



**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**

**October 25, 2016 Government Records Council Meeting**

Klarida Papajani  
Complainant

Complaint No. 2015-122 and 2015-198

v.

NJ Turnpike Authority  
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council’s June 29, 2016 Interim Order because he did not respond in a timely manner, nor did he seek an extension to reply. The Custodian did ultimately provide a copy of the requested certified confirmation of compliance to the Executive Director on July 12, 2016, the sixtieth business day after receipt of the Council’s Order.
2. Although the original Custodian unlawfully denied access to the requested records by failing to respond in the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant’s January 15, 2015 OPRA request by appropriately requesting a special service charge. In addition, the Custodian responded to the Complainant’s February 19, 2015 OPRA request by disclosing responsive records. Additionally, the Custodian timely responded to the Complainant’s remaining OPRA requests by providing responsive records. The Council notes, however, that the Custodian would have fully complied had he either satisfied the Order within eight (8) business days of receipt or contacted the Council for an extension of time in which to reply. Instead, the Custodian did not finally comply until sixty (60) business days after the issuance of the Interim Order. However, the Council stresses that the Custodian ultimately satisfied the Order by advising the GRC that the Complainant had declined to pay the special service charge. Accordingly, 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 25<sup>th</sup> Day of October, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: October 27, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 25, 2016 Council Meeting**

**Klarida Papajani<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-122, 2015-198<sup>2</sup>**

v.

**NJ Turnpike Authority<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

January 15, 2015 OPRA Request (#3373)

“All emails send to other department for inside NJTPAA & GSP, Klarida Papajani, from February 1, 12 till present” (sic).

February 17, 2015 OPRA Request (#3425)

“Please forward the e-mails that NJTPA has forward to local 194 from Sept, 2014 til present, in case of Klarida Papajani” (sic).

February 19, 2015 OPRA Request (#3439)<sup>4</sup>

“Forward all e-mails that NJTPA has send from September 2013 till present in case of Klarida Papajani” (sic).

March 12, 2015 OPRA Request (#3513)<sup>5</sup>

1. “Emails forward from NJTPA with each other departments forward attorneys and Local 194 from September 2013 to September 2014” (sic).
2. “All violations copies, procedure in vest training” (sic).

**Custodian of Record:** Ramon de la Cruz, Esq.

**Request Received by Custodian:** January 15, 2015; January 22, 2015; February 17, 2015; February 19, 2015; March 12, 2015.

**Response Made by Custodian:** January 28, 2015; February 14, 2015; February 26, 2015; March 3, 2015; March 17, 2015; March 25, 2015; April 1, 2015; May 1, 2015.

**GRC Complaint Received:** April 27, 2015; June 29, 2015.

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

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

<sup>3</sup> No legal representation listed on record.

<sup>4</sup> The Complainant requested additional records that are not at issue in this Complaint.

<sup>5</sup> The Complainant requested additional records that are not at issue in this Complaint.

## Background

### June 28, 2016 Council Meeting:

At its June 28, 2016 public meeting, the Council considered the June 21, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The NJTPA did not respond to the Complainant's OPRA request until January 29, 2015, the tenth (10th) business day following receipt. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. 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 review of the 2,000 responsive e-mails would likely take at least 33 hours of the Custodian's time. Moreover, the application of the Custodian's hourly rate of \$62.60 results in a \$2,065.80 special service charge. *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).
3. **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 \$2,065.80 for the records responsive to the January 15, 2015 request, 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 same. 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 eight (8) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 with respect to the Complainant's willingness or refusal to purchase the requested records.**
4. The Custodian certified that the agency provided the above-mentioned e-mails to the Complainant in a timely manner, and the Complainant asserted neither legal nor factual arguments nor provided evidence to the contrary. The Council therefore declines to order disclosure because the evidence of record indicates that the requested records were, in fact, disclosed to the Complainant.

5. Because OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request, the Custodian's response on the eighth (8th) business day following receipt of the request resulted in a "deemed" denial, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council ultimately declines to order disclosure because the Custodian certified that the agency provided the above-mentioned records to the Complainant, and the Complainant neither asserted legal nor factual arguments nor provided evidence to the contrary.
6. Because the Custodian certified that the agency provided the above-mentioned e-mails and safety vest procedure document to the Complainant in a timely manner, and the Complainant asserted neither legal nor factual arguments nor provided evidence to the contrary, the Council declines to order disclosure because the evidence of record indicates that the existing requested records were, in fact, disclosed to the Complainant.
7. 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 June 29, 2016, the Council distributed its Interim Order to all parties. On September 27, 2016, the Custodian responded to the Council's Interim Order, providing a certification of compliance.

