



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

FINAL DECISION

February 21, 2017 Government Records Council Meeting

Law Offices of Walter M. Luers, LLC.  
(o/b/o C.C.)  
Complainant

Complaint No. 2015-15

v.

Eastern Camden County Regional School District  
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s October 27, 2015 Interim Order because he responded in the prescribed time frame by submitting to the GRC nine (9) copies of the relevant redacted and unredacted records for an *in camera* examination, along with a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the records responsive to the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-6.**
3. The original Custodian’s response was insufficient because he failed to provide a specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). However, the original Custodian’s special service charge was reasonable and warranted. N.J.S.A. 47:1A-5(c); N.J.S.A. 47:1A-6. Additionally, the Custodian timely complied with the Council’s October 27, 2015 Interim Order. Finally, the *in camera* examination revealed that the original Custodian lawfully denied access to the redacted information. Further, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian’s actions did 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. The Complainant has not 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 does not exist 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 reasonable and warranted. Further, the Custodian lawfully redacted all records reviewed *in camera*. Therefore, the Complainant is not 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.

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 21<sup>st</sup> 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**

**Law Offices of Walter M. Luers, LLC<sup>1</sup>  
(On behalf of C.C.)  
Complainant**

**GRC Complaint No. 2015-15**

**v.**

**Eastern Camden County Regional School District<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

July 14, 2014 OPRA request: Electronic copies via e-mail of:

1. All bills for legal services rendered in the case of C.C. from September 1, 2013, to present.
2. All invoices for legal services rendered from September 1, 2013, to present.
3. All purchase orders for legal services rendered from September 1, 2013, to present.
4. All vouchers for legal services rendered from September 1, 2013, to present.
5. All cancelled checks (front and back) for legal services rendered from September 1, 2013, to present.
6. All Board of Education (“BOE”) resolutions approving legal services payments from September 1, 2013, to present.
7. All agreements for the provision of legal services from September 1, 2013, to present.

July 15, 2014 OPRA request: Electronic copies via e-mail of:

1. Any executive session minutes of Harassment, Intimidation & Bullying (“HIB”) appeals from July 1, 2011, to present.
2. Any demand letters received from, and responses to, any student, their parents, or their attorneys from July 1, 2011, to present.
3. Any Tort Claim Notices received from and responses to any student, their parents, or their attorneys from July 1, 2011, to present.
4. Any settlement agreements or consent ordered entered into by the BOE with any student, their parents, or their attorneys from July 1, 2011, to present.
5. The BOE’s liability policy in effect during the 2013-2014 school year.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Anthony I. Padovani, Esq., of Sahli & Padovani (Hammonton, NJ).

**Custodian of Record:** Diana L. Schiraldi<sup>3</sup>  
**Request Received by Custodian:** July 15, 2014  
**Response Made by Custodian:** July 18, 2014  
**GRC Complaint Received:** January 13, 2015

**Records Submitted for *In Camera* Examination:**

1. Invoice No. 20806 for attorney work conducted between February 10, and February 24, 2014.
2. Eight (8) sets of executive session minutes.
3. Records related to four (4) Tort Claim matters.
4. Settlement Agreement and Release dated June 24, 2014.

**Background**

October 27, 2015 Council Meeting:

At its October 27, 2015 public meeting, the Council considered the October 20, 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. Because the Custodian failed to provide a specific lawful basis for redactions made to the legal bills, executive session minutes, demand letters, tort claim notices, and settlement agreements, the Custodian's response to the Complainant's OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010).
2. The Custodian has proved that a special service charge was both reasonable and warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the requests took over 35 hours to complete. Moreover, the charge ultimately applied for both OPRA requests amounted to an hourly rate of \$2.20 per hour, well below any of the identified hourly salaries of employees utilized to fulfill the OPRA request. *See* 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); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008). Thus, notwithstanding that Mr. Epstein sought electronic delivery of the responsive records, the Custodian proved that a special service charge was still warranted.
3. The GRC must conduct an *in camera* review of only those pages of the responsive records in which the Custodian redacted information to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA

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<sup>3</sup> The original Custodian of Record was Fred D. Wright.

because they contain student or parent information. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index,<sup>5</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 October 28, 2015, the Council distributed its Interim Order to all parties. On November 4, 2015, the current Custodian responded to the Council's Interim Order. The current Custodian certified that she was providing nine (9) copies of the redacted and unredacted records to the GRC. The Custodian included a document index and Custodian Counsel's explanation of redactions to the attorney billing detail, executive session minutes, and Tort Claim documents as follows:

- N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:31-7.1 *et seq.* – disciplinary proceedings against a student to the extent that disclosure would reveal the student's identity.
- N.J.S.A. 47:1A-1.1 – information generated on behalf of public employers or employees in connection with any grievance filed by or against an individual.
- N.J.S.A. 47:1A-10 – personnel records involving an employee discipline matter.

In his detailed explanations, the Custodian's Counsel averred that he recommended redactions of student/parent names and identifiers in certain portions of Invoice No. 20806 to protect against easy identification of the subject student in an ongoing HIB case. The Custodian's Counsel affirmed that he also redacted the name of the attorney involved to avoid identification of the relevant student. The Custodian's Counsel noted that there was significant concern that the matter would result in civil litigation. The Custodian's Counsel noted that both

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<sup>4</sup> 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.

