



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 22, 2018 Government Records Council Meeting

Galloway Township News
Complainant

Complaint No. 2015-419

v.

City of Cape May (Cape May)
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 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 failed to fully comply with the Council’s March 27, 2018 Interim Order, Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, she failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.
2. The original Custodian unlawfully denied access to the responsive legal bills. N.J.S.A. 47:1A-6. Further the current Custodian did not fully comply with the Council’s March 27, 2018 Interim Order. However, the current Custodian ultimately provided all responsive records to the Complainant on April 19, 2018. Additionally, the evidence of record does not indicate that either the original or the current Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the original nor the current Custodian’s respective actions 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 22nd Day of May, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Galloway Township News¹
Complainant**

GRC Complaint No. 2015-419

v.

**City of Cape May (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of: “[T]he legal bills for the Cape May Convention center which is outlined in Mr. Scheeler’s lawsuit as well as the legal bills for the Cape May County Prosecutor’s Office lawsuit.”

Custodian of Record: Louise Cummiskey³

Request Received by Custodian: December 11, 2015

Response Made by Custodian: December 14, 2015; December 15, 2015; December 16, 2015; December 17, 2015; December 18, 2015; December 23, 2015

GRC Complaint Received: December 29, 2015

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 Findings and Recommendations of the Council Staff 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. Notwithstanding the Custodian’s rescission of her assessment for copying costs associated with redacting electronic records, the initial imposition of the assessment was unlawful under OPRA. N.J.S.A. 47:1A-5(b). The Custodian cannot impose such an assessment when she has the means to electronically redact the records. See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated April 20, 2011). Additionally, while there was contention between the parties regarding a special service charge, the Custodian did not in fact assess a charge and has also rescinded this claim. Therefore, the Council declines to address the issue in depth.

¹ No legal representation listed on record.

² Represented by Frank L. Corrado, Esq. of Barry Corrado & Grassi, PC (Wildwood, NJ).

³ The current Custodian of Record is Patricia Harbora.

2. The Custodian may have unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) disclose the records to the Complainant; or 2) provide evidence to support that she already disclosed them to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.⁵**
4. 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 March 28, 2018, the Council distributed its Interim Order to all parties. On April 16, 2018, the Custodian requested and was granted an extension of time to respond to until April 23, 2018.

On April 20, 2018, the Custodian responded to the Council's Interim Order. The Custodian provided a certification asserting that on April 19, 2018, she delivered responsive records to the Complainant in accordance with the Interim Order.

Analysis

Compliance

At its March 27, 2018 meeting, the Council ordered the Custodian to provide responsive records to the Complainant or submit evidence that such records had previously been provided, and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Council Staff. On March 28, 2018, 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 April 5, 2018.

On April 16, 2018, the twelfth (12th) business day after receipt of the Council's Order, the Custodian sought an extension of time to respond to the Interim Order. The extension was granted to until April 23, 2018. On April 20, 2018, the Custodian responded to the Council's Order, certifying that the responsive records were provided to the Complainant on April 19, 2018.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Therefore, the Custodian failed to fully comply with the Council’s March 27, 2018 Interim Order, Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, she failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.

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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the original Custodian unlawfully denied access to the responsive legal bills. N.J.S.A. 47:1A-6. Further the current Custodian did not fully comply with the Council’s March 27, 2018 Interim Order. However, the current Custodian ultimately provided all responsive records to the Complainant on April 19, 2018. Additionally, the evidence of record does not indicate that either the original or the current Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the original nor the current Custodian’s respective actions 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 Council Staff respectfully recommends the Council find that:

1. The Custodian failed to fully comply with the Council’s March 27, 2018 Interim Order, Specifically, although the Custodian ultimately provided all responsive records to the Complainant along with an accompanying certification, she failed to seek an extension of time to respond to the Interim Order within the initial five (5) business days.