#### Analysis

#### Compliance

At its June 28, 2016 meeting, the Council ordered the Custodian to certify to the Council as to the Complainant's willingness or refusal to purchase the records at issue and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 29, 2016 the Council distributed its Interim Order to all parties, providing the Custodian eight (8) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 12, 2016.

On September 27, 2016, the sixtieth (60th) business day after receipt of the Council's Order, the Custodian responded to the Council's Interim Order by providing a certification of compliance that the Complainant had failed to take action within five (5) business days

Therefore, the Custodian did not fully comply with the Council's June 29, 2016 Interim Order because he did not respond in a timely manner, nor did he seek an extension to reply. The Custodian did ultimately provide a copy of the requested certified confirmation of compliance to the Executive Director on July 12, 2016, the sixtieth business day after receipt of the Council's Order.

## **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 original Custodian unlawfully denied access to the requested records by failing to respond in the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant’s January 15, 2015 OPRA request by appropriately requesting a special service charge. In addition, the Custodian responded to the Complainant’s February 19, 2015 OPRA request by disclosing responsive records. Additionally, the Custodian timely responded to the Complainant’s remaining OPRA requests by providing responsive records. The Council notes, however, that the Custodian would have fully complied had he either satisfied the Order within eight (8) business days of receipt or contacted the Council for an extension of time in which to reply. Instead, the Custodian did not finally comply until sixty (60) business days after the issuance of the Interim Order. However, the Council stresses that the Custodian ultimately satisfied the Order by advising the GRC that the Complainant had declined to pay the special service charge. Accordingly, 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 June 29, 2016 Interim Order because he did not respond in a timely manner, nor did he seek an extension to reply. The Custodian did ultimately provide a copy of the requested certified confirmation of compliance to the Executive Director on July 12, 2016, the sixtieth business day after receipt of the Council's Order.
  
2. Although the original Custodian unlawfully denied access to the requested records by failing to respond in the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant's January 15, 2015 OPRA request by appropriately requesting a special service charge. In addition, the Custodian responded to the Complainant's February 19, 2015 OPRA request by disclosing responsive records. Additionally, the Custodian timely responded to the Complainant's remaining OPRA requests by providing responsive records. The Council notes, however, that the Custodian would have fully complied had he either satisfied the Order within eight (8) business days of receipt or contacted the Council for an extension of time in which to reply. Instead, the Custodian did not finally comply until sixty (60) business days after the issuance of the Interim Order. However, the Council stresses that the Custodian ultimately satisfied the Order by advising the GRC that the Complainant had declined to pay the special service charge. Accordingly, 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: Husna Kazmir  
Staff Attorney

October 18, 2016



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

June 28, 2016 Government Records Council Meeting

Klarida Papajani  
Complainant

Complaint Nos. 2015-122 and 2015-198

v.

NJ Turnpike Authority  
Custodian of Record

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The NJTPA did not respond to the Complainant’s OPRA request until January 29, 2015, the tenth (10th) business day following receipt. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. 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 review of the 2,000 responsive e-mails would likely take at least 33 hours of the Custodian’s time. Moreover, the application of the Custodian’s hourly rate of \$62.60 results in a \$2,065.80 special service charge. 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).
3. **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 \$2,065.80 for the records responsive to the January 15, 2015 request, 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 same. 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 eight (8) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 with respect to the Complainant's willingness or refusal to purchase the requested records.**

4. The Custodian certified that the agency provided the above-mentioned e-mails to the Complainant in a timely manner, and the Complainant asserted neither legal nor factual arguments nor provided evidence to the contrary. The Council therefore declines to order disclosure because the evidence of record indicates that the requested records were, in fact, disclosed to the Complainant.
5. Because OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request, the Custodian's response on the eighth (8th) business day following receipt of the request resulted in a "deemed" denial, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council ultimately declines to order disclosure because the Custodian certified that the agency provided the above-mentioned records to the Complainant, and the Complainant neither asserted legal nor factual arguments nor provided evidence to the contrary.
6. Because the Custodian certified that the agency provided the above-mentioned e-mails and safety vest procedure document to the Complainant in a timely manner, and the Complainant asserted neither legal nor factual arguments nor provided evidence to the contrary, the Council declines to order disclosure because the evidence of record indicates that the existing requested records were, in fact, disclosed to the Complainant.
7. 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 28<sup>th</sup> Day of June, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 29, 2016**

**TuSTATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2016 Council Meeting**

**Klarida Papajani<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-122, 2015-198<sup>2</sup>**

v.