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

<sup>6</sup> "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."

the parents' exposure and a desire to protect attorney-client privileged information remained a concern for the BOE.

Moreover, the Custodian's Counsel stated that he redacted several pieces of information to include an attorney's name in the DiNote Tort Claim, because disclosure of the name could lend towards the student's identification. The Custodian's Counsel stated that he also redacted several pieces of information to include a teacher's name in the Skwirut Tort Claim to protect the accused employee, who was sued. The Custodian's Counsel further averred that he redacted individually identifying information in the Einhorn documents, which included two (2) teachers and witnesses that could identify the subject student. The Custodian's Counsel stated that he made similar identifier redactions in the Fenton documents but also redacted information contained therein to comply with the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). Finally, the Custodian's Counsel stated that he redacted the student's name and other identifiers in the I.S. (On Behalf of N.S.) settlement agreement.

### **Analysis**

#### **Compliance**

At its October 27, 2015 meeting, the Council ordered the Custodian to provide the Council with nine (9) copies of the relevant redacted and unredacted records for an *in camera* review, as well as a document index. The Council also 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 27, 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 November 4, 2015.

On November 24, 2015, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian submitted nine (9) copies of the relevant redacted and unredacted records, a document index, and certified confirmation of compliance to the Executive Director. Based on the foregoing, the Custodian has complied with the Council's Order.

Accordingly, the Custodian complied with the Council's October 27, 2015 Interim Order because he responded in the prescribed time frame by submitting to the GRC nine (9) copies of the relevant redacted and unredacted records for an *in camera* examination along with a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

#### **Unlawful Denial of Access**

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

As noted in the Interim Order, the Custodian did not provide a statutory basis for redacting student and parent information from the responsive records. However, the Custodian did include statutory provisions as part of his compliance: N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:31-7.1 et seq.; and N.J.S.A. 47:1A-10. Those provisions address student disciplinary actions, student records confidentiality, and personnel information.

OPRA further provides that its provisions “. . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or Executive Order of the Governor . . .” N.J.S.A. 47:1A-9(a).

The Family Educational Rights & Privacy Act (“FERPA”) provides the following:

Each educational agency or institution shall maintain a record, kept with the education records of each student . . . Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 USCA §1 232g(b)(4)(A).

Further, N.J.A.C. 6A:32-7.4 provides that “[t]he chief school administrator . . . shall be responsible for . . . assuring that access to [student] records is limited to authorized persons.”

Moreover, the Council previously conducted an *in camera* review of similar redactions in White v. Monmouth Reg’l High Sch., GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013). There, the Council looked to FERPA, N.J.S.A. 47:1A-1.1, and State regulations at both N.J.A.C. 6A:32-7.4 and N.J.A.C. 6A:32-4.9. Ultimately, the Council was satisfied that the custodian properly redacted staff member initials and student/parent names.

Finally, the Council previously addressed the disclosure of student settlement agreements in Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012). There, the Council was tasked with determining whether a settlement agreement between the agency and parents of a special education student was subject to disclosure under OPRA. The Council held that the settlement agreement was a “student record” not subject to disclosure. In reaching this conclusion, the Council distinguished that complaint from prior decisions in Ungaro v. Town of Dover (Morris), GRC Complaint No. 2008-115 (November 2009), and O’Connor v. Town of Dover (Morris), GRC Complaint No. 2008-164 (November 2009), by stating that “the content of the settlement agreement itself . . . renders it a student record exempt from disclosure pursuant to the [rules of the State Board of Education].” Of particular note, the Council also distinguished that complaint from Paff v. Barrington Sch. Dist. (Camden), GRC Complaint No. 2009-55 (October 2010), by noting that it held differently regarding the disclosure of a student settlement agreement because “the custodian had already disclosed the record to the complainant [in redacted form].”

In the instant matter, the GRC conducted an *in camera* examination on the submitted record. The results of the examination are set forth in the following table:

Record No.	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination <sup>7</sup>
1.	Invoice No. 20806	1. Parent/student last name (2 redactions) 2. Parent attorney's name or last name (8 redactions) 3. Attorney's address (1 redaction)	Redactions protected minor from easily being identified, as the matter discussed was being investigated as a HIB incident with other civil litigation possible.	The GRC is satisfied that, given the explanation provided by Custodian's Counsel, the original Custodian properly redacted the identified information. Specifically, the Complainant, Mr. Epstein, or his client could have easily identified the student based on the attorney. Further, the Complainant did not provide any evidence indicating that they were an authorized party able to receive this information. Thus, the Custodian lawfully denied access to the redacted information. <u>N.J.S.A. 47:1A-6</u> ; <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.A.C. 6A:32-7.1 et seq.</u>

<sup>7</sup> **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.