2. The original Custodian unlawfully denied access to the responsive legal bills. N.J.S.A. 47:1A-6. Further the current Custodian did not fully comply with the Council's March 27, 2018 Interim Order. However, the current Custodian ultimately provided all responsive records to the Complainant on April 19, 2018. Additionally, the evidence of record does not indicate that either the original or the current Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the original nor the current Custodian's respective actions 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: Samuel A. Rosado
Staff Attorney

May 15, 2018



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DEPARTMENT OF COMMUNITY AFFAIRS
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PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

March 27, 2018 Government Records Council Meeting

Galloway Township News
Complainant

Complaint No. 2015-419

v.

City of Cape May (Cape May)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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. Notwithstanding the Custodian’s rescission of her assessment for copying costs associated with redacting electronic records, the initial imposition of the assessment was unlawful under OPRA. N.J.S.A. 47:1A-5(b). The Custodian cannot impose such an assessment when she has the means to electronically redact the records. See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated April 20, 2011). Additionally, while there was contention between the parties regarding a special service charge, the Custodian did not in fact assess a charge and has also rescinded this claim. Therefore, the Council declines to address the issue in depth.
2. The Custodian may have unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) disclose the records to the Complainant; or 2) provide evidence to support that she already disclosed them to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Council Staff.²**

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. 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 27th Day of March, 2018

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: March 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Galloway Township News¹
Complainant**

GRC Complaint No. 2015-419

v.

**City of Cape May (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of: “[T]he legal bills for the Cape May Convention center which is outlined in Mr. Scheeler’s lawsuit as well as the legal bills for the Cape May County Prosecutor’s Office lawsuit.”

Custodian of Record: Louise Cummiskey³

Request Received by Custodian: December 11, 2015

Response Made by Custodian: December 14, 2015; December 15, 2015; December 16, 2015; December 17, 2015; December 18, 2015; December 23, 2015

GRC Complaint Received: December 29, 2015

Background⁴

Request and Response:

On December 10, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 14, 2015, the first (1st) business day after receipt, the Custodian, via Counsel,⁵ indicated that he would need the full seven (7) business days to review and, if needed, redact responsible records containing attorney-client privileged communications. On December 15, 2015, the Complainant requested a specific return date. That same day, Counsel requested clarification on the specific topics requested within the attorney bills. Counsel also stated that once clarification was received, he can provide a return date. Additionally, Counsel stated that a fee would be imposed, and he could provide an estimate when he receives the Complainant’s clarification.

On December 16, 2015, the Complainant responded to the Custodian, noting that the OPRA request had already indicated specific topics: litigation pertaining to the “Cape May

¹ No legal representation listed on record.

² Represented by Frank L. Corrado, Esq. of Barry Corrado & Grassi, PC (Wildwood, NJ).

³ The current Custodian of Record is Patricia Harbora.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ At the time of the OPRA request, the Counsel for the Custodian was Louis A. DeLollis, Esq.

Convention center” and the “Cape May County Prosecutor’s Office” lawsuit, both within the 2015 period. The Complainant also questioned why fees would be have to be imposed when legal bills are billed generally once a month, resulting in twelve (12) bills per year. The Complainant also stated that because bills are “immediate” access records, an extension of just four (4) business days is sufficient to review any responsive records.

Counsel responded on December 16, 2015, stating that based the Complainant’s clarifications, an extension to until December 21, 2015 was required. Counsel also reiterated that a copying fee would be assessed by the Custodian and would let the Complainant know by the next day. On December 17, 2015, the Custodian notified the Complainant that the copying fee for the records was approximated at \$25.00. The Complainant replied that day requesting a specific breakdown of the estimated cost, including the number of pages, rate per page, and why a charge was assessed at all. On December 18, 2015, the Custodian responded to the Complainant stating that approximately 171 pages of responsive records needed to be redacted; the rate per page is \$0.05 per letter sized page or smaller pursuant to N.J.S.A. 47:1A-5(b); and that she would need to create three (3) photocopies of the records for a total charge of \$25.65.

