



**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**

**November 12, 2019 Government Records Council Meeting**

Jeffrey Gural  
Complainant

Complaint No. 2016-282

v.

Cinnaminson Township (Burlington)  
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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 the Council dismiss this complaint because the Complainant’s Counsel withdrew same in accordance with a settlement agreement via e-mail to the GRC on October 28, 2019. Therefore, no further adjudication is required.

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 12<sup>th</sup> Day of November 2019

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: November 15, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 12, 2019 Council Meeting**

**Jeffrey Gural<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-282**

v.

**Cinnaminson Township (Burlington)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

August 22, 2016 OPRA request:<sup>3</sup> Electronic copies via e-mail Cinnaminson Township (“Township”) closed meeting minutes and agendas where “An Ordinance of the [Township] . . . providing for the acquisition of 2135 Route 130 . . .” was discussed and/or official action was taken.

August 24, 2016 OPRA request:<sup>4</sup> Electronic copies via e-mail of:

1. “Any and all documents generated, received[,] or transmitted” regarding an investigation or ordinance violations at Garden State Inn that began on or about May 1, 2015 (with an unknown end date) that was the subject of a scheduled special hearing after August 28, 2015.
2. “Any and all documents generated, received[,] or transmitted” concerning the Garden State Inn and its owner, inclusive of minutes of the August 26, 2015 special meeting, open and closed session agendas, and any follow-up meeting concerning this topic.

**Custodian of Record:** Lisa Passione

**Request Received by Custodian:** August 22, 2016; August 24, 2016

**Response Made by Custodian:** September 1, 2016

**GRC Complaint Received:** October 28, 2016

**Background**

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 2019

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<sup>1</sup> Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

<sup>2</sup> Represented by Stuart A. Platt, Esq. of Platt & Riso, P.C. (Stratford, NJ). Previously represented by George M. Morris, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> Ibid.

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 Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Further, the first component charging \$96.00 for a police detective to perform two (2) hours of work is reasonable. However, the second component comprising Custodian Counsel's hourly rate of \$175.00 is unreasonable. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199, 203-204 (October 28, 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian must recalculate the special service charge for reviewing and redacting the responsive executive session minutes based on the lowest paid Township employee capable of performing the work.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge, inclusive of the \$96.00 fee, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame 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 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director<sup>7</sup> within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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<sup>5</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>7</sup> 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 Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 6, 2019, the Council distributed its Interim Order to all parties. On October 2, 2019, Complainant's Counsel e-mailed the Government Records Council ("GRC") advised that the parties had reached a tentative settlement. Counsel stated that the parties would notify the GRC once the settlement was approved by the Township.

On October 28, 2019, Complainant's Counsel e-mailed the GRC advising that the parties reached a settlement and that this complaint can be withdrawn.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council dismiss this complaint because the Complainant's Counsel withdrew same in accordance with a settlement agreement via e-mail to the GRC on October 28, 2019. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Executive Director

October 30, 2019



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

**INTERIM ORDER**

**September 24, 2019 Government Records Council Meeting**

Jeffrey Gural  
Complainant

Complaint No. 2016-282

v.

Cinnaminson Township (Burlington)  
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Further, the first component charging \$96.00 for a police detective to perform two (2) hours of work is reasonable. However, the second component comprising Custodian Counsel’s hourly rate of \$175.00 is unreasonable. Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199, 203-204 (October 28, 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian must recalculate the special service charge for reviewing and redacting the responsive executive session minutes based on the lowest paid Township employee capable of performing the work.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge, inclusive of the \$96.00 fee, available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant’s failure to take any action within said time frame 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 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver<sup>1</sup> certified confirmation of**

<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

**compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director<sup>3</sup> within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of September 2019

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 26, 2019**

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<sup>2</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."

<sup>3</sup> 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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**Jeffrey Gural<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-282**

v.