1.	August 29, 2012 Executive Session Minutes	<p><b>HIB Hearing:</b></p> <ol style="list-style-type: none"> <li>1. Parent/student names (11 redactions)</li> <li>2. Identification of employee/position (3 redactions).</li> </ol> <p><b>Student Discipline:</b></p> <ol style="list-style-type: none"> <li>1. Student initials (3 redactions)</li> <li>2. Identification of grade level. (1 redaction)</li> <li>3. Student “number”</li> </ol>	Disciplinary proceedings against a student to the extent that disclosure would identify the student. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.A.C. 6A:32-7.1 et seq.</u>	In accordance with <u>N.J.S.A. 47:1A-1.1</u> , <u>N.J.A.C. 6A:32-7.1 et seq.</u> , and <u>White</u> , GRC 2012-218, the Custodian lawfully denied access to the redacted information under the <b>HIB Hearing</b> and <b>Student Discipline</b> headings. <u>N.J.S.A. 47:1A-6</u> .
2.	September 19, 2012 Executive Session Minutes	<p><b>HIB Hearing:</b></p> <ol style="list-style-type: none"> <li>1. Parent/student names (8 redactions)</li> <li>2. Employee name/position (6 redactions)</li> </ol>	Disciplinary proceedings against a student to the extent that disclosure would identify the student. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.A.C. 6A:32-7.1 et seq.</u>	In accordance with <u>N.J.S.A. 47:1A-1.1</u> , <u>White</u> , GRC 2012-218, and <u>N.J.A.C. 6A:32-7.1 et seq.</u> , the Custodian lawfully denied access to the redacted information under the <b>HIB Hearing</b> heading. <u>N.J.S.A. 47:1A-6</u> .
3.	February 20, 2013 Executive Session Minutes	<p><b>HIB Appeal:</b></p> <ol style="list-style-type: none"> <li>1. Parent/student names (including pronouns)(14 redactions)</li> <li>2. Pronoun identification of accused (2 redactions)</li> <li>3. Identification of employee/position (2 redactions)</li> </ol>	Disciplinary proceedings against a student to the extent that disclosure would identify the student. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.A.C. 6A:32-7.1 et seq.</u>	In accordance with <u>N.J.S.A. 47:1A-1.1</u> , <u>N.J.A.C. 6A:32-7.1 et seq.</u> , and <u>White</u> , GRC 2012-218, the Custodian lawfully denied access to the redacted information under the <b>HIB Appeal</b> heading. <u>N.J.S.A. 47:1A-6</u> .
4.	May 15, 2013 Executive Session Minutes	<p><b>Grievance:</b></p> <ol style="list-style-type: none"> <li>1. Employee’s name/position (including pronouns)(11 redactions)</li> <li>2. Employee’s attorneys (2 redactions)</li> </ol>	Information generated by or on behalf of public employers or employees in connection with any grievance filed by or against an	In accordance with <u>N.J.S.A. 47:1A-1.1</u> , <u>N.J.S.A. 47:1A-10</u> , and <u>White</u> , GRC 2012-218, the Custodian lawfully denied access to the redacted grievance information under the <b>Grievance</b> heading. <u>N.J.S.A. 47:1A-6</u> .

		<p><b>Settlement:</b></p> <ol style="list-style-type: none"> <li>1. Student name (2 redactions)</li> <li>2. Location of private school (2 redactions)</li> </ol>	<p>individual.  <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.A.C. 6A:32-7.1</u>, <i>et seq.</i>  Student record to the extent that disclosure would reveal identity of student (special education placement).  <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.A.C. 6A:32-7.1</u>, <i>et seq.</i></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1</u>, <u>N.J.A.C. 6A:32-7.1 et seq.</u>, and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted information under the <b>Settlement</b> heading.  <u>N.J.S.A. 47:1A-6.</u></p>
5.	June 19, 2013 Executive Session Minutes	<p><b>Student Placement:</b></p> <ol style="list-style-type: none"> <li>1. Parent/student names (5 redactions).</li> <li>2. Location (1 redaction)</li> <li>3. Amount of tuition payment (2 redactions)</li> </ol>	<p>Student record to the extent that disclosure would reveal identity of student (special education placement).  <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.A.C. 6A:32-7.1</u>, <i>et seq.</i></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1</u>, <u>N.J.A.C. 6A:32-7.1 et seq.</u>, and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted information.  <u>N.J.S.A. 47:1A-6.</u></p>
6.	August 21, 2013 Executive Session Minutes	<p><b>Request for Special Services:</b></p> <ol style="list-style-type: none"> <li>1. Parent/Student names (8 redactions)</li> <li>2. Student condition (1 redaction)</li> <li>3. Student's current school (2 redactions)</li> </ol> <p><b>Projection Graduation:</b></p> <ol style="list-style-type: none"> <li>1. Parent/student names (including pronouns)(20 redactions)</li> <li>2. Identification of role in District (2 redactions)</li> <li>3. Employee name</li> </ol>	<p>Student record to the extent that disclosure would reveal identity of student (special education placement).  <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.A.C. 6A:32.7.1.</u></p> <p>Disciplinary proceedings against a student to the extent that disclosure would identify the student. <u>N.J.S.A. 47:1A-1.1</u>;</p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1</u>, <u>N.J.A.C. 6A:32-7.1 et seq.</u>, and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted information under the <b>Request for Special Services</b>, <b>Projection Graduation</b>, and <b>HIB Hearing</b> headings.  <u>N.J.S.A. 47:1A-6.</u></p> <p>In accordance with <u>N.J.S.A. 47:1A-1.1</u>, <u>N.J.S.A. 47:1A-10</u>, and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted</p>