On December 23, 2015, the Complainant asked the Custodian why a copying fee was assessed when she requested the records electronically. The Complainant contended that the redaction process normally only required the creation of two (2) copies of the records, not three (3). Furthermore, the Complainant argued that the documents could be electronically redacted once scanned into the computer, thereby eliminating the need to create any physical copies. The Custodian replied that same day, stating that the previous e-mail’s reference to three (3) copies was made in error, and that the fee was calculated at \$19.05. The Custodian also stated that a special service charge may be assessed due to the expenditure of time and effort needed for review, redactions, and accompanying redaction log. Upon receipt of the fee assessed for copying, the Custodian stated she would begin working on the request and provide a release date and an estimate of any additional fees imposed.

In response, the Complainant objected to the Custodian’s claim that review of the located records warranted a special service charge. She asserted that the Custodian cannot first charge a fee for copying costs, then at a later date withhold the records until a special service charge is asserted. The Complainant stated that an estimate of the costs, including a special service charge, was to be made up front, giving the requestor the opportunity to reject payment. Nevertheless, the Complainant objected to the Custodian’s claim that review of 171 pages of records justifies a special service charge.

On December 25, 2015, Counsel for the Custodian responded to the Complainant, asserting that the agency has the right impose a special service charge on top of copying costs. Furthermore, Council asserted that the Custodian previously stated that there may be a special service charge, rather than a guarantee that there will be one imposed. If a special service charge is imposed, and the Complainant objects to paying, Counsel stated that the Complainant would receive a refund for the copying costs.

Denial of Access Complaint:

On December 29, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian is not permitted to impose a special service charge for the review and redaction of attorney bills, and even if they were, a total of 171 pages to review would not meet the criteria of an “extraordinary effort.” The Complainant cited Scheeler v. N.J. Dep’t of Educ., GRC Complaint No. 2013-190 (Interim Order dated January 28, 2014), where the GRC held that the redaction of 243 pages of records did not warrant a special service charge.

Additionally, the Complainant argued that the Custodian is not permitted to charge copying fees in a request for electronic records, in accordance with previous training seminars and accompanying materials provided by the GRC. The Complainant contended that in more recent seminars, the GRC informed custodians that they may charge for as many copies as needed when redacting records to ensure that the redacted information isn’t revealed when be converted to an electronic format. The Complainant stated that access to public records at a reasonable cost should not be contingent upon whether or not the agency has quality tools or available software to make redactions. The Complainant argued that if the agency has access to the Internet and can reliably respond to requests for electronic records, then it should utilize freely available redaction software and not charge for copies made during the redaction process.

The Complainant alleged that the GRC is aware of agencies commonly over-redacting documents in order to conceal embarrassing information, and has previously ordered agencies to disclose records that have been improperly redacted. The Complainant asserted that it is unlikely that all 171 located records would warrant an OPRA exemption, and concluded that the Custodian’s request for a service charge calculated based upon reliance on advice from the GRC is unreasonable as applied to this request.

On January 12, 2016, the Complainant provided a chain of e-mails sent from December 25, 2015 through December 30, 2015, between the Custodian and another OPRA requestor. The requestor sought the purchase orders for Microsoft Office and Adobe Acrobat software programs. The Custodian responded that the City of Cape May (“City”) had not purchased Microsoft Office since 2007, and that orders for that purchase have been destroyed. However, the Custodian stated that the City utilizes Adobe Acrobat Pro and pays a monthly of \$16.04 for the privilege.

The Complainant asserted that this correspondence is evidence that the City had the means to electronically redact records without the need to print copies and incur copying fees. The Custodian contended that should the GRC find there was an unlawful denial of access, it should also review and assess a knowing and willful penalty.

Statement of Information:

On January 26, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 10, 2015. The Custodian certified that she sought clarification from the Complainant as she contended that

the request was broad and unclear. Specifically, the Custodian stated that the request sought the same legal bills as those requested via a civil suit, however the civil suit requested legal bills over a period of time, and didn't specify a topic as the Complainant identified in her OPRA request. Additionally, the Custodian stated that the topic described by the Complainant spanned an extended period of time, necessitating clarification.