**Cinnaminson Township (Burlington)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

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August 24, 2016 OPRA request:<sup>4</sup> Electronic copies via e-mail of:

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2. “Any and all documents generated, received[,] or transmitted” concerning the Garden State Inn and its owner, inclusive of minutes of the August 26, 2015 special meeting, open and closed session agendas, and any follow-up meeting concerning this topic.

**Custodian of Record:** Lisa Passione

**Request Received by Custodian:** August 22, 2016; August 24, 2016

**Response Made by Custodian:** September 1, 2016

**GRC Complaint Received:** October 28, 2016

**Background**<sup>5</sup>

**Request and Response:**

On August 22, 2016, the Complainant submitted an Open Public Records Act (“OPRA”)

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<sup>1</sup> Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

<sup>2</sup> Represented by George M. Morris, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> Ibid.

<sup>5</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.

Jeffrey Gural v. Cinnaminson Township (Burlington), 2016-282 – Findings and Recommendations of the Executive Director

request to the Custodian seeking the above-mentioned records. On August 24, 2016, the Complainant submitted a second (2<sup>nd</sup>) OPRA request to the Custodian seeking the above-mentioned records.

On September 1, 2016, the Custodian responded in writing to both OPRA requests. The Custodian stated that the Complainant's OPRA requests generated hundreds of pages of records. The Custodian stated that multiple records within the Police Department, as well as closed session minutes, require review, redaction, and the creation of a redaction log. The Custodian averred that the Township was thus proposing a special service charge of \$971.00. N.J.S.A. 47:1A-5(c). The Custodian noted that this charge was based on the following:

- Police Detective: two (2) hours at \$48.00 an hour;
- Township Attorney review: five (5) hours at \$175.00 per hour.

The Custodian requested that the Complainant advise whether he agreed to the proposed fee. The Custodian noted that the Township would not begin obtaining and reviewing records until the Complainant provided written acceptance.

On September 21, 2016, Complainant's Counsel sent a letter to Custodian's Counsel rejecting the proposed charge and extending the response time frame seven (7) additional business days. On September 27, 2016,<sup>6</sup> Complainant's Counsel e-mailed Custodian's Counsel consenting to a reasonable extension in lieu of a special service charge. Custodian's Counsel responded via e-mail noting that the universe of responsive records spanned hundreds, if not thousands, of pages. Custodian's Counsel provided suggestions for decreasing the special service charge. Custodian's Counsel also averred that it would take two (2) to three (3) weeks to provide records once the Complainant acquiesced to the charge. Complainant's Counsel responded disputing that the Complainant was required to pay an attorney review fee. Complainant's Counsel requested that the Township disclose records within the next seven (7) business days. Custodian's Counsel again responded restating the Township's position and asking whether the Complainant would be willing to submit a deposit.

On October 5, 2016, Custodian's Counsel sent a letter to Complainant's Counsel recapitulating previous communications. Custodian's Counsel stated that, to accommodate the Complainant, the Township agreed to waive the \$96.00 fee and lower the attorney fee to a \$500.00 escrow. On October 17, 2016, Complainant's Counsel e-mailed Custodian's Counsel stating that the Complainant was willing to pay "up to \$100.00" for police reports and closed session minutes. On October 21, 2016, Custodian's Counsel e-mailed Complainant's Counsel advising that the Township Committee agreed that the charge was reasonably calculated. Custodian's Counsel thus requested a deposit so that the Township could begin the review process.

#### Denial of Access Complaint:

On October 28, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the reasonableness of the proposed special service charge. The Complainant requested that the Council compel the

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<sup>6</sup> This communication followed an alleged verbal discussion between Complainant's Counsel and Custodian's Counsel regarding the special service charge issue.



Township to disclose the responsive records. The Complainant also requested that the Council determine that he was a prevailing party entitled to an award of attorney's fees.