		<p>(including pronouns)(3 redactions)</p> <p><b>HIB Hearing:</b> 1. Parent/student names (including pronouns)(14 redactions) 2. Employee name (including pronouns)(6 redactions)</p> <p><b>Affirmative Action:</b> 1. Employee name/position (including pronouns)(10 redactions)</p> <p><b>HHS Club</b> 1. Employee names (4 redactions) 2. Proper club name (1 redaction)</p>	<p><u>N.J.A.C. 6A:32-7.1 et seq.</u></p> <p>Information generated by or on behalf of public employers or employees in connection with any grievance filed by or against an individual. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10.</u></p>	<p>grievance information under the <b>Affirmative Action</b> and <b>HHS Club</b> headings. <u>N.J.S.A. 47:1A-6.</u></p>
7.	February 19, 2014 Executive Session Minutes	<p><b>HIB Hearing:</b> 1. Parent/student names (13 redactions)</p>	<p>Disciplinary proceedings against a student to the extent that disclosure would identify the student. <u>N.J.S.A. 47:1A-1.1; N.J.A.C. 6A:32-7.1 et seq.</u></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:32-7.1 et seq., and White, GRC 2012-218,</u> the Custodian lawfully denied access to the redacted information under the <b>HIB Hearing</b> heading. <u>N.J.S.A. 47:1A-6.</u></p>
8.	April 30, 2014 Executive Session Minutes	<p><b>Settlement Offer:</b> 1. Classification of student. 2. Settlement figures discussed between parties (4 redactions)</p>	<p>Student record to the extent that disclosure would reveal identity of student. <u>N.J.S.A. 47:1A-1.1; N.J.A.C. 6A:32.7.1.</u></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:32-7.1 et seq., and White, GRC 2012-218,</u> the Custodian lawfully denied access to the redacted information under the <b>Settlement Offer</b> heading. <u>N.J.S.A. 47:1A-6.</u></p>

1.	<u>DiNote</u> Tort Claim matter	<p>1. Parent/student name or last name and address (7 redactions)</p> <p>2. Student date of birth (1 redaction)</p> <p>3. Parent attorney’s name or last name (7 redactions)</p> <p>4. Employee name (3 redactions)</p>	<p>Student record to the extent that disclosure would reveal identity of student, including the attorney’s name (special education placement). <u>N.J.S.A. 47:1A-1.1; N.J.A.C. 6A:32-7.1, et seq.</u></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:32-7.1 et seq.,</u> and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted student/parent names, addresses, and date of birth. <u>N.J.S.A. 47:1A-6.</u> Custodian’s Counsel also provided sufficient reasoning for redacting the attorney and employee names.</p>
2.	<u>Skwirut</u> Tort Claim matter	<p>1. Parent/student name or last names (including pronouns)(8 redactions)</p> <p>2. Student date of birth and social security number (“SSN”)(2 redactions)</p> <p>3. Employee name (including pronouns)(14 redactions)</p>	<p>Student record to the extent that disclosure would reveal identity of student. <u>N.J.S.A. 47:1A-1.1; N.J.A.C. 6A:32-7.1, et seq.</u></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:32-7.1 et seq.,</u> and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted student/parent names, addresses, and date of birth. <u>N.J.S.A. 47:1A-6.</u> Custodian’s Counsel also provided sufficient reasoning for redacting the employee name.</p>
3.	<u>Einhorn</u> Tort Claim matter	<p>1. Parent/student name or last names (including pronouns)(9 redactions).</p> <p>2. Student home address, date of birth and telephone number (4 redactions)</p> <p>3. Witness names (2 redactions)</p> <p>4. Employee names (6 redactions)</p>	<p>Student record to the extent that disclosure would reveal identity of student. <u>N.J.S.A. 47:1A-1.1; N.J.A.C. 6A:32-7.1, et seq.</u></p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:32-7.1 et seq.,</u> and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the redacted student/parent names, addresses, and date of birth. <u>N.J.S.A. 47:1A-6.</u> Custodian’s Counsel also provided sufficient reasoning for redacting the employees’ names.</p>
4.	<u>Fenton</u> Tort Claim matter	<p>1. Parent/student names (12 redactions)</p> <p>2. Student home address, date of birth, and SSN (9 redactions)</p> <p>3. Parent SSN (1</p>	<p>Student record to the extent that disclosure would reveal identity of student (special education</p>	<p>In accordance with <u>N.J.S.A. 47:1A-1.1, N.J.A.C. 6A:32-7.1 et seq.,</u> and <u>White</u>, GRC 2012-218, the Custodian lawfully denied access to the</p>

