



**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**

**September 25, 2018 Government Records Council Meeting**

Ronald W. Yarbrough  
(o/b/o Pro-Spec Corporation)  
Complainant

Complaint No. 2016-234

v.

East Windsor Municipal Utilities Authority (Mercer)  
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council (“Council”) considered the September 18, 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 did not comply fully with the Council’s July 31, 2018 Interim Order. Specifically, the Custodian recalculated and provided the proposed special service charge to the Complainant the same day as receipt of the Order. However, the Custodian did not provide certified confirmation of compliance to the Council Staff until six (6) business days after the expiration of the compliance time frame.
2. The Custodian bore his burden of proof that he timely responded to the Complainant’s OPRA request. Further, although the Custodian bore his burden of proof that a special service charge was warranted, the Council found that the proposed fee was not reasonable. Further, the Custodian did not comply fully with the Council’s July 31, 2018 Interim Order. Notwithstanding, the Custodian recalculated and provided to the Complainant the proposed fee and was not obligated to disclose records in the wake of the Complainant’s silence on his potential acquiescence of it. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 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: September 27, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
September 25, 2018 Council Meeting**

**Ronald W. Yarbrough<sup>1</sup>  
(On Behalf of Pro-Spec Corporation)  
Complainant**

**GRC Complaint No. 2016-234**

v.

**East Windsor Municipal Utilities Authority (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:

1. All documents, communications, correspondence, agreements, and computer data related to Bid File: Painting of the Twin Rivers 2MG Standpipe Contract No. 00004694 (“Bid File”).
2. All documents, communications, correspondence, agreements, and computer data exchanged between the East Windsor Municipal Utilities Authority (“EWMUA”) and Mumford-Bjorkman Associates (“MBA”) related to the Bid File over the last three (3) years.
3. All documents, communications, correspondence, agreements, and computer data exchanged between the EWMUA and Sherman Williams Paint Company related to the Bid File over the last three (3) years.
4. All agreements, time records, and invoices between MBA and the EWMUA executed or otherwise effective over the last five (5) years.
5. All documents, communications, correspondence, and computer data exchanged between the EWMUA and any person or entity, excluding EWMUA’s attorney, related to the Bid File.
6. All meeting minutes or resolutions related the Bid File and the file’s “Consultant.”
7. All documents, communications, correspondence, agreements, and computer data between the Custodian, Skip Lovejoy (EWMUA), Jim Criss (Sherman Williams), and Andy Mumford (MBA) related to the Bid File.

**Custodian of Record:** Richard Brand  
**Request Received by Custodian:** February 8, 2016  
**Response Made by Custodian:** February 18, 2016  
**GRC Complaint Received:** August 19, 2016

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<sup>1</sup> As noted above, the Complainant represents the Pro-Spec Corporation.

<sup>2</sup> Represented by Andrew M. Slom, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

## Background

### July 31, 2018 Council Meeting:

At its July 31, 2018 public meeting, the Council considered the July 24, 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. The Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full forty (40)-hour charge should be calculated based solely on the Office Manager's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
3. **The Custodian shall comply with conclusion No. 2 above by making the amended special service charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall provide the Complainant the opportunity to inspect the responsive records onsite upon payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order. Further, and within the same ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule R. 1:4-4<sup>3</sup> to the Council Staff with respect to the Complainant's willingness or refusal to pay the newly calculated special service charge and whether he inspected said records.**
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 August 2, 2018, the Council distributed its Interim Order to all parties. On the same day, the Custodian sent a letter via certified mail to the Complainant with a recalculated charge of

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

\$560.00 based on 40 hours at the secretarial rate of \$14.00 per hour. The Custodian requested that the Complainant advise whether he accepted or rejected the charge.

On August 24, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that per the Council's Order, he recalculated the special service charge and notified the Complainant of the new proposed fee via certified mail on August 2, 2018. The Custodian affirmed that the Complainant appeared to have received the letter because he received the return receipt. On August 31, 2018, in response to the Government Records Council's ("GRC") request to supplement the certification, the Custodian affirmed that the Complainant did not respond to his August 2, 2018 letter.

### **Analysis**

#### **Compliance**

At its July 31, 2018 meeting, the Council ordered the Custodian to recalculate the special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. The Order further required the Custodian to provide the new rate to the Complainant and disclose records if he agreed to it. Finally, the Custodian was required to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Council staff. On August 2, 2018, the Council distributed its Interim Order to all parties, providing the Custodian ten (10) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 16, 2018.