**NJ Turnpike Authority<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

January 15, 2015 OPRA Request (#3373)

“All emails send to other department for inside NJTPAA & GSP, Klarida Papajani, from February 1, 12 till present” (sic).

February 17, 2015 OPRA Request (#3425)

Please forward the e-mails that NJTPA has forward to local 194 from Sept, 2014 til present, in case of Klarida Papajani” (sic).

February 19, 2015 OPRA Request (#3439)<sup>4</sup>

“Forward all e-mails that NJTPA has send from September 2013 till present in case of Klarida Papajani” (sic).

March 12, 2015 OPRA Request (#3513)<sup>5</sup>

1. “Emails forward from NJTPA with each other departments forward attorneys and Local 194 from September 2013 to September 2014” (sic).
2. “All violations copies, procedure in vest training” (sic).

**Custodian of Record:** Ramon de la Cruz, Esq.

**Request Received by Custodian:** January 15, 2015; January 22, 2015; February 17, 2015; February 19, 2015; March 12, 2015.

**Response Made by Custodian:** January 28, 2015; February 14, 2015; February 26, 2015; March 3, 2015; March 17, 2015; March 25, 2015; April 1, 2015; May 1, 2015.

**GRC Complaint Received:** April 27, 2015; June 29, 2015.

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

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

<sup>3</sup> No legal representation listed on record.

<sup>4</sup> The Complainant requested additional records that are not at issue in this Complaint.

<sup>5</sup> The Complainant requested additional records that are not at issue in this Complaint.

## **Background**<sup>6</sup>

### January 15, 2015 Request (#3373) and Response:

On January 15, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On January 29, 2015, the tenth (10th) business day following receipt of the request, Administrative Assistant Jackie Rooney wrote to the Complainant, advising that the request for e-mails would result in approximately 2,000 e-mails and that a special service charge, pursuant to N.J.S.A. 47:1A-5(c), may be warranted. Ms. Rooney advised that a staff attorney would have to review each e-mail for OPRA exemptions and that an estimated cost would be calculated for the time spent reviewing the documents. Ms. Rooney stated that, in the alternative, if the Complainant were to limit the search to date and/or other search term parameters, “we can see if the results are more reasonable in scope.” Ms. Rooney additionally noted that the agency required up to five (5) additional business days to process this request and requested that the Complainant contact the agency to determine whether the request could be narrowed or if she would prefer to pay the special service charge once the total cost was estimated. On February 4, 2015, Ms. Rooney contacted the Complainant to reiterate the January 29, 2015 request for 5 (five) additional business days to gather and review responsive e-mails.

On February 9, 2015, the Custodian wrote to the Complainant, stating that certain records were subject to OPRA exemptions and/or redaction. The Custodian informed the Complainant that the NJTA’s estimate for a staff attorney to review the documents and/or prepare a log of documents withheld as subject to OPRA was \$2,033, based upon an average hourly rate of \$61.00 and 33 hours to review the estimated 2,000 documents. The Custodian asked the Complainant to confirm whether the estimate was acceptable and noted that payment was required in order to start processing the e-mails. The Custodian noted that, in the alternative, if the Complainant could “limit the search, we can see if the results are more reasonable in scope.” The Custodian requested that the Complainant advise as to the route she wished to pursue within seven (7) business days and stated, “if we do not hear back within 7 business days we will presume you are no longer interested in proceeding and will close this OPRA.”