		redaction) 4. Student Grade (3 redactions. 5. Student witness (1 redaction) 6. Employee name (1 redaction)	placement). <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.A.C. 6A:32-7.1</u> , <i>et seq.</i>	redacted student/parent names, addresses, and date of birth. <u>N.J.S.A. 47:1A-6</u> . Custodian’s Counsel also provided sufficient reasoning for redacting the student and employee names.
1.	Settlement Agreement and Release dated June 24, 2014	1. Parent/student initials and Parent’s signature (18 redactions) 2. Student’s home address and date of birth (2 redactions) 3. Name of attending school (12 redactions) 4. School costs and settlement figures (10 redaction) 5. Parent attorney’s name or last name (1 redaction)	Student record to the extent that disclosure would reveal identity of student (special education placement). <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.A.C. 6A:32-7.1</u> , <i>et seq.</i>	In accordance with <u>N.J.S.A. 47:1A-1.1</u> , <u>N.J.A.C. 6A:32-7.1 et seq.</u> , and <u>White</u> , GRC 2012-218, the Custodian lawfully denied access to the redacted student/parent initials and name, addresses, and date of birth. <u>N.J.S.A. 47:1A-6</u> . The Council further finds that its decision in <u>Popkin</u> , GRC 2011-263, supports all redactions contained within the settlement agreement. <sup>8</sup>

Thus, the Custodian lawfully denied access to all redacted information contained within the responsive records and no further action is required.

**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).

<sup>8</sup> The GRC notes that the Appellate Division recently issued an unpublished decision, which upheld an agency’s redaction of student initials contained within attorney bill entries. Wolosky v. Alvarez, 2017 N.J. Super. Unpub. LEXIS 79 (App. Div. 2017).

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 original Custodian's response was insufficient because he failed to provide a specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). However, the original Custodian's special service charge was reasonable and warranted. N.J.S.A. 47:1A-5(c); N.J.S.A. 47:1A-6. Additionally, the Custodian timely complied with the Council's October 27, 2015 Interim Order. Finally, the *in camera* examination revealed that the original Custodian lawfully denied access to the redacted information. Further, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions did 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 (7<sup>th</sup> 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 (on behalf of a client), disputing the original Custodian's special service charge. The Complainant also argued that the Custodian violated OPRA by not providing a lawful basis for redactions contained within the responsive records. To that end, the Complainant requested that the GRC order the original Custodian to submit a lawful basis for the redactions and perform an *in camera* review of the records. In its October 27, 2015 Interim Order, the Council determined that the charge was reasonable and warranted. Further, the Council ordered an *in camera* review of the records to include a document index. The Custodian timely complied with the Order, and the Council determined that all redactions were lawful.

In determining whether the Complainant is a prevailing party entitled to appropriate fees, the special service charge issue garnered no relief because the Council has determined that the charge was reasonable and warranted. Further, although the Council acquiesced to the Complainant's request to perform an *in camera* review, such an action was consistent with how the Courts have required the Council to act when it is unable to determine the adequacy of a custodian's denial. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Ultimately, the Council has determined that the original Custodian lawfully redacted all responsive records; thus, no disclosure is necessary. Accordingly, the Complainant is a not prevailing party and is not entitled to an award of attorney's fees.

Therefore, the Complainant has not 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 does not exist 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 reasonable and warranted. Further, the Custodian lawfully redacted all records reviewed *in camera*. Therefore, the Complainant is not 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 27, 2015 Interim Order because he responded in the prescribed time frame by submitting to the GRC nine (9) copies of the relevant redacted and unredacted records for an *in camera* examination, along with a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the records responsive to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-6.**
3. The original Custodian's response was insufficient because he failed to provide a specific lawful basis for redactions made to the responsive records. N.J.S.A. 47:1A-5(g). However, the original Custodian's special service charge was reasonable and warranted. N.J.S.A. 47:1A-5(c); N.J.S.A. 47:1A-6. Additionally, the Custodian timely



complied with the Council's October 27, 2015 Interim Order. Finally, the *in camera* examination revealed that the original Custodian lawfully denied access to the redacted information. Further, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions did 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. The Complainant has not 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 does not exist 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 reasonable and warranted. Further, the Custodian lawfully redacted all records reviewed *in camera*. Therefore, the Complainant is not 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.

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

February 14, 2017



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**October 27, 2015 Government Records Council Meeting**

Law Offices of Walter M. Luers, LLC  
(On behalf of C.C.)  
Complainant

Complaint No. 2015-15

v.

Eastern Camden County Regional School District  
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide a specific lawful basis for redactions made to the legal bills, executive session minutes, demand letters, tort claim notices, and settlement agreements, the Custodian’s response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010).
2. The Custodian has proved that a special service charge was both reasonable and warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the requests took over 35 hours to complete. Moreover, the charge ultimately applied for both OPRA requests amounted to an hourly rate of \$2.20 per hour, well below any of the identified hourly salaries of employees utilized to fulfill the OPRA request. *See* 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); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008). Thus, notwithstanding that Mr. Epstein sought electronic delivery of the responsive records, the Custodian proved that a special service charge was still warranted.
3. The GRC must conduct an *in camera* review of only those pages of the responsive records in which the Custodian reacted information to determine the validity of the Custodian’s assertion that the records are exempt in their entirety under OPRA because they contain student or parent information. *See* Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).



4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index,<sup>2</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 27<sup>th</sup> Day of October, 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 28, 2015**

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<sup>1</sup> 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.