Additional Submissions:<sup>7</sup>

On February 21, 2017, Custodian's Counsel submitted a letter brief and legal certification to the GRC. Therein, Counsel stated that the issue before the GRC is whether the proposed charge was reasonable to redact closed session minutes from 2011 through July 2014. Counsel stated that the Township originally proposed a fee of \$971.00 but decreased that amount to \$500.00 in an attempt to accommodate the OPRA request. Counsel noted that his fees for private OPRA work typically range from \$300.00 to \$325.00 per hour. The Custodian also asserted that the GRC previously recognized the principle that attorneys were the most suitable persons to review and redact closed session minutes. See Fisher v. Dep't of Law & Pub. Safety, Div. of Law, GRC Complaint No. 2004-55 (August 2006).

Counsel stated that despite not receiving an agreement from the Complainant, the Township Committee authorized him to perform the work to confirm the reasonableness of the charge. Counsel certified that he spent 5.3 hours reviewing the minutes and creating a log, which only addressed the first fourteen (14) pages of minutes. Counsel affirmed that at his 2017 rate of \$180.00 per hour, he had already incurred a cost of \$954.00 before additional pending work. Counsel also estimated that it would likely take another hour and a half (1.5) to two (2) hours to complete the index at a cost of \$270.00 to \$360.00. Counsel noted that to benefit the Complainant, he had a paralegal at a rate of \$100.00 per hour perform the redactions based on his review: an additional one (1) to two (2) hour charge of \$100.00 or \$200.00 would apply. Counsel averred that the total estimated cost would be between \$1,105.00 and \$1,514.00; well above either proposed fee. Counsel thus requested that the GRC dismiss this complaint and require the Complainant to pay into escrow the originally proposed fee of \$971.00.

Statement of Information:

On March 22, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 22, and 24, 2016. The Custodian certified that she responded in writing on September 1, 2016 proposing a special service charge of \$971.00 to provide the responsive records.

The Custodian averred that OPRA allows agencies to charge a special service charge when disclosure involved an extraordinary amount of time and effort. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002). The Custodian noted that in Courier Post, the court looked to several factors in determining the reasonableness of the proposed charge. The Custodian stated that the court ultimately held that the volume of records and the amount of time it took to locate and produce them was extraordinary. The Custodian further asserted that both Courier Post and Fisher, 400 N.J. Super. 61 (App. Div. 2008), consider the cost of redactions imposed by attorneys due to the attorney-client privilege exemption.

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<sup>7</sup> On November 14, 2016, this complaint was referred to mediation. On February 28, 2017, this complaint was referred back to the GRC for adjudication.

The Custodian contended that here, the issue is reviewing and redacting hundreds of police records and three (3) years of closed session minutes. The Custodian affirmed that the redactions included personnel, personal privacy, and attorney-client privileged information. The Custodian argued that in accordance with Courier Post, the Township was required to spend an extraordinary amount of time and effort to respond to the subject OPRA requests. The Custodian also argued that the Township set its fee to the lowest possible rate to reduce the Complainant's cost. The Custodian asserted that this included reviewing police records and Counsel as the only individual able to determine whether portions of the minutes should be disclosed or redacted.

The Custodian provided the following 14-point analysis responses as part of her SOI:

**1. What records are requested?**

**Response:** Police records and closed session minutes that contain “highly classified” and attorney-client privileged information.

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

**Response:** The Police file is between 400 and 500 pages. The closed session minutes comprise about 72 pages of single spaced typing.

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

**Response:** The Police records cover a multi-month investigation into criminal activity and ordinance violations at the Garden State Inn and include significant personal information throughout. The minutes are for the years 2011 through 2014.

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

**Response:** All responsive records were “pulled” and stored at the Township. Further, the Township did not include a retrieval cost as part of its special service charge.

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

**Response:** Under 100 full and part-time employees; however, almost all employees work in positions not related to OPRA.

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

**Response:** A police officer to review the police records and Custodian's Counsel to review the minutes.

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

**Response:** All records needed review for possible redactions of information relevant to police investigations and privileged closed session discussions.

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

**Response:** The charge is composed of 7 total hours of work as follows:

Employee	Hours Spent	Hourly Rate
Police Officer	2 hours	\$48.00
Custodian's Counsel	5 hours	\$175.00

Upon performing most of the work, Counsel had exhausted the five (5) hour estimate with additional work left to perform.