On August 2, 2018, the Custodian recalculated the cost and sent a letter to the Complainant advising of it. The Custodian further requested that the Complainant state whether he accepted or rejected the new proposed fee. On August 24, 2018, the sixteenth (16<sup>th</sup>) business day after receipt of the Council's Order, the Custodian certified that he sent the letter advising of the recalculated fee. In a supplemental response, the Custodian affirmed that the Complainant did not respond to his August 2, 2018 letter. While the Custodian recalculated the charge and advised the Complainant of such within the appropriate time frame, he did not provide certified confirmation of compliance until after its expiration. Thus, the record supports that the Custodian did not comply with the Council's Order fully.

Therefore, the Custodian did not comply fully with the Council's July 31, 2018 Interim Order. Specifically, the Custodian recalculated and provided the proposed special service charge to the Complainant the same day as receipt of the Order. However, the Custodian did not provide certified confirmation of compliance to the Council Staff until six (6) business days after the expiration of the compliance time frame.

#### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the

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

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

In the matter before the Council, the Custodian bore his burden of proof that he timely responded to the Complainant’s OPRA request. Further, although the Custodian bore his burden of proof that a special service charge was warranted, the Council found that the proposed fee was not reasonable. Further, the Custodian did not comply fully with the Council’s July 31, 2018 Interim Order. Notwithstanding, the Custodian recalculated and provided to the Complainant the proposed fee and was not obligated to disclose records in the wake of the Complainant’s silence on his potential acquiescence of it. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not comply fully with the Council’s July 31, 2018 Interim Order. Specifically, the Custodian recalculated and provided the proposed special service charge to the Complainant the same day as receipt of the Order. However, the Custodian did not provide certified confirmation of compliance to the Council Staff until six (6) business days after the expiration of the compliance time frame.
2. The Custodian bore his burden of proof that he timely responded to the Complainant’s OPRA request. Further, although the Custodian bore his burden of proof that a special service charge was warranted, the Council found that the proposed fee was not reasonable. Further, the Custodian did not comply fully with the Council’s July 31, 2018 Interim Order. Notwithstanding, the Custodian recalculated and provided to the Complainant the proposed fee and was not obligated to disclose records in the wake of

the Complainant's silence on his potential acquiescence of it. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

September 18, 2018



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**July 31, 2018 Government Records Council Meeting**

Ronald W. Yarbrough (o/b/o Pro-Spec Corporation)  
Complainant

Complaint No. 2016-234

v.

East Windsor Municipal Utilities Authority (Mercer)  
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 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. The Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full forty (40)-hour charge should be calculated based solely on the Office Manager’s hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
3. **The Custodian shall comply with conclusion No. 2 above by making the amended special service charge available to the Complainant within three (3) business days from receipt of the Council’s Interim Order. The Custodian shall provide the Complainant the opportunity to inspect the responsive records onsite upon payment of the special service charge, if any, within ten (10) business days from receipt of the Council’s Interim Order. Further, and within the same ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule**





**R. 1:4-4<sup>1</sup> to the Council Staff with respect to the Complainant's willingness or refusal to pay the newly calculated special service charge and whether he inspected said records.**

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 31<sup>st</sup> Day of July, 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: August 2, 2018**

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
July 31, 2018 Council Meeting**

**Ronald W. Yarbrough<sup>1</sup>  
(On Behalf of Pro-Spec Corporation)  
Complainant**

**GRC Complaint No. 2016-234**

v.

**East Windsor Municipal Utilities Authority (Mercer)<sup>2</sup>  
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**Records Relevant to Complaint:** Electronic copies via e-mail of:

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4. All agreements, time records, and invoices between MBA and the EWMUA executed or otherwise effective over the last five (5) years.
5. All documents, communications, correspondence, and computer data exchanged between the EWMUA and any person or entity, excluding EWMUA’s attorney, related to the Bid File.
6. All meeting minutes or resolutions related the Bid File and the file’s “Consultant.”
7. All documents, communications, correspondence, agreements, and computer data between the Custodian, Skip Lovejoy (EWMUA), Jim Criss (Sherman Williams), and Andy Mumford (MBA) related to the Bid File.

**Custodian of Record:** Richard Brand

**Request Received by Custodian:** February 8, 2016

**Response Made by Custodian:** February 18, 2016

**GRC Complaint Received:** August 19, 2016

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<sup>1</sup> As noted above, the Complainant represents the Pro-Spec Corporation.