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

<sup>3</sup> "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  
October 27, 2015 Council Meeting**

**Law Offices of Walter M. Luers, LLC<sup>1</sup>  
(On behalf of C.C.)  
Complainant**

**GRC Complaint No. 2015-15**

**v.**

**Eastern Camden County Regional School District<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

July 14, 2014 OPRA request: Electronic copies via e-mail of:

1. All bills for legal services rendered in the case of C.C. from September 1, 2013, to present.
2. All invoices for legal services rendered from September 1, 2013, to present.
3. All purchase orders for legal services rendered from September 1, 2013, to present.
4. All vouchers for legal services rendered from September 1, 2013, to present.
5. All cancelled checks (front and back) for legal services rendered from September 1, 2013, to present.
6. All Board of Education (“BOE”) resolutions approving legal services payments from September 1, 2013, to present.
7. All agreements for the provision of legal services from September 1, 2013, to present.

July 15, 2014 OPRA request: Electronic copies via e-mail of:

1. Any executive session minutes of Harassment, Intimidation & Bullying (“HIB”) appeals from July 1, 2011, to present.
2. Any demand letters received from, and responses to, any student, their parents, or their attorneys from July 1, 2011, to present.
3. Any Tort Claim Notices received from and responses to any student, their parents, or their attorneys from July 1, 2011, to present.
4. Any settlement agreements or consent ordered entered into by the BOE with any student, their parents, or their attorneys from July 1, 2011, to present.
5. The BOE’s liability policy in effect during the 2013-2014 school year.

**Custodian of Record:** Fred D. Wright

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Anthony I. Padovani, Esq., of Sahli & Padovani (Hammonton, NJ).

Law Offices of Walter M. Luers, Esq., LLC (On behalf of C.C.) v. Eastern Camden County Regional School District, 2015-15 – Findings and Recommendations of the Executive Director

**Request Received by Custodian:** July 15, 2014  
**Response Made by Custodian:** July 18, 2014  
**GRC Complaint Received:** January 13, 2015

### **Background**<sup>3</sup>

#### Request and Response:

On July 15, 2014, Mr. Jamie Epstein, Esq., C.C.'s attorney,<sup>4</sup> submitted two (2) Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. Mr. Epstein noted that the Custodian may redact all personal identifiers of students and parents leaving only their initials. On July 17, 2014, the Custodian verbally acknowledged receipt of the C.C.'s OPRA requests.

On July 18, 2014, the Custodian responded in writing, advising that the Eastern Camden County Regional School District ("District") will need an additional ten (10) calendar days in order to properly review and redact records. The Custodian noted that the District is typically short-staffed during the summer. On the same day, Mr. Epstein agreed to allow for an extension until July 25, 2014, for the second (2<sup>nd</sup>) OPRA request. However, Mr. Epstein did not agree to an extension to the first (1<sup>st</sup>) OPRA request, noting that it sought "immediate access" financial information.<sup>5</sup>

On July 22, 2014, the Custodian responded in writing, advising Mr. Epstein that he is prepared to provide 41 pages of financial records responsive to the Complainant's July 14, 2014, OPRA request. The Custodian noted that, due to the amount of time required to compile the responsive records, he assessed a \$20.00 fee to send records electronically. The Custodian stated that, if Mr. Epstein wished to retrieve the records in person, he would charge \$2.05 for hardcopies.

On July 22, 2014, Mr. Epstein e-mailed the Custodian, seeking an explanation for the \$20.00 fee. On July 23, 2014, the Custodian responded, advising that according to the District's official OPRA request form, it may charge a fee for electronic delivery of records when provided on supply cost, programming, clerical and/or supervisory assistance, and substantial use of information technology. The Custodian stated that he and other staff spent in excess of one (1) hour to locate records, dismantle packets, photocopy the responsive records, reassemble and refile the packets, locate minutes and bill lists approving payments, review all detailing billing records, redact and recopy those needing redaction, and locate and copy contracts for legal services. The Custodian stated that the applicable rates were \$27.68 and \$28.37 per hour, with his rate being substantially higher. The Custodian averred that \$20.00 was a fair estimate, given

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<sup>3</sup> 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.

<sup>4</sup> Mr. Epstein represents C.C. in actions not related to the instant Denial of Access Complaint.

<sup>5</sup> Mr. Epstein actually transposed the "financial records" request with the non-financial records request in his correspondence.

the circumstances. The Custodian noted that OPRA copy costs favor requestors, thus he might not be able to recover more than \$.05 per page for disclosure.

On July 25, 2014, the Custodian responded in writing, advising Mr. Epstein that he is prepared to provide 138 pages of records responsive to the Complainant's July 15, 2014, OPRA request. The Custodian stated that he assessed a \$60.00 fee for electronic delivery; however, Mr. Epstein could retrieve hardcopies of the records in person for a total of \$6.90.

On July 25, 2014, Mr. Epstein sent a letter to the Custodian, advising that he wished to receive the records electronically. Mr. Epstein stated that he would rather pay the hardcopy cost of \$8.95 for both requests. However, Mr. Epstein stated that if the Custodian him required to pay the \$80.00 fee, he would do so in protest and reserve his right to file a complaint regarding the fee. Mr. Epstein stated that he enclosed two (2) checks and requested that the Custodian send back the check he did not accept.