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:** See Item No. 8 above.

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:** See Item No. 8 above, noting that no additional charge was considered for this process.

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 Township chose the least expensive staff members available and qualified to perform the work required.

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:** Police Department Detective (\$48.00 per hour) and Custodian's Counsel (\$175.00).

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

**Response:** Aside from making copies of the responsive records, no specialized technology was needed to respond to the subject OPRA request.

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

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

Employee	Estimated Time	Actual Time
Police Detective	2.0 hours (\$48.00 per hour)	N/A

	Total: \$96.00	
Custodian's Counsel	5.0 hours (\$175.00 per hour) to review closed session minutes for redaction of confidential information and develop a redaction index.  Total: \$875.00	Counsel has already spent 5 ¼ hours with additional work on the redaction log necessary.

### Analysis

#### Special Service Charge

Initially, the GRC notes that the Complainant's August 22, 2016 OPRA request sought closed session minutes where actions on a certain topic were taken or discussed. Further the Custodian's August 24, 2016 OPRA request sought in part "any and all documents" from an investigation. These requests, in part or whole where applicable, are invalid on their face because they failed to seek identifiable records. See Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012); Donnelly v. NJ Office of the Governor, GRC Complaint No. 2014-91 (October 2014). However, in matters where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014). Here, the Custodian was clearly able to locate a number of responsive records. Based on this, the GRC declines to address the invalid OPRA request issue and will proceed to addressing the threshold special service charge issue.

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 that:

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 . . .*

[Id. (emphasis added).]

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 a variety of factors. These factors were discussed in Courier Post, 360 N.J. Super. at 199. 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.

Further, OPRA provides that if a custodian “. . . asserts that part of a particular record is exempt from public access . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5(g). However, OPRA does not prohibit a public agency’s use of an attorney to advise, supervise or even to perform such redactions. The Courier Post court agreed with the rationale that OPRA provided:

[F]or the “custodian” to redact, excise or delete the exempt information. The 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 the redaction.

[Id. at 203-204 (emphasis added)].

The court ultimately 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. The court’s holding in Courier Post, 360 N.J. Super. 191 is clear: “[a]ttorneys’ fees will not be allowed to be charged . . . to any other requestor of documents for review and redaction of exempt material.” Id. at 207. To this end, the Council has previously decided that an agency could not pass the cost of a contracted attorney’s time onto the requestor. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012).

Here, the Custodian provided in her SOI a 14-point analysis that reflects the analytical framework outlined in Courier Post, 360 N.J. Super. 199, regarding the proper assessment of a special service charge. The Complainant’s August 22, 2016 OPRA request sought “closed

minutes” regarding a property acquisition over a three (3) year period. The Complainant’s August 24, 2016 OPRA request sought generic (“all documents”) records regarding investigations at the Garden State Inn, inclusive of variable time periods averaging over a one (1) year period. The Custodian certified that a complete response estimated between 400 and 500 pages from a Police file and 72 pages of closed session minutes. The Custodian argued that the proposed charge of \$971.00 represented seven (7) hours of time to review and redact the responsive records. The Custodian certified that two (2) of the approximately 100 employees had the expertise necessary to comply with the request: a police detective at \$48.00 per hour and Custodian’s Counsel at \$175.00. Further, the Custodian noted that all records were stored at the Township, but that no costs associated with retrieving same were included in the calculation. Additionally, an accounting of Counsel’s proposed time of nearly eight (8) hours to complete the minutes review shows that the Custodian charged for approximately three (3) hours less than the estimated time required to respond to the OPRA request.

In first determining whether the assessed charge was warranted, the GRC finds compelling similarities between the facts here and those in Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). There, the custodian’s 14-point analysis is comparable here in that the Borough Police Department (“BPD”) was similarly sized at approximately 100 employees. Further, the BPD estimated seven (7) hours of work to review and redact 411 pages of records. Also, the custodian identified a member of the BPD as one of the employees capable of performing work on the request. Based on the forgoing, the GRC is persuaded that, in principle, a special service charge is warranted in this complaint. Additional factors in reaching this determination include that the Custodian undercut the number of hours needed to review and redact the executive session minutes, where applicable.

