



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**February 22, 2022 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2016-86

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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 has failed to establish in her request for reconsideration of the Council’s April 28, 2020 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian failed to show that a Complainant may not be adjudicated a prevailing party for subsequent issues raised after the complaint filing. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council finds that 9.2 hours at \$350.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant’s Counsel in the amount of \$3,220.00.**

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 22<sup>nd</sup> Day of February 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 24, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration & Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
February 22, 2022 Council Meeting**

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-86**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

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

1<sup>st</sup> OPRA Request

“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [“Kean”].”

2<sup>nd</sup> OPRA Request

“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** December 21, 2015

**Response Made by Custodian:** January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

**GRC Complaint Received:** March 24, 2016

**Background**

April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Council considered the April 3, 2020 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, found that:

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddlebrook, NJ) (as of May 16, 2019).

<sup>2</sup> Represented by Deputy Attorney General Kerry Sorrano. Previously represented by Deputy Attorney General Jennifer Hoof.

1. The Custodian complied with the Council's February 26, 2020 Interim Order because she responded to the Executive Director in the prescribed time frame, certifying that the Complainant did not wish to pay the revised special service charge.
2. The Custodian unlawfully redacted the unprotected names of employees listed in the payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Custodian lawfully redacted the names of students pursuant to 20 U.S.C. 1232g, the Family Education Rights and Privacy Act, as well as the financial information of employees protected under Executive Order No. 26 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9(a). Furthermore, the Custodian complied with the Council's April 18, 2018, March 26, 2019, and February 26, 2020 Interim Orders. 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.
3. Pursuant to the Council's February 26, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian was ordered to revise the redacted records, and make them available to the Complainant upon receiving payment of the revised special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On April 29, 2020, the Council distributed its Interim Order to all parties. On May 13, 2020, the Custodian filed a request for reconsideration of the Council's April 28, 2020 Interim Order based on a mistake. The Custodian argued that because the Complainant was not represented by counsel at the time he prevailed in this matter, he was not entitled to an attorney fee award.

The Custodian asserted that in the Council's March 26, 2019 Interim Order, the Council found that Kean unlawfully redacted responsive records, and required disclosure of same or calculate a special service charge if warranted. The Custodian asserted that in accordance with the Interim Order, a special service charge estimate of \$3,554.82 was provided to the Complainant, who in turn had until May 16, 2019 to either pay or decline the estimate. The Custodian asserted

that on May 16, 2019, Kean submitted a certification indicating they did not receive payment or a statement declining to purchase the records from the Complainant. The Custodian then asserted that at 8:32PM on May 16, 2019, Complainant's Counsel filed a Notice of Appearance along with a challenge to the special service charge estimate.

The Custodian asserted that on February 26, 2020, the Council issued an Interim Order determining that a special service charge was warranted, but the number of hours calculated was unreasonable and were reduced to \$1,328.46. The Custodian asserted that the Complainant declined to pay the reduced amount and on March 5, 2020, Kean submitted a certification reflecting same. The Custodian argued that the Council concluded on April 28, 2020, that the Complainant was a prevailing party pursuant to the Council's February 26, 2020 Interim Order.

The Custodian asserted that the New Jersey Supreme Court adopted the catalyst theory to determine whether a litigant is entitled to counsel fees under OPRA. Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). The Custodian asserted that in order to prevail, the requestor must satisfy a two-prong test. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). The Custodian asserted that the litigant must "establish that the lawsuit was causally related to securing the relief obtained; a fee award must be justified if [the party's] efforts are a necessary and important factor in obtaining the relief." Id. (internal citations omitted).

The Custodian argued that Counsel's efforts in this matter were not a factor in obtaining access to records in accordance with Pack-Bamberger & Co., 167 N.J. at 444. The Custodian argued that the Complainant was a prevailing party at the time when the Council ordered Kean to revise its redactions in its March 29, 2019 Interim Order. The Custodian asserted that since Counsel was not retained until May 16, 2019, he should not be awarded counsel fees since his appearance was limited to challenging the special service charge amount. The Custodian argued that the Complainant's initial relief sought was access to the records, which he received prior to Counsel's appearance. The Custodian argued that a revision to the special service charge was not causally related to securing the relief granted, since the Complainant had already obtained that relief prior to obtaining Counsel. The Custodian therefore argued that the Complainant could not be entitled to counsel fees.