On July 29, 2014, the Custodian e-mailed to Mr. Epstein the responsive records (with redactions) and advised that he would return the check in the amount of \$8.90.

#### Denial of Access Complaint:

On January 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian's \$80.00 charge should be refunded to Mr. Epstein. The Complainant contended that the Custodian imposed the fee to penalize Mr. Epstein because he sought records electronically, as opposed to hard copies. The Complainant argued that, in his July 23, 2014, e-mail, the Custodian admitted to charging for the simple task of searching and copying responsive records and not a substantial use of information technology. The Complainant asserted that, regardless of whether the Custodian made copies or scanned the records, he appeared to be misinterpreting OPRA to allow an arbitrary charge to electronically disclose records. The Complainant asserted that the charge is in violation of OPRA and the GRC's case law regarding electronic delivery of records.

Additionally, the Complainant contended that the Custodian violated OPRA by redacting portions of the 138 pages of non-financial records without providing a lawful basis for same. The Complainant requested that the GRC order the Custodian to provide a specific lawful basis for the redactions and conduct an *in camera* review of the records.

#### Statement of Information:

On February 25, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received Mr. Epstein's two (2) OPRA requests on July 15, 2014.

The Custodian certified that his search for the responsive records included locating the records either digitally or by hardcopy. The Custodian affirmed that, in three (3) instances, he was required to dismantle and reassemble packets of records. The Custodian certified that he utilized employees in the Business Office, as well as Custodian's Counsel, to fulfill the subject OPRA requests. The Custodian certified that he scanned the records, checked them to ensure the

redactions effectively blacked out exempt information, and set up two (2) separate e-mails to Mr. Epstein.

The Custodian certified that he responded in writing on July 22, 2014, advising Mr. Epstein that 41 pages of records responsive to the July 14, 2014, OPRA were available for a cost of \$20.00 (if delivered electronically). The Custodian further certified that he responded in writing on July 25, 2014, advising Mr. Epstein that 138 pages of records responsive to the July 15, 2014, OPRA request were available for a cost of \$60.00 (if delivered electronically). The Custodian affirmed that the Complainant submitted a check for \$80.00, and on July 29, 2014, he e-mailed all responsive records to Mr. Epstein.

The Custodian asserted that the normal process for responding to an OPRA request should apply to the requests at issue here. The Custodian contended that most of the responsive records related to current, on-going litigation; thus, the District needed to employ a higher standard of review to ensure that they were complying with OPRA while not disclosing exempt information. The Custodian certified that the District spent 13.8 hours for direct work on the requests and 22.4 hours of research, planning, and review. Further, the Custodian noted that he conducted most of the preparation and review due to the sensitive nature of the records.

The Custodian certified that he provided the Complainant with an explanation of the fees charged for both requests. The Custodian asserted that the \$20.00 charge for the first request was reasonable, given that it represented less than the hourly rates of staff involved in the process (\$27.68 and \$28.37). Additionally, the Custodian argued that the total \$80.00 charge still represented less than his own hourly rate (\$89.66). The Custodian asserted that the charge was reasonable, given the additional work necessary to locate, copy, review, redact, recopy, review again, and scan the responsive records. The Custodian asserted that he believed the fee was warranted, given the District's labor to provide the responsive records electronically.

## Analysis

### Sufficiency of Response

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). Thus, OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions.

In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner by providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council held that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction . . .” Id. at 4. The Council further held that “the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and has not borne his burden of proving the denial of access to the redacted portions was authorized by law. . .” Id. at 5. *See* Schwarz v. NJ Dep’t of Human Serv., GRC Complaint No. 2004-60 (February, 2005)(setting forth the proposition that specific citations to the law that

allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010)(noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

In this matter, the Custodian disclosed records with redactions to the Complainant on July 29, 2014. However, he failed to provide a specific lawful basis for the redactions contained in the records upon providing access to same. It was not until the submission of the SOI that the Custodian argued that he redacted information pertaining to students and parents. It should also be noted that the Custodian did not include a statutory citation for these redactions in the SOI. *See Paff v. Borough of Manasquan (Monmouth)*, GRC Complaint No. 2009-281 (Interim Order dated March 29, 2011)(holding that the addition of a statutory citation would have reinforced the denial of redacted information).

Therefore, because the Custodian failed to provide a specific lawful basis for redactions made to the legal bills, executive session minutes, demand letters, tort claim notices, and settlement agreements, the Custodian's response to the Complainant's OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010).

### **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.

OPRA provides that "[a]ccess to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs."

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). 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.

Additionally, in complaints where the complainant paid an assessed fee and the Council subsequently determined that the fee was unwarranted or unreasonable, the Council has ordered the public agency to refund monies to complainant. *See Coulter v. Twp. of Bridgewater (Somerset)*, GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009)(*citing Janney v. Estell Manor City (Atlantic)*, GRC Complaint No. 2006-205 (January 2008))(holding that the assessed special service charge was unreasonable and ordering the Custodian to refund the difference between the \$5.00 fee and the actual cost of \$0.96 (or \$4.04)).

