.A. 47:1A-5(c). The Complainant responded, noting that the Borough previously sent him responsive records via e-mail based on the Council's Interim Order in Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2013-199 (March 2014).

On August 25, 2014, the Custodian's Counsel noted that he previously notified the Complainant on August 21 and 22, 2014, of the proposed charge. The Custodian's Counsel advised that all records are prepared for scanning and e-mailing upon receipt of payment from the Complainant. On the same day, the Complainant again disputed the charge and threatened to file a complaint if the Borough did not send him the responsive records free of charge.

Denial of Access Complaint:

On August 28, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the Borough's proposed special service charge of \$210.92. The Complainant provided no additional arguments.

Statement of Information:

On September 11, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 14, 2014. The Custodian affirmed that, after an extension of time, the Custodian's Counsel responded in writing on August 22, 2014, providing the Complainant a proposed special service charge of \$210.92. The Custodian certified that the Complainant rejected the proposed charge and filed this complaint.

⁴ The GRC notes that the Custodian later certifies in the Statement of Information that the Borough required 14.5 hours to respond to the Complainant's OPRA request.

Additional Submissions:

On February 26, 2015, the GRC requested additional information from the Custodian. Specifically, the GRC requested that the Custodian submit a 14-point analysis by March 4, 2015, so that the GRC can determine whether the disputed special service charge is reasonable and warranted.

On March 2, 2015, the Custodian responded to the GRC's request for additional information as follows:

1. What records are requested?

Response: See Complainant's OPRA request

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

Response: 162 pages of records plus a summary page containing earnings records, attendance records, health insurance information, list of vehicles, legal expenses, fuel costs, and other vehicle use information.

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

Response: January 1, 2014, to August 14, 2014.

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

Response: No.

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

Response: 101 employees, not including seasonal and part-time employees

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

Response: The Borough Administrator, Assistant to the Custodian, Clerical DPW employee, Secretary to the Chief of Police, Library Director, and Administrative Assistant in the Library.

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

Response: All records reviewed for redaction of home addresses, telephone numbers, dates of birth, and social security numbers.

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?**

Response: The charge is composed of 4.5 hours of the total 14.5 hours of work as follows:

Employee	Hours Spent	Hourly Rate
Borough Administrator	7.0 (2 hours)	\$72.28
Assistant to Custodian	1.5 (1.5 hours)	\$29.67
Clerical DPW Employee	1.5 (1 hour)	\$21.85
Secretary to Chief of Police	0.5	\$25.23
Library Director	2.0	\$45.09
Administrative Assistant in the Library	2.0	\$16.49

The Borough determined that 4.5 hours went beyond the ordinary retrieval and copying of records. The employees, hours, and hourly rates being charged are bolded above and total \$210.92.

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?**

Response: N/A

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?**

Response: Included in total hours per Item No. 8.

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

Response: The Complainant's OPRA request required detailed records from multiple departments.

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

Response: See Item No. 8.

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

Response: Technological capabilities are available.

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

Response: The following is required to response to the Complainant’s OPRA request:

Employee	Work Required
Borough Administrator	2.0 hours (\$72.28 per hour) reviewing records for redaction of confidential information and generating reports not otherwise kept in the normal course of business. Total: \$144.56
Assistant to Custodian	1.5 hours (\$29.67 per hour) working with ADP to generate special report detailing earning and customizing spreadsheet Total: \$44.51
Clerical DPW Employee	1.0 (\$21.95 per hour) generating a report from a program controlling the Borough’s fuel dispensing system. Total: \$21.95

Analysis

Issues Presented

The GRC first notes two (2) threshold issues that must be briefly addressed. However, the GRC will decline to address same for the reasons set forth below.

Regarding the Complainant’s request item seeking individual health information, in Palkowitz v. Hasbrouck Heights (Bergen), GRC Complaint No. 2013-199 (Interim Order dated February 25, 2014), the complainant requested individual healthcare benefits. There, the Council determined that same were exempt from disclosure. N.J.A.C. 17:9-1.2; Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2011-293 (Interim Order dated March 22, 2013). However, the Council did require disclosure of the total amount of money spent to provide its employees with healthcare benefits over a defined period of time.

Although it is not clear whether the Borough intends to disclose this information, there is a reference to “health insurance information” included as part of the Custodian’s 14 point analysis. Thus, although it appears that the Borough intends to disclose individual health information, the GRC notes that the Council’s prior decisions on this issue do not require disclosure of individual healthcare information.