The Custodian further argued that the only revision that occurred after Counsel's appearance was the amount of the special service charge. The Custodian asserted that the Council already authorized the imposition of a special service charge as stated in its February 26 and April 28, 2020 Interim Orders. The Custodian argued that neither ruling affected the Council's standing order that Kean had to revise the redactions to the responsive records. The Custodian thus contended that the Complainant did not prevail with the assistance of counsel.

On May 20, 2020, the Complainant's Counsel submitted objections to the request for reconsideration. Counsel asserted that the GRC has previously awarded counsel fees where the requestor reduced or eliminated a special service charge. Counsel also asserted that the work performed by same related solely to getting the special service charge reduced, and thus compensable.

Counsel asserted that under the catalyst theory in Mason, the Complainant prevailed because he achieved a reduction in the special service charge amount, and the reduction was made as a result of his challenge. 196 N.J. at 76. Counsel noted that the GRC has previously recognized that a party may be a prevailing party when challenging the amount or imposition of a special service charge. Halper v. Twp. of Piscataway, GRC Complaint No. 2021-281 (October 2013); Verry v. Borough of South Bound Brook, GRC Complaint Nos. 2010-105 and 2010-106 (Interim Order dated January 31, 2012); and Paff v. Borough of Wildwood Crest, GRC Complaint No. 2009-54 (February 2011).

Counsel further argued that the Complainant was entitled to reasonable counsel fees since the allotted work pertained to the special service charge issue. Counsel asserted that that work on the case began on May 16, 2019, with the focus of challenging the special service charge. Counsel argued that the Custodian was taking an overly narrow view of the prevailing party status. Counsel argued that the Complainant prevailed on two (2) issues: revision of the responsive records, and reduction of the special service charge. Counsel contended that counsel fees were sought only with regards to the special service charge reduction. Counsel also noted that Custodian did not impose a special service charge until three (3) years after the complaint filing, when the GRC invited the Custodian to request a special service charge on March 28, 2019. Counsel asserted that the issue of a special service charge was initially raised by the Custodian pertaining to the instant matter, causing the Complainant to retain counsel. Counsel thus argued that the Complainant was a prevailing party on an issue that was raised by the Custodian.

#### Additional Submissions

On May 28, 2020, Counsel submitted an application and letter brief in support of an award of attorney's fees. The fee application and Certification of Services ("Certification") set forth the following:

- 1) The complaint name and number: Rodriguez v. Kean Univ., GRC Complaint No. 2016-86
- 2) Complainant Counsel's law firm affiliation: Counsel is the sole practitioner of the Law Offices of Walter M. Luers, LLC.<sup>3</sup>
- 3) A statement of client representation: Counsel certified to his services, including preparation and review of documents for filing with the GRC; discussing submissions with the Complainant; reviewing of e-mail correspondence to and/or from the GRC; and preparing the fee application.
- 4) The hourly rate of all attorneys and support staff involved in the complaint: Counsel, the sole professional who worked on the file, certified that he charged \$350.00 per hour.
- 5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheet from May 19, 2019 through May 27, 2020 (the "Fee Period"). During the Fee Period counsel billed a total of 9.2 hours for a total fee of \$3,220.00.

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<sup>3</sup> On September 8, 2020, Counsel became a member of the firm Cohn Lifland Pearlman Herrmann & Knopf, LLP.

- 6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charges “\$350 per hour for work in OPRA matters.” Certification at ¶ 3(3). Counsel certified to his education, years of legal experience and representation of clients in OPRA cases before the GRC and in Superior Court. See *i.e. Paff v. Galloway Twp.*, 444 N.J. Super. 495 (App. Div. 2016), *rev’d*, 229 N.J. 340 (2017). Counsel further noted that he was “counsel of record” in several OPRA matters before both courts that resulted in published opinions. See *i.e. Verry v. Franklin Fire Dist. No. 1*, 230 N.J. 285 (2017). Counsel also certified to his educational and teaching experience, as well as his time as President of the New Jersey Foundation for Open Government and extensive activities with the New Jersey State Bar Foundation. Certification at ¶ 3(7). Counsel averred that the requested fee is reasonable and the same as or lower than other attorneys representing clients. Certification at ¶ 12. Counsel also certified that his fee was lower than the average attorney with twenty (20) years of experience based on survey results from the Community Legal Services of Philadelphia. Certification at ¶ 14.
- 7) Detailed documentation of expenses: Counsel did not seek reimbursements for expenses.