Moreover, OPRA provides that providing access to records electronically “shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.” Id. However, this provision does not necessarily mean that a custodian can never charge for electronic delivery unless supplies are involved. For example, the Council has also previously held that a custodian could charge a per-page copy cost for redacted records if the agency did not have ability to electronically redact same. Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, it follows that requestors seeking records electronically may be subject to the imposition of a special service charge based on “an extraordinary expenditure of time and effort” to respond to the request. N.J.S.A. 47:1A-5(c).

Here, the Complainant disputed the \$80.00 charge for electronic disclosure of records. The Complainant argued that OPRA provides that electronic access to records must be free of charge. N.J.S.A. 47:1A-5(b). Further, the Complainant argued that the Custodian misinterpreted OPRA to charge an arbitrary fee in order to punish Mr. Epstein for not requesting hard copies of the records. The Complainant also argued that a custodian could not charge a fee for simple tasks such as locating, copying, and scanning records.

Conversely, the Custodian argued in the SOI that the fee was warranted because of the amount of time spent to fulfill the request, which he estimated to take over 35 hours. The Custodian noted that an immense amount of work went into preparing the responsive records, and that the fee was reasonable, given the amount of time spent and the fact that the total charge was less than his own hourly rate.

Thus, the GRC must determine whether the assessed charge was reasonable and warranted. When special service charges are at issue, the GRC will typically require a custodian to complete a 14-point analysis questionnaire prior to making a determination on the reasonableness of the charge. However, the Custodian provided enough information in the SOI to allow the GRC to forego requiring the completion of the analysis questionnaire.

The Complainant's OPRA requests sought twelve different types of records: seven (7) of the items spanned nearly eleven (11) months and the remaining five (5) items spanned just over twelve (12) months. In the SOI, the Custodian did not assert that any of the responsive records were archived; however, some of the records were bound together and needed to be dismantled in order to obtain those responsive for copying and scanning. Ultimately, the Custodian certified that he provided to the Complainant via e-mail 179 pages of records to the Complainant, some of which contained redactions. The Custodian certified that the District expended 13.8 hours working on the responsive records and 22.4 hours to research the requests, plan the response, and review all responsive correspondence. Such an extensive amount of time, coupled with the amount of records and redactions, support that a special service charge was indeed warranted in the instant matter.

Having found the proposed fee warranted, 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, assuming that 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*, GRC 2006-205.

Here, the Custodian provided three (3) hourly rates for individuals that worked on the request: 1) \$27.68; 2) \$28.37; and 3) \$89.66. The first two rates related to staff members that aided the Custodian in responding to the Complainant's OPRA requests, while the third rate related to the Custodian. He feels that \$20.00 for the first OPRA request and \$60.00 for the second OPRA request, for a total of \$80.00, is reasonable. Dividing \$80.00 by the number of hours the Custodian certified that his office expended (36.2) amounts to approximately \$2.20 an

hour, well below New Jersey's minimum wage, let alone the hourly rates set forth in the SOI. While it is indisputable that the Custodian was not the lowest paid employee capable of performing most of the tasks associated with responding to this OPRA request, the facts of this complaint support that the charge was ultimately reasonable.

Accordingly, the Custodian has proved that a special service charge was both reasonable and warranted here. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the requests took over 35 hours to complete. Moreover, the charge ultimately applied for both OPRA requests amounted to an hourly rate of \$2.20 per hour, well below any of the identified hourly salaries of employees utilized to fulfill the OPRA request. *See* N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Janney, GRC 2006-205. Thus, notwithstanding that Mr. Epstein sought electronic delivery of the responsive records, the Custodian proved that a special service charge was still warranted.

### **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. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> 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:

[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:

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<sup>6</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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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 Complainant disputed redactions made to several records. Although he did not initially provide a lawful basis for redactions, the Custodian subsequently asserted that he redacted student and parent names from legal bills, executive session minutes, demand letters, tort claim notices, and settlement agreements. However, the Custodian did not include a statutory exemption, and it is unclear whether all redactions contain only student or parent identifiers. Thus, the GRC must review same in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of only those pages of the responsive records in which the Custodian reacted information to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain student or parent information. See Paff, 379 N.J. Super. at 346.

**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. Because the Custodian failed to provide a specific lawful basis for redactions made to the legal bills, executive session minutes, demand letters, tort claim notices, and settlement agreements, the Custodian's response to the Complainant's OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010).

2. The Custodian has proved that a special service charge was both reasonable and warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the requests took over 35 hours to complete. Moreover, the charge ultimately applied for both OPRA requests amounted to an hourly rate of \$2.20 per hour, well below any of the identified hourly salaries of employees utilized to fulfill the OPRA request. *See 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); *Janney v. Estell Manor City (Atlantic)*, GRC Complaint No. 2006-205 (January 2008). Thus, notwithstanding that Mr. Epstein sought electronic delivery of the responsive records, the Custodian proved that a special service charge was still warranted.
3. The GRC must conduct an *in camera* review of only those pages of the responsive records in which the Custodian reacted information to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain student or parent information. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of the redacted records, a document or redaction index,<sup>8</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.

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Reviewed By: Joseph D. Glover

Executive Director

October 20, 2015

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<sup>7</sup> 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.

<sup>8</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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

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