Now that the GRC has determined that a special service charge is warranted here, it must determine whether the proposed fee of \$971.00 was reasonable. That charge is broken into two (2) components. The first component reflects two (2) hours of time for a police detective to review and redact 400 to 500 pages of records at an hourly rate of \$48.00. The second component reflects five (5) hours of time for Custodian’s Counsel to review and redact seventy-two (72) pages of executive session meeting minutes at an hourly rate of \$175.00. The GRC will address each component separately below.

Regarding the first component, the GRC concludes that the two (2) hour charge for the detective at \$48.00 per hour to review between 400 and 500 pages of records to redact personal information is reasonable. Such a finding is consistent with the Council’s decision in Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012) (finding a police personnel’s hourly rate for two (2) hours to review mobile video recordings was reasonable). The number of potentially responsive pages, as well as the need to perform a careful review to ensure the nondisclosure of personal information is compelling. Further, the subject OPRA requests in each complaint contained a comparable time frame. Thus, the total allowable charge for this component is \$96.00.

However, the GRC is not persuaded that the Custodian can charge for Custodian Counsel’s time to review the executive session minutes for two (2) reasons. First, the court’s ruling in Courier Post, 360 N.J. Super. at 203-204, is clear that the Township cannot pass Counsel’s cost for review and redaction of the minutes onto the Complainant. See also Carter, GRC 2011-71. Second, the GRC questions that Counsel’s expertise was required to review and redact said minutes. The

Courier Post court articulated such a question in the instance of attorney billing records, which may necessarily be more complicated to review than executive session meeting minutes. Simply put, the GRC does not agree that the most appropriate reviewer and redactor of minutes needed to be an attorney.

Custodian's Counsel has cited to Fisher, GRC 2004-55 in support of charging an attorney's fee for review and redaction of records. However, the facts here depart from Fisher on two (2) significant bases. The court discussed these factors in affirming the Council's decision in that the custodian could charge the hourly rate for deputy attorney generals ("DAG") to locate and review potentially responsive e-mails. Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008). First, the records sought were maintained by DAGs. The court noted that Fisher could be distinguished from Courier Post in that "[t]his is not a case where the government records have already been retrieved and a public agency seeks to impose a 'special service charge' solely for the purpose of outside counsel determining whether the records contain privileged material that should be redacted." Id. at 72. Second, the hourly rate for those DAGs was "substantially less than the . . . annual salary" of the custodian. Id. at 74.

Based on the forgoing, Custodian Counsel's charge representing \$875.00 for five (5) hours of work is unreasonable. In order to cure this issue, the Custodian will need to recalculate this portion of the fee to reflect the lowest paid employee's hourly rate to review and redact the responsive executive session minutes.

Accordingly, the Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera, 2009-285. Further, the first component charging \$96.00 for a police detective to perform two (2) hours of work is reasonable. However, the second component comprising Custodian Counsel's hourly rate of \$175.00 is unreasonable. Courier Post, 360 N.J. Super. at 199, 203-204. See also Carter, GRC 2011-71. Thus, the Custodian must recalculate the cost reviewing and redacting the responsive executive session minutes based on the lowest paid Township employee capable of performing the work.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011).

Further, the first component charging \$96.00 for a police detective to perform two (2) hours of work is reasonable. However, the second component comprising Custodian Counsel's hourly rate of \$175.00 is unreasonable. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199, 203-204 (October 28, 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian must recalculate the special service charge for reviewing and redacting the responsive executive session minutes based on the lowest paid Township employee capable of performing the work.

2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge, inclusive of the \$96.00 fee, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame 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 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Executive Director<sup>10</sup> within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

September 17, 2019

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<sup>8</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

<sup>10</sup> 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.

Jeffrey Gural v. Cinnaminson Township (Burlington), 2016-282 – Findings and Recommendations of the Executive Director