That same day, the Complainant replied to the Custodian, stating that she was sick and that “as soon as I get better” she would “stop by and look at all papers and get what I need.” On February 15, 2015, the Complainant wrote to the Custodian, requesting to know when “the agency’s attorney would be “free for me to stop by and look at emails and get what I need. . .” On February 17, 2015, the Custodian reiterated the statements of his February 9, 2015 e-mail, namely that the estimated special service charge for processing the request was \$2,033 or that, alternatively, the Complainant could attempt to limit the search in order to produce a “more reasonable” volume of results.

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<sup>6</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.

That same day, the Complainant responded to the Custodian, stating, “In simple English language you will not allow me to look at the request and get what I need??? Please answer in writing yes or no.” The Custodian responded that same day, referring the Complainant to his earlier response. The Complainant responded to this e-mail, requesting a “Yes or No” answer to her last e-mail. The Custodian responded that same day, again referring the Complainant to his earlier response. The Complainant responded to the e-mail that same day, stating, “I am not paying none of the ridiculous estimate. I will pay when I see the papers.” (sic). The Custodian responded to the e-mail that same day, writing that the agency would close out the OPRA request based on that response.

#### February 17, 2015 OPRA Request (#3425) and Response

On February 17, 2015, the Complainant submitted an OPRA request, seeking the above-mentioned records. On February 25, 2015, Ms. Rooney responded, attaching the requested e-mails. The Complainant replied that same day, stating that she could not open the attachment. On February 26, 2015, Ms. Rooney responded, attaching the e-mails once more and advising that the request was now considered closed and complete.

#### February 19, 2015 OPRA Request (#3439) and Response

On February 19, 2015, the Complainant submitted an OPRA request, seeking the above-mentioned records. Ms. Rooney replied on March 1, 2015, attaching “Part 1” of the requested e-mails. On March 3, 2015, Ms. Rooney wrote to the Complainant and attached “Part 3” of the requested e-mails. That same day, Ms. Rooney again wrote to the Complainant and attached “Part 4” of the requested e-mails, thereby concluding and closing the request. The Complainant replied that same day, stating, “My OPRA is not complete.”

#### March 12, 2015 OPRA Request (#3513) and Response

On March 12, 2015, the Complainant submitted an OPRA request, seeking the above-mentioned records. On March 17, 2015, Jane Paxton from the NJTA’s Law Department wrote to the Complainant seeking clarification as to item #2, seeking “all violations copies, procedure in vest training” (sic) and requested to know the specific documents sought as well as the time frame. The Complainant responded that same day, clarifying that she was referring to “any violation that Turnpike has/not received for wearing/not vest during work hours. If is any violation than copies of the violation, what was done to fix this violation including all process how was fixed this violation” (sic). The Complainant additionally noted that the time frame was for the last ten (10) years.

On March 24, 2015, Ms. Paxton responded to the Complainant. With respect to item #1, she attached the requested e-mails. With respect to item #2, Ms. Paxton wrote that “no safety vest violations were found and therefore, there are no responsive documents to provide” and attached a document pertaining to safety vest procedure, titled “Safety Bulletin.”

## Denial of Access Complaints:

### Denial of Access Complaint No. 2015-122

On April 20, 2015, the Complainant filed with the Government Records Council (“GRC”) a Denial of Access Complaint regarding requests #3439, #3513, #3373, and #3425. The Complainant asserted that she was told that the cost for processing one of her requests, #3373, was \$2,033 because there were “over 2000 e-mails” and that she “narrow[ed] the question in 5 OPRA requests.” She asserted, however, that she ultimately received no more than “60 e-mails.” She additionally alleged that in response to the e-mails requested in requests #3439, 3513, and 3425, she received “5%.” The Complainant asserted no other legal or factual arguments.

### Denial of Access Complaint No. 2015-198

On June 10, 2015, the Complainant filed a Denial of Access Complaint regarding request #3513, from March 12, 2015. She wrote that the NJTA “lied,” as item #3 of that request sought “all violations, procedures in vest training” and that the NJTA responded saying there were “no vest safety violations.” She asserted that she “had to investigate on [her] own and found violations on 3/23/2010.” The Complainant argued “this proves that NJ Turnpike is lying.” The Complainant attached a one-page document from the NJ Department of Labor and Workforce Development, dated May 23, 2010, noting that an injured employee was not wearing a required High Visibility Safety Vest at a vehicular-pedestrian accident on December 13, 2009.