The Custodian certified that she assessed a copy fee from the Complainant before providing the requested records, arguing that OPRA allows custodians to seek copying fees pursuant to N.J.S.A. 47:1A-5. Furthermore, the Custodian cited Santos v. N.J. State Parole Bd., GRC Complaint No. 2004-74 (August 2004), where the Council held that the custodian was not required to release the records to the complainant when they hadn't received the actual cost of creating copies of the records. The Custodian also referred to Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February 2005), where the Council held that the custodian was allowed to withhold release of the requested record until they received payment for copying costs. The Custodian argued that the circumstances here are similar, in that they are allowed to withhold disclosure of the records until they receive payment for copying costs.

Regarding the imposition of copying costs in general, the Custodian asserted that the legal bills at issue are mailed to the City via regular mail, processed at the City's Finance Department, and neither provided nor kept electronically. The Custodian stated that in order to fulfill the request, she would need to locate the records, make an initial copy, then another copy as a result of redactions made pertaining to ongoing litigation and the attorney-client privilege.

On the matter of the special service charge, the Custodian argues that the determination of what request justifies an imposition of a special service charge is on a case-by-case basis. The Custodian cited The Courier Post v. Lenape Reg'l High School, 360 N.J. Super. 191, 202 (Law Div. 2002), where the court determined that under OPRA, what constitutes "extraordinary expenditure of time and effort" is dependent upon a variety of factors, including but not limited to, the size of the agency, the number of employees available to process the request, the availability of information technology, as well as the nature, size and number of documents requested.

In the instant matter, the Custodian argued that the records' location, the copying process, the number of responsive records in total, and the time needed to review and redact the records, all justified the imposition of a special service charge. However, the Custodian contended that she had not requested a special service charge from the Complainant, only that she informed the Complainant that such a charge may be assessed after determining the time and effort needed to process the request.

Additional Submissions:

On February 2, 2016, the Complainant provided additional submissions to the GRC in relation to the current matter, as well as a request for a change of venue. The Complainant argued that the crux this complaint is the fee request for copies as well as the special service charge. To this end, the Complainant alleged that the former Deputy Director of the GRC played a role in creating this schism.

The Complainant argued that the medium in which the legal bills are stored is irrelevant, and that the Custodian has in possession a “commercial grade high capacity copy machine which is also a 60 page per minute scanner.” The Complainant attached as Exhibit “A” to her correspondence a copy of a lease agreement between a vendor and the City for a specific copy machine. The Complainant also included as Exhibit “B” a copy of the user pamphlet for the copy machine mentioned above, which detailed some of its capabilities.

In addition to the copier, the Complainant argued that the Custodian’s access to Adobe Acrobat means the Custodian is able to redact records electronically, without the need to create hard copies of the records for redaction purposes. The Complainant included as Exhibit “C” a step-by-step process to redact electronic records using the Adobe Acrobat software. Therefore, the Complainant argued that based upon the above information on the Custodian’s capabilities, she is not entitled to impose copying costs, never mind a special service charge.

Lastly, the Complainant included correspondence marked as Exhibit “D”, where the Custodian attempted to confirm with the former GRC Deputy Executive Director guidance she heard at an OPRA seminar regarding charges for copies made when processing an electronic OPRA request that needs redactions. The Complainant argued that, given the apparent role played by the GRC in this matter prior to filing her complaint, the GRC should transfer this matter to the Office of Administrative Law for adjudication.

On September 28, 2017, the GRC requested from the Custodian additional information regarding the matter, as well as a fourteen (14) point special service charge analysis. On January 25, 2018, after receiving no response, the GRC sent the request again. On January 29, 2018, the current Custodian, via Counsel, responded to the GRC. The Custodian stated that at the time of the request, she did not have access to Adobe Acrobat Pro, but the software was installed and available on or around December 2017. Additionally, the Custodian also believed that the Complainant received the requested records without any incursion of cost or redactions, and thereby withdraws any pending request for assessment of a special service charge based on the need to redact the records.

On February 12, 2018, the Complainant replied to the Custodian’s September 29, 2018 response. The Complainant asserted that she has not received any responsive records from the Custodian on this matter, contrary to the Custodian’s claim. The Complainant asserted that prior to adjudication, all requested records should be released to the Complainant’s satisfaction.