Additionally, the Complainant sought information on Borough owned vehicles, cost for gas, mileage, cost of gas paid to Borough officials reimbursed for using private vehicles, and

legal fees. The GRC notes that the Council has routinely determined that similar requests for information are invalid under OPRA. LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Litchult v. Borough of Waldwick Police Dep't (Bergen), GRC Complaint No. 2010-159 (May 2011); Vance v. Cnty. of Sussex, Sheriff's Office, GRC Complaint No. 2012-188 (June 2013). However, the Custodian has advised that the Borough is providing access to records providing information requested in these four (4) items.

Special Service Charge

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

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

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies

N.J.S.A. 47:1A-5(c).

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

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate" pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any,

required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Here, the Custodian provided a response to questions posed by the GRC that reflect the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the proposed charge of \$210.92 represented 4.5 of the 14.5 hours the Borough would expend to produce responsive records as follows:

Employee	Work Required
Borough Administrator	2.0 hours (\$72.28 per hour) reviewing records for redaction of confidential information and generating reports not otherwise kept in the normal course of business. Total: \$144.56
Assistant to Custodian	1.5 hours (\$29.67 per hour) working with ADP to generate special report detailing earning and customizing spreadsheet Total: \$44.51
Clerical DPW Employee	1.0 (\$21.95 per hour) generating a report from a program controlling the Borough’s fuel dispensing system. Total: \$21.95

The Complainant’s OPRA request sought personnel information and expense account records over an eight (8) month period for every employee within the Borough, numbering 101 employees before part-time and seasonal workers. The request also sought information on Borough vehicles and gas expenses, as well legal fees paid over the same eight (8) month period. The Custodian certified that 162 pages of records are responsive to the request. However, the GRC notes that the Custodian’s 14-point analysis confirms that a vast majority of the records would need to be generated and reviewed for personal information. Additionally, the Custodian charged for only a fraction of those hours expended (4.5). The evidence of record supports that the Borough’s expenditure of 14.5 hours represents an extraordinary amount of time and effort to produce responsive records given the size of this agency. *See Rivera v. Rutgers, The State Univ. of New Jersey*, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the evidence of record adequately supports that a special service charge is warranted here.

However, the Council must now address whether the proposed fee is reasonable. In Courier Post, 360 N.J. Super. at 204, the Court held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the custodian can prove that the professional level of human resource was needed to fulfill the request. Thus, as part of the calculation of a special service charge, a custodian must prove that same was based upon the lowest paid, qualified employee's hourly rate to perform the work required to respond to the subject OPRA request. *See also* Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007).

Here, the GRC is not satisfied that the Borough Administrator is the lowest qualified employee capable of redacting home addresses, telephone numbers, dates of birth, and social security numbers. In fact, the Custodian never disputed that she or a clerical employee could easily identify and redact this information. For this reason, the GRC does not agree that the full two (2) hours for the Borough Administrator is reasonable for redactions and generating reports. However, the GRC does agree that one (1) hour of his time is reasonable to generate reports. For this reason, the applicable charge should be reduced to \$138.74 (less one (1) hour of the Borough Administrator's proposed charge).

Therefore, although the Custodian has proved that a special service charge is warranted here, the inclusion of one (1) hour for the Borough Administrator to review the records and perform redactions is unreasonable. Specifically, the evidence does not support that the Borough Administrator was solely capable and required to redact home addresses, telephone numbers, dates of birth, and social security numbers. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Janney, GRC 2006-205. Thus, the Custodian is only obligated to grant access once the Complainant has remitted payment of \$138.74 for same. *See* Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian has proven that a special service charge is warranted here, the inclusion of one (1) hour for the Borough Administrator to review the records and perform redactions is unreasonable. Specifically, the evidence does not support that the Borough Administrator was solely capable and required to redact home addresses, telephone numbers, dates of birth, and social security numbers. *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, 204 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). Thus, the Custodian is only obligated to

grant access to the requested records once the Complainant has remitted payment of \$138.74 for same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Complainant shall, within five (5) business days from receipt of the Council's Interim Order, deliver to the Custodian: (a) payment in the amount of \$138.74, or (b) a statement declining to purchase the records. Should the Complainant accept and pay the appropriate special service charge, the Custodian shall disclose the responsive records within three (3) business days from receipt of payment. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4⁵ to the Executive Director with respect to the Complainant's willingness or refusal to purchase the requested records.**
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.

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Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015

⁵ "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."