## Statement of Information:

### Statement of Information for Complaint No. 2015-122<sup>7</sup>

On May 14, 2015 the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received Complainant’s above-mentioned OPRA requests as follows:

#### January 15, 2015 OPRA Request (#3373)

The Custodian certified that the agency received the request on January 15, 2015. The Custodian attached correspondence that showed the search undertaken to locate the requested records. On January 28, 2015, Administrative Manager Dennis Zilinski wrote to Jackie Rooney, advising that documents responsive to item #1 were located, but “managers were unclear” on the specific request in item #2. Ms. Rooney advised Mr. Zilinski that the Complainant sought “all incident reports resulting from a Turnpike and/or Parkway employee being injured as the result of a safety violation.” Later that day, Mr. Zilinski advised Ms. Rooney by e-mail that a check with District Managers and Administrative Assistants resulted in the agency locating no injury reports stemming from a safety violation.

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<sup>7</sup> In the SOI, the Custodian addressed other OPRA requests previously filed by the Complainant. The GRC declines to adjudicate OPRA requests that were not raised by the Complainant in her two Complaints.

The Custodian attached correspondence showing that Ms. Rooney responded to item #1 of the request on February 4, 2015, attaching a report of a vehicular accident involving Anil Sookhram.

With respect to item #3, the Custodian attached correspondence showing that Ms. Rooney initially responded on January 29, 2015, advising the Complainant that that portion of the request would result in approximately 2,000 e-mails. Ms. Rooney further advised that the agency required five (5) additional business days to process the request and that a staff attorney would need to review each e-mail for OPRA exemptions. Ms. Rooney noted that a special service charge may be warranted for a request requiring an extraordinary expenditure of time and effort. Ms. Rooney advised the Complainant that, in the alternative, if she could limit the search to date and/or other search term parameters, “we can see if the results are more reasonable in scope.”

On February 9, 2015, the Custodian responded to this portion of the request, stating that he examined some of the records retrieved and determined there are records subject to OPRA exemptions and/or redaction. The Custodian advised the Complainant that the Authority estimated a special service charge of \$2,033.00, based upon an average hourly rate of \$61.00 and 33 hours of review of the estimated 2,000 documents. The Custodian advised the Complainant that payment was required to start processing the request. On February 17, 2015, the Complainant ultimately responded that she would not pay the estimate, and the Custodian closed out the request that same day.

#### February 17, 2015 OPRA Request (#3425)

The Custodian certified that the agency received this request on February 17, 2015 and responded on February 25, 2015, attaching the responsive e-mails. Ms. Rooney re-sent the attachment on February 26, 2015, after the Complainant indicated that she was unable to open the previous attachment.

#### February 19, 2015 OPRA Request (#3439)

The Custodian certified that the agency received the request on February 19, 2015, and that Jackie Rooney responded to Item #1 on March 3, 2015, by sending three separate e-mails and attaching the responsive e-mails. By separate e-mail that same day, Ms. Rooney responded to item #2 of the request by advising the Complainant as to the names of employees participating in both written and operating tests for heavy machinery for the aforementioned timeframe.

#### March 12, 2015 OPRA Request (#3513)

The Custodian certified that the agency received the request on March 12, 2015. The Custodian attached correspondence showing that Ms. Paxton initially responded on March 17, seeking clarification as to item #2 in terms of the time frame for the information sought and regarding a misspelled word. On March 24, 2015, Ms. Paxton responded with respect to item #2 by attaching a responsive safety vest procedure document and noting that no responsive records

concerning “safety vest violations” were found. With respect to item #1, Ms. Paxton attached the responsive e-mails and thereafter deemed those items to be complete.

With respect to all of the above-mentioned requests, the Custodian certified that the agency performed an extensive search to locate the requested records, both on- and off-site and that “accommodations were made” to enable the Complainant several options to obtain the responsive records. The Custodian argued that the NJTA was responsive to the Complainant’s OPRA requests and twice provided several options for her to receive responsive records.