Analysis

Copying Costs

OPRA provides that “the assessed for the duplication of a government record embodied in the form of printed matter shall be: \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger.” N.J.S.A. 47:1A-5(b). Additionally, OPRA allows the Custodian “to charge the actual cost of duplicating the record” if the Custodian can show that the costs exceed the rates stated above. Id. The actual cost assessed is determined in part by “the cost of materials and supplies used to make a copy of the record.” However, OPRA states that “access 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.” Id.

In Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated April 20, 2011), the Council addressed the issue of copying fees associated with the redaction of electronic records. The custodian charged the complainant \$6.00 for providing electronic records. This cost was due to the custodian needing to print the electronic records, manually make redactions, then re-scan the redacted copies for delivery. The custodian certified that they did not have the ability to electronically redact the records, thus the need to print copies. As a result, the Council held that the \$6.00 charge for the cost of making the copies was warranted under OPRA. However, the Council noted that where the custodian has the capability to redact records electronically in a visually obvious manner, the custodian may not charge for the electronic delivery of those redacted records, consistent with prior case law. See Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order dated April 8, 2010).

In the instant matter, the Custodian asserted that the need to make redactions to responsive records necessitated the creation of hard copies, and that she did not have the means to make redactions electronically. Thus, at the time of the OPRA request the Custodian would not provide the records until she received the assessed amount from the Complainant. In the response to the GRC’s request for additional information, the Custodian certified that she did not have access to Adobe Acrobat Pro, a software capable of making electronic redactions, until on or around December 2017. The Complainant disputed the Custodian’s claims, providing correspondence regarding an unrelated OPRA request where the Custodian told a requestor that the City had access to Adobe Acrobat Pro since around the same month (December 2015) as when she received the Complainant’s OPRA request.

The facts in the current matter do not parallel those in Paff, GRC 2010-09. Although the Custodian made the same claim that they did not have the means to electronically redact records, the contradictory evidence provided by the Complainant lends doubt to this assertion. The current Custodian’s claim that she did not have access to Adobe Acrobat Pro until December 2017 is not credible when the former Custodian asserted that the City at large had access since December 2015.

Therefore, notwithstanding the Custodian’s rescission of her assessment for copying costs associated with redacting electronic records, the initial imposition of the assessment was unlawful under OPRA. N.J.S.A. 47:1A-5(b). The Custodian cannot impose such an assessment when she had the means to electronically redact the records. See Paff GRC 2010-09. Additionally, while there was contention between the parties regarding a special service charge, the Custodian did not in fact assess a charge and has also rescinded this claim. Therefore, the Council declines to address the issue in depth.

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 the instant matter, the Custodian argued in her SOI that the Complainant’s request for attorney bills necessitated an assessment of copying fees, due to the need to potentially redact the records for privileged material. The Complainant objected, asserting that the Custodian had the means to redact the records electronically, eliminating the need to make copies of the records.

When the GRC asked for more information, the current Custodian rescinded the assessment of copying fees and a special service charge, and claimed that the records had since been provided to the Complainant. However, the Complainant disputed this claim, stating that she has not received any responsive records pertaining to this matter.

Therefore, the Custodian may have unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) disclose the records to the Complainant; or 2) provide evidence to support that she already disclosed them 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 Council Staff respectfully recommends the Council find that:

1. Notwithstanding the Custodian’s rescission of her assessment for copying costs associated with redacting electronic records, the initial imposition of the assessment was unlawful under OPRA. N.J.S.A. 47:1A-5(b). The Custodian cannot impose such an assessment when she has the means to electronically redact the records. See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated April 20, 2011). Additionally, while there was contention between the parties regarding a special service charge, the Custodian did not in fact assess a charge and has also rescinded this claim. Therefore, the Council declines to address the issue in depth.
2. The Custodian may have unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) disclose the records to the Complainant; or 2) provide evidence to support that she already disclosed them to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Council Staff.⁷

4. 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: Samuel A. Rosado
Staff Attorney

March 20, 2018

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.