On June 3, 2020, the Custodian sought a two (2) week extension to file objections, which the GRC granted through June 18, 2020. On June 18, 2020, the Custodian submitted objections to the fee application, in addition to maintaining the position that the Complainant was not a prevailing party.

The Custodian argued that the assessed fees were unreasonable and duplicative. The Custodian asserted that Counsel billed 2.3 hours on May 16, 2020 to review Kean’s eleven (11) page request for reconsideration and prepare and file his opposition, but also billed 0.3 hours on May 20, 2020 for further review of the opposition brief and to file same with the GRC. The Custodian asserted that Counsel thereafter billed 2.0 hours to file a motion for counsel fees on May 27, 2020, but contended that the included letter brief requested the same relief as made in the opposition filing. The Custodian argued that Counsel should have waited for a decision from the GRC on whether he was entitled to counsel fees before billing an additional 4.6 hours in furtherance of filing the fee application.

The Custodian further asserted that Counsel conceded that this matter was not difficult and was able to rely on form documents and briefs. See Certification at ¶ 3(1)(c). The Custodian therefore argued that the hours spent on filing these motions were unreasonable, duplicative, and ultimately unrecoverable. See *Rendine v. Pantzer*, 141 N.J. 292, 335 (1995).

### **Analysis**

#### **Reconsideration**

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following

receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order dated April 28, 2020 on May 13, 2020, ten (10) days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon review, the Custodian's arguments do not establish that the Council made a mistake in its Interim Order; thus, the GRC rejects them. The primary contention from the Custodian is that the Complainant already obtained the relief sought prior to obtaining counsel, which was access to the requested records. However, the GRC agrees with Complainant's Counsel that this a narrow view of the prevailing party status. The Custodian provides no evidence in the record demonstrating that the GRC's application of Mason's catalyst theory is limited solely to relief requested in the initial complaint. While the complaint was filed on the issue of access, Kean elected to impose a special service charge and the Complainant was open to raise the issue of its reasonableness. Thus, because Counsel entered his appearance prior to the Complainant prevailing on the special service charge issue, the Complainant is entitled to an attorney fee award for costs stemming from that issue.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Custodian failed to show that a Complainant may not be adjudicated a prevailing party for subsequent issues raised after the complaint filing. Thus, the Custodian's request for



reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Because the Custodian's request for reconsideration has been denied, the GRC now moves to review the parties' filings with respect to the attorney fee award.

### **Prevailing Party Attorney Fee Award**

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser.” Rendine, 141 N.J. at 322 (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian's conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney's fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties' ability to reach an agreement, the Council provided the Complainant's Counsel an opportunity to file an application for fees.

#### **A. Standards for Fee Award**

The starting ““point for determining the amount of a reasonable fee is the number of hours

reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The loadstar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent. [Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a)).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter, Counsel is seeking a fee award of \$3,220.00, representing 9.2 hours at \$350.00 per hour. In support of this hourly rate, Counsel certified to his extensive OPRA experience in Superior Court, the Appellate Division, and the Supreme Court. Counsel also certified that the requested hourly rate is on par or lower than similarly experienced attorneys in recent OPRA litigation. See *e.g.* Gannett Satellite Info. Network, LLC v. Twp. of Neptune, Docket No. L.-2616-17 (May 13, 2019).<sup>4</sup> It should be noted that although the Custodian filed objections to the fee application, the requested hourly rate was not disputed.

Based on the foregoing, the rate of \$350.00 per hour is reasonable for a practitioner with Counsel’s experience and skill level in this geographical area.

#### **b. Time Expended**

In support of his request for fees, Counsel submitted a log of his time. For the period from May 16, 2019, through May 27, 2020, Counsel billed a total of 9.2 hours for work on the file. This included reading and exchanging e-mails with the parties, filing objections to the special service charge amount, reviewing Kean’s motion for reconsideration, filing an opposition thereto, and composing and filing the fee application.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s time sheet provided basic descriptions of the work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The entries identify generic actions such as “attention to email correspondence,” “review email from client and respond,” and “review GRC decision; prepare fee demand and transmit it.” However, Counsel also included a more detailed description of his initial review of the casefile and filing an objection to the special service charge and responding to the request for reconsideration.

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<sup>4</sup> The Appellate Division recently reversed the trial court’s award of fees because plaintiff prevailed only under the common law right of access. Gannett Satellite Info. Network, LLC v. Tp. of Neptune, 467 N.J. Super. 385, 412 (App. Div. 2021).