Statement of Information for Complaint No. 2015-198

The Custodian submitted a second SOI on July 10, 2015, regarding the Complainant’s June 10, 2015 Denial of Access Complaint concerning the March 12, 2015 OPRA request. The Custodian certified that the agency received the request on March 12, 2015, and responded on March 17, 2015, seeking clarification, and on March 24, 2015, providing whatever responsive records were located. The Custodian averred that the agency performed an “extensive search” to locate records both onsite and offsite. The Custodian additionally certified that accommodations were made to provide the requestor with several options to obtain responsive records. With respect to the Complainant’s assertion that the agency “lied,” the Custodian stated that the one page document provided by the Complainant is part of a broader document entitled “Notice of Order to Comply,” which is not a record of a sustained fine or employee violation. The Custodian stated that the Complainant’s request sought violations and that no fines or employee violations were sustained.

Additional Submissions

On March 31, 2016, the GRC wrote to the Custodian, seeking additional information to determine whether a special service charge was warranted in this case. The GRC requested that the Custodian prepare a 14-point analysis. The GRC’s questions and the Custodian’s responses follow in the chart below:

GRC’s Questions	Custodian’s Responses
1. What records are requested?	“All emails send to each other department for inside NJTPA, GSP – Klarida Papajani – Feb. 1, 12 till present.”
2. Give a general nature description and number of the government records requested.	2,000 e-mails and/or attachments which amounted to approximately 2,000 documents related to Ms. Papajani.
3. What is the period of time over which the records extend?	February 1, 2012, to January 2015.
4. Are some or all of the records sought archived or in storage?	Emails and/or attachments are electronically archived.
5. What is the size of the agency (total number	Enterprise-wide there are 1,938 employees,

of employees)?	490 part time employees and 72 temporary employees.
6. What is the number of employees available to accommodate the records request?	One Information Technology System (“ITS”) employee; One reviewer of e-mails (Ramon de la Cruz, esq.); One staff assistant (Jane Paxton)
7. To what extent do the requested records have to be redacted?	The main focus of the special service charge is related to the review/redaction task of potential records exempted by OPRA. A review of the 2,000 emails showed throughout that redactions were warranted. E-mails and/or attachments had to be generally reviewed for applicable OPRA exemptions, but more particularly, for <u>N.J.S.A. 47:1A-1.1(1), (7), and (12)</u> .
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?	An ITS employee would be able to process the e-mail search query without a special service charge. The amount of time involved is approximately 45 minutes. A law department employee would also be able to assemble for printing two sets of responsive records, the privilege/exemption log and/or scan them for e-mailing to the requester without a special service charge. The amount of time involved is estimated to be 45-60 minutes.
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?	Not applicable. In order for the records requestor to inspect responsive records, the Authority is first required to review and redact disclosable records which would be subject to inspection.
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?	Not applicable.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The review of records involved requires the reviewer to identify and interpret attorney/client and other intra confidential communications which are subject to OPRA exemption(s) and cannot be disclosed.
12. Who (name and job title) in the agency will	Response by Ramon de la Cruz, Esq., staff



perform the work associated with the records request and that person’s hourly rate?	attorney and OPRA records custodian for the Authority. Hourly rate is \$62.60.
13. What is the availability of information technology and copying capabilities?	The information technology/copying available include Internet, printing, and scanning capabilities.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce, and return the requested documents.	The reviewer and Authority’s OPRA records custodian, Ramon de la Cruz, Esq., would perform the review and redactions of 2,000 responsive records including a privilege/exemption log.  The estimated time is 33 hours or less and the hourly rate is \$62.60.

### Analysis

#### 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.

The GRC will address each OPRA request separately and in chronological order.

January 15, 2015 OPRA Request (#3373)

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>8</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

<sup>8</sup> A custodian’s written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Here, the NJTPA did not respond to the Complainant's OPRA request until January 29, 2015, the tenth (10th) business day following receipt. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Special Service Charge**

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 those documents, the court found that 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 responses to questions posed by the GRC that reflect the analytical framework outlined in the Courier Post regarding the proper assessment of a special service charge. The Custodian argued the necessity of his hourly cost of \$62.60 being passed onto the Complainant in order to perform thirty-three (33) hours of work to redact records responsive to the Complainant’s January 15, 2015 OPRA request. The Custodian noted that the “main focus” of the charge related to the review/redaction task of the 2,000 responsive e-mails. The Custodian stated that an ITS employee could process the e-mail search query without incurring a special service charge (taking about 45 minutes), and a law department employee would also be able to assemble for printing two sets of records, the privilege/exemption log and/or scan or e-mail them to the requester without a special service charge (taking about 45-60 minutes).