<sup>2</sup> Represented by Andrew M. Slom, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

Ronald W. Yarbrough (On Behalf of Pro-Spec Corporation) v. East Windsor Municipal Utilities Authority (Mercer), 2016-234 – Findings and Recommendations of the Council Staff

## Background<sup>3</sup>

### Request and Response:

On February 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 18, 2016, the seventh (7<sup>th</sup>) business day<sup>4</sup> after receipt of the OPRA request, the Custodian responded in writing stating that a special service charge was required due to the voluminous nature of the request and labor costs. N.J.S.A. 47:1A-5(c). The Custodian stated that the estimated special service charge was as follows:

Copy Cost (\$0.05 or \$0.07)	1,000 pages x \$0.05	\$50.00
Labor – Secretarial	48 hours x \$32.15	\$1,543.20
Postage		\$30.00
Total Estimate		\$1,623.20

The Custodian noted that although the Complainant sought the records electronically, he could only provide them in hard copy. The Custodian stated that the records were stored in hard copy only and electronic conversion would result in greater labor costs. The Custodian requested that the Complainant advise whether he accepted or rejected the estimated charge, noting that it would take an additional two (2) weeks to disclose the records after the EWMUA received payment.

On February 26, 2016, the Complainant resubmitted his OPRA request changing the preferred method of delivery to “on-site inspection.” On March 7, 2016, the Custodian responded again advising that a special service charge was required. The Custodian stated that the estimated charge was as follows:

Copy Cost (\$0.05 or \$0.07)	0 pages x \$0.05	\$0.00
Labor – Secretarial	40 hours x \$32.15	\$1,543.20 (sic)
Postage		\$0.00
Total Estimate		\$1,286.20

The Custodian again requested that the Complainant advise whether he accepted or rejected the estimated charge. The Custodian also reiterated that records were only in hard copy, and that he would need two (2) weeks after receipt of payment to prepare the responsive records.

On August 18, 2016, the Complainant responded to the Custodian rejecting the proposed charge. The Complainant stated that OPRA provided for a copy cost of \$0.75 for the first ten (10)

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> This calculation does not include President’s Day on February 15, 2016, which is a federal holiday.

Ronald W. Yarbrough (On Behalf of Pro-Spec Corporation) v. East Windsor Municipal Utilities Authority (Mercer), 2016-234 – Findings and Recommendations of the Council Staff

pages, \$0.50 for the next ten (10) pages, and \$0.25 per page thereafter.<sup>5</sup> The Complainant noted that these specific costs were not present in the Custodian's response. The Complainant further argued that OPRA required municipalities to set rates higher than the forgoing by ordinance, a copy of which he requested from the Custodian.

The Complainant also argued that he believed the hourly rate was unreasonable. The Complainant contended that it would not take an entire work week to prepare records he estimated to amount to "a few hundred copies." The Complainant noted that he amended his OPRA request to seek on-site inspection so as to avoid secretarial labor. Further, the Complainant stated that some of the responsive records fell within the "immediate access" provision of OPRA. N.J.S.A. 47:1A-5(e). The Complainant thus requested immediate access to any of the corresponding documents falling within this definition.

Finally, the Complainant requested that the Custodian provide the appropriate days, times, and designated locations for on-site inspection. The Complainant noted that he anticipated a "prompt reply."

#### Denial of Access Complaint:

On August 19, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant alleged that he originally submitted his OPRA request "on or about February 1, 2016" seeking "on-site inspection. . . ." The Complainant contended that "on or about February 16, 2016," EWMUA's failure to respond resulted in him resubmitting the request via facsimile and regular mail. The Complainant asserted that "on or about April 1, 2016," he received the Custodian's response assessing a special service charge of over \$1,200. The Complainant contended that such a charge was not within the reasonableness standard. The Complainant noted that the Custodian's response contained "several inconsistencies throughout and ignored the fact that [his] original request was for . . . on-site inspection." The Complainant also argued that several of the responsive records were subject to "immediate access."

#### Statement of Information:

On September 26, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's initial OPRA request on February 8, 2016. The Custodian certified that he responded in writing on February 18, 2016 proposing a special service charge of \$1,623.20. The Custodian affirmed that on March 3, 2016, he received an amended version of the OPRA request changing the preferred method of delivery to "on-site inspection." The Custodian certified that he responded in writing on March 7, 2016 again assessing a lesser special service charge of \$1,286.20.

The Custodian certified that he did not undertake a search because the Complainant rejected the proposed special service charge. Further, the Custodian affirmed that EWMUA did

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<sup>5</sup> The Complainant relied on OPRA's original fee schedule. However, OPRA was amended effective November 9, 2010 to change the copy cost to "\$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).