The current issue is similar to one issue contemplated by the Court in Courier Post. There, the Court held that “[a]ttorneys’ fees will not be allowed to be charged to the Post or to any other requestor of documents for review and redaction of exempt material.” Id. at 207. In reaching this decision, the Court reasoned that “[t]he Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the custodian is responsible for asserting the privilege and making [redactions].” Id. at 203-204. *But see Fisher v. Div. of Law*, 400 N.J. Super. 61 (App. Div. 2008) (affirming the Council’s decision that the custodian could charge for a deputy attorney general’s time spent retrieving and redacting records based on special circumstances).

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

[A]lthough the original Custodian sought Mr. Cooper’s aid in redacting the responsive vendor list, the Custodian cannot attempt to pass the cost of Mr. Cooper’s services onto the Complainant because OPRA clearly requires “that the *custodian* is responsible for asserting the privilege and making the redaction.” Courier Post . . . at 203-204. Moreover, the current Custodian failed to prove that Counsel’s expertise is required to review the vendor list and redact personal information. Thus, the proposed special service charge of \$375.00 to \$450.00 is not reasonable or warranted pursuant to N.J.S.A. 47:1A-5(c). Therefore, the

current Custodian must redact and provide the responsive list to the Complainant at no charge.

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

In the matter currently before the Council, the GRC notes that the Custodian himself would review and redact the responsive e-mails, distinguishing the case from Carter, where the agency sought to have the complainant pay for an outside attorney to review and redact the requested records. Here, the Complainant's OPRA request sought "all e-mails" relating to herself from February 2012 to January 2015. The Custodian certified that a search resulted in 2,000 e-mails and/or attachments. The Custodian acknowledged that the e-mail search query would take approximately 45 minutes and that the preparation of records would take an estimated 45-60 minutes. However, the Custodian estimated that review and potential redaction of the 2,000 documents would take him an estimated 33 hours or less, at an hourly rate of \$62.60. While the special service charge originally cited by the Custodian was \$2,033, the GRC has calculated a cost of \$2,065.80, based on the hourly rate cited by the Custodian. It should further be noted that in the original interaction with the Complainant regarding this request, the Custodian suggested that the Complainant could limit her search to produce a "more reasonable" volume of results.

The circumstances of Fisher, where a special service charge was upheld, are somewhat analogous here. There, the special service charge sought by the Division of Law was for the cost of retrieving the government records responsive to the appellant's requests, and the public officials assigned to perform that responsibility were the same public officials who prepared the government records. Id. at 72. Here, as attested to by the Custodian in his certification, the agency does not seek to charge the Complainant for the cost of retrieval but to impose a special service charge solely for the purpose of the Custodian determining whether the large quantity of e-mails contains any material that may be exempt under OPRA, particularly N.J.S.A. 47:1A-1.1(1); (7); and (12); and whether such material should be redacted. The Court's holding in Courier Post, where a special service charge was imposed solely for outside counsel determining whether the records contained privileged material that should be redacted, is not applicable here. Rather, the holding in Fisher, where attorneys who prepared the records in question were reviewing and redacting the records, is more illustrative. Here, the agency seeks to impose a charge for the Custodian's review of the responsive documents, which he certified entailed 2,000 e-mails and/or attachments.

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 review of the 2,000 responsive e-mails would likely take at least 33 hours of the Custodian's time. Moreover, the application of the Custodian's hourly rate of \$62.60 results in a \$2,065.80 special service charge. *See* N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204.

#### February 17, 2015 OPRA Request (#3425)

The Custodian certified that the NJTPA received the request on February 17, 2015, and that Ms. Rooney responded on February 25, 2015, the seventh business day following receipt of

the request, attaching the requested e-mails. The Custodian certified that the attachment was re-sent the next day, February 26, 2015.

In the instant matter, the Custodian certified that the agency provided the above-mentioned e-mails to the Complainant in a timely manner, and the Complainant asserted no other legal or factual arguments. Nor did the Complainant provide evidence to the contrary. The Council therefore declines to order disclosure because the evidence of record indicates that the requested records were, in fact, disclosed to the Complainant.

#### February 19, 2015 OPRA Request (#3439)

In the instant request, the Custodian certified that the agency received the request on February 19, 2015, and that Ms. Rooney responded on March 3, 2015, the eighth (8th) business day following receipt. The Custodian certified that Ms. Rooney attached the responsive e-mails and additionally, in separate e-mail, advised the Complainant as to the names of employees participating in written and operating tests for heavy machinery for the aforementioned timeframe.

Because OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request, the Custodian's response on the eighth (8th) business day following receipt of the request resulted in a "deemed" denial, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council ultimately declines to order disclosure because Custodian certified that the agency provided the above-mentioned records to the Complainant, and the Complainant neither asserted legal or factual arguments nor provided evidence to the contrary.

#### March 12, 2015 OPRA Request (#3513)

The Custodian certified that the agency received the request on March 12, 2015, and attached correspondence showing that Ms. Paxton initially responded on March 17, the third (3rd) business day following receipt, seeking clarification as to item #2 in terms of the time frame for the information sought and regarding a misspelled word. The Custodian certified that Ms. Paxton ultimately responded on March 24, 2015, the fifth (5th) business day following her request for clarification, attaching a responsive safety vest procedure document and noting that no responsive records concerning "safety vest violations" were found. She additionally attached responsive e-mails with respect to item #1 and deemed both items to be complete.

With respect to all of the above-mentioned requests, the Custodian certified that the agency performed an extensive search to locate the requested records, both on- and off-site, and that "accommodations were made" to enable the Complainant several options to obtain the responsive records. The Custodian argued that the NJTA was responsive to the Complainant's OPRA requests and twice provided several options for her to receive responsive records.

The Complainant's second Denial of Access Complaint, filed on June 10, 2015, asserted that the NJTA "lied" as to item #2, which sought "all violations, procedures in vest training." The Complainant noted that the NJTA responded, saying there were "no vest safety violations."

She alleged that she had to investigate on her own and “found violations on 3/23/2010.” The Complainant argued that her investigation “proves that NJ Turnpike is lying.” The Complainant attached a document, titled 5 of 7, from the NJ Department of Labor and Workforce Development, dated May 23, 2010, noting that an injured employee was not wearing a required High Visibility Safety Vest at a vehicular-pedestrian accident on December 13, 2009.

In his SOI dated July 10, 2015, the Custodian stated that the one-page document submitted by the Complainant is part of a document titled “Notice of Order to Comply.” The Custodian stated that the Complainant’s original request sought “violations” and that no fines or employee violations were sustained and that the Agency located no such records.

Because the Custodian certified that the agency provided the above-mentioned e-mails and safety vest procedure document to the Complainant in a timely manner, and the Complainant asserted neither legal or factual arguments nor provided evidence to the contrary, the Council declines to order disclosure because the evidence of record indicates that the existing requested records were, in fact, disclosed to the Complainant.

### **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. The NJTPA did not respond to the Complainant’s OPRA request until January 29, 2015, the tenth (10th) business day following receipt. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. 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 review of the 2,000 responsive e-mails would likely take at least 33 hours of the Custodian’s time. Moreover, the application of the Custodian’s hourly rate of \$62.60 results in a \$2,065.80 special service charge. *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).
3. **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**

**\$2,065.80 for the records responsive to the January 15, 2015 request, 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 same. 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 eight (8) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 with respect to the Complainant's willingness or refusal to purchase the requested records.**

4. The Custodian certified that the agency provided the above-mentioned e-mails to the Complainant in a timely manner, and the Complainant asserted neither legal nor factual arguments nor provided evidence to the contrary. The Council therefore declines to order disclosure because the evidence of record indicates that the requested records were, in fact, disclosed to the Complainant.
5. Because OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request, the Custodian's response on the eighth (8th) business day following receipt of the request resulted in a "deemed" denial, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council ultimately declines to order disclosure because the Custodian certified that the agency provided the above-mentioned records to the Complainant, and the Complainant neither asserted legal nor factual arguments nor provided evidence to the contrary.
6. Because the Custodian certified that the agency provided the above-mentioned e-mails and safety vest procedure document to the Complainant in a timely manner, and the Complainant asserted neither legal nor factual arguments nor provided evidence to the contrary, the Council declines to order disclosure because the evidence of record indicates that the existing requested records were, in fact, disclosed to the Complainant.
7. 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.

Prepared By: Husna Kazmir  
Staff Attorney

June 21, 2016