Ronald W. Yarbrough (On Behalf of Pro-Spec Corporation) v. East Windsor Municipal Utilities Authority (Mercer), 2016-234 – Findings and Recommendations of the Council Staff

not destroy any records associated with this request, but that some may have been damaged or destroyed as a result of Superstorm Sandy.

Initially, the Custodian contended that the Complainant misconstrued his OPRA request and the facts in his Denial of Access Complaint. The Custodian certified that, contrary to the Complainant's "inspection" allegation, the original OPRA request sought electronic copies of records. The Custodian affirmed that the Complainant's amended OPRA request actually reflected "on-site inspection" as the preferred method of delivery for the first time. Additionally, the Custodian certified that, contrary to the Complainant's response allegations, he twice responded in writing in a timely manner.

The Custodian further argued that he reasonably assessed a special service charge due to the voluminous nature of the request, which would have required extensive time and effort to fulfill. The Custodian also noted that the overly broad nature of the OPRA request exacerbated the proposed fee: a more specific request would have lowered the cost significantly. The Custodian asserted that the request here is similar to the one at issue in Gould v. Twp. of Fairfield (Cumberland), GRC Complaint No. 2014-224 (June 2015) (holding that a request for "any and all documentation pertaining to . . ." a water supply pipe was invalid). The Custodian argued that the breadth of the request directly correlated to the charge amount.

The Custodian finally argued that the 14-point analysis, as follows, supports that the special service charge was warranted and reasonable

**1. What records are requested?**

**Response:** Records pertain to the Bid File (painting of a water tank located in East Windsor).

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

**Response:** An estimated 1,000 records could fall within the categories of those sought by the Complainant.

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

**Response:** Records date back to 2011.

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

**Response:** Approximately 60% of the records are not stored electronically. Further, a majority of the records are archived off-site at the waste-treatment plant.

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

**Response:** Thirty-five (35) employees.

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

**Response:** Office Manager and Office Clerk

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

**Response:** N/A

**8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?**

**Response:** The Office Clerk works part time and is paid \$14.00 an hour; however, her part time status meant she would often be unavailable to assist. The Office Manager works full time and is paid approximately \$32.00 an hour. It would take approximately forty (40) hours to locate and retrieve responsive records.

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

**Response:** Approximately four (4) hours to monitor inspection. No personnel level/hourly rate included.

**10. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to return records to their original storage place?**

**Response:** Approximately eight (8) hours to return all records to storage. No personnel level/hourly rate included.

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

**Response:** The Office Clerk and Office Manager were the two (2) employees to respond to the Custodian's inquiry as to who could perform a computer search.

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

**Response:** See Item No. 8.

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

**Response:** No response.

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

**Response:** See Item Nos. 8, 9, and 10.

**Analysis**

**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>6</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).

In the instant complaint, the Complainant contended that submitted an OPRA request on February 1, 2016. The Complainant further argued that they resubmitted the OPRA request "on or about February 16, 2016" after not receiving a response. It should be noted that the Complainant only included as part of his filing a letter he sent to the Custodian on August 18, 2016. In the SOI, the Custodian certified that they had responded to the original OPRA request. The Custodian including as part of the SOI the Complainant original OPRA request (with date-stamp), as well as his response and a signed certified mail receipt. The Custodian also included the Complainant's second request, which was dated February 26, 2016, under cover of letter dated March 3, 2016. Both dates after the signature date on the mail receipt. The Custodian also included his response, dated March 7, 2016, and the EWMUA's certified mail receipt accompanying the mailing.

It is readily apparent that the evidence of record does not support a "deemed" denial to either the original or follow-up OPRA request. The Custodian provided sufficient proof to show his attempts to timely respond. Further, this proof grossly rejects the Complainant's Denial of Access Complaint arguments that the Custodian "ignored" the request in any facet.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

**Special Service Charge**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise

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<sup>6</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.

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exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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

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

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

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

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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



In Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015), the Council was tasked with determining whether a proposed special service charge was warranted and reasonable. The custodian provided to the GRC a response to its 14-point analysis request that included specific details such as the hours spent by employee, the task performed during those hours, and the hourly rate. The Council reviewed the response and found that the charge was warranted. However, the Council also found that the charge was not reasonable. Specifically, the Council found that the Borough Administrator was not the lowest paid employee qualified to perform some of the work the custodian credited him with in the 14-point analysis response. Thus, the Council adjusted the fee less the amount identified as unreasonable. Id. at 8.

Initially, the GRC notes that the EWMUA first charged a fee of \$1,623.20 for disclosure of the records in hard copies. The Complainant subsequently requested the records for on-site inspection, at which time the Custodian adjusted the fee to \$1,286.20. Although the Complainant made several unsupported assertions in the Denial of Access Complaint, his arguments were directed towards reviewing the records on-site. For this reason, the GRC will address the special service charge issue based on the proposed on-site inspection fee of \$1,286.20.

Here, the Custodian provided in his SOI a 14-point analysis that reflects the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the proposed charge of \$1,286.20 represented forty (40) of the estimated fifty-two (52) hours the EWMUA proposed it would expend to produce responsive records for on-site inspection. The Custodian certified that two (2) of the thirty-five (35) employees have the expertise to comply with the request: the part-time Office Clerk at \$14.00 and full-time Office Manager at \$32.00. The Complainant's OPRA request sought multiple generic ("all documents") and specific records (*i.e.* "correspondence," "minutes," *etc.*) regarding the Bid File for variable lengths of time, inclusive of time periods of three (3) and five (5) years. The Custodian certified that a complete response estimated 1,000 pages of records. However, the GRC notes that the Custodian's 14-point analysis confirms that roughly 60% of those records were in paper copy only, while the remaining 40% could be accessed electronically. Additionally, the Custodian charged for twelve (12) hours less than the estimated time required to respond to the OPRA request.

A review of the forgoing supports that the EWMUA's expenditure of 40 hours represents an extraordinary amount of time and effort to produce responsive records given the number of records and size of the agency. See Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). The GRC is further persuaded by the fact that more than half of the estimated responsive records exist only in paper format and must be retrieved from storage prior to the inspection. The GRC is also cognizant of the fact that the EWMUA charged for twelve (12) hours less than the estimated time required. Further, the Office Clerk's participation in responding to the request may be limited by the part-time nature of her job. Thus, the evidence of record adequately supports that a special service charge for forty (40) hours of time is warranted here.

However, the Council must now address whether the proposed fee is reasonable. In Courier Post, 360 N.J. Super. at 204, the court held that it would be appropriate to calculate the hourly

wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the custodian can prove that the professional level of human resource was needed to fulfill the request. Thus, as part of the calculation of a special service charge, a custodian must prove that same was based upon the lowest paid, qualified employee's hourly rate to perform the work required to respond to the subject OPRA request. Palkowitz, GRC 2014-302. See also Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007).

Here, the Custodian calculated his charge based on the Office Manager's hourly rate (\$32.15) for all forty (40) hours. However, the GRC is not satisfied that this number is a correct calculation, given that he identified in the SOI two (2) employees with differing hourly rates capable of fulfilling the OPRA request. Further, the Custodian provided no detailed indication of the number of hours applicable to work performed by the Office Clerk. Yet, two (2) truths are evident: 1) the Office Clerk was available enough to be identified as an one of the two employees able to comply with the request; and 2) the Office Clerk's hourly rate is the lesser rate. For these reasons, the GRC does not agree that the EWMUA appropriately calculated the special service charge.

While the GRC agrees that a special service charge is warranted, the charge based on that time must reflect the lowest paid hourly rate to perform the work. See Palkowitz, GRC 2014-302 at 8. However, unlike in Palkowitz, the Custodian did not provide a detailed accounting of work performed by either the Office Clerk or Manager. The Custodian simply calculated the cost based on the Office Manager's rate. Such an action is inapposite to OPRA and prevailing case law. For this reason, the applicable charge should be reduced to represent the actual cost of work conducted by the Office Clerk and Office Manager.

Therefore, although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full forty (40)-hour charge should be calculated based solely on the Office Manager's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Janney, GRC 2006-205; Palkowitz, GRC 2014-302. Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.

### **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. The Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of

access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

2. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full forty (40)-hour charge should be calculated based solely on the Office Manager's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
3. **The Custodian shall comply with conclusion No. 2 above by making the amended special service charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall provide the Complainant the opportunity to inspect the responsive records onsite upon payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order. Further, and within the same ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide certified confirmation of compliance in accordance with N.J. Court Rule R. 1:4-4<sup>7</sup> to the Council Staff with respect to the Complainant's willingness or refusal to pay the newly calculated special service charge and whether he inspected said records.**
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: Frank F. Caruso  
Communications Specialist/Resource Manager

July 24, 2018

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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