The Custodian submitted objections challenging Counsel's May 27, 2020 fee application. The Custodian argued that the hours expended pertaining to preparing the fee application should be omitted since the issue of whether the Complainant was a prevailing party had not been resolved. The Custodian further asserted that Counsel's itemized expenditures for May 16, 2020 and May 20, 2020 were duplicitous since they referenced Counsel's act of reviewing and filing the opposition to reconsideration. In total, the Custodian argued that the 4.6 hours expended between May 16, 2020 through May 27, 2020 should not be recovered.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis.

Initially, the GRC finds that Counsel's accounting of charges from May 16, 2019 through April 29, 2020 to be reasonable. The GRC accepts that 2.3 hours to review the casefile and prepare and file the objection to the special service charge was reasonable to ensure the accuracy. The GRC also accepts that 1.3 hours to review Kean's 14-point special service charge analysis as well as prepare and file a response was reasonable.

Regarding the May 16, 2020 charges, the GRC finds it to be reasonable as well. Notwithstanding the page length of Kean's request for reconsideration, the GRC finds 2.3 hours to be an appropriate length of time to prepare a detailed but concise brief along with accompanying exhibits. Further, it is not unreasonable for Counsel to expend 0.3 hours to review his filing prior to submission on May 20, 2020, given the submission's size.

With regard to the May 27, 2020 charges pertaining to the fee application, the Custodian asserted that Counsel's letter brief seeks the same relief sought in his May 20, 2020 opposition to the request for reconsideration. However, a review of the record does not support this contention. In his May 27, 2020 letter brief, while Counsel reiterates his argument that the Complainant is a prevailing party, that portion constitutes a fraction of the letter's substance. The remainder of the Complainant's letter is dedicated to the arguments and justifications of his asserted counsel fees. Furthermore, no portion of the Certification refers to the issue of whether the Complainant is a prevailing party.

Accordingly, the Council finds that 9.2 hours at \$350.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the amount of \$3,220.00.**

## **2. Enhancement Analysis**

Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has failed to establish in her request for reconsideration of the Council's April 28, 2020 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian failed to show that a Complainant may not be adjudicated a prevailing party for subsequent issues raised after the complaint filing. Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council finds that 9.2 hours at \$350.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the amount of \$3,220.00.**

Prepared By: Samuel A. Rosado  
Staff Attorney

February 15, 2022



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**

**April 28, 2020 Government Records Council Meeting**

Luis Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2016-86

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 Supplemental 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 complied with the Council’s February 26, 2020 Interim Order because she responded to the Executive Director in the prescribed time frame, certifying that the Complainant did not wish to pay the revised special service charge.
2. The Custodian unlawfully redacted the unprotected names of employees listed in the payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Custodian lawfully redacted the names of students pursuant to 20 U.S.C. 1232g, the Family Education Rights and Privacy Act, as well as the financial information of employees protected under Executive Order No. 26 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9(a). Furthermore, the Custodian complied with the Council’s April 18, 2018, March 26, 2019, and February 26, 2020 Interim Orders. 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.
3. Pursuant to the Council’s February 26, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian was ordered to revise the redacted records, and make them available to the Complainant upon receiving payment of the revised special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on**

**this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of April 2020

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: April 29, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 28, 2020 Council Meeting**

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-86**

**v.**

**Kean University<sup>2</sup>  
Custodial Agency**

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

1<sup>st</sup> OPRA Request

“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [“Kean”].”

2<sup>nd</sup> OPRA Request

“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** December 21, 2015

**Response Made by Custodian:** January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

**GRC Complaint Received:** March 24, 2016

**Background**

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 2020<sup>3</sup> 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, found that:

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, Esq. (Clinton, NJ) (as of May 16, 2019).

<sup>2</sup> Represented by Deputy Attorney General Kerry Sorzano. Previously represented by Deputy Attorney General Jennifer Hoof.

<sup>3</sup> This complaint was prepared for adjudication at the Council’s January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.



1. The Custodian complied with the Council's March 26, 2019 Interim Order because she responded in the prescribed extended time frames providing the Complainant with an estimated special service charge, as well as a certification as to whether the Complainant has accepted or rejected the estimate.
2. 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). However, the first component estimating ninety-six (96) hours of work to research, review, and redact the listed names in the records is unreasonable. See Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Thus, the first component has been revised to forty (40) hours at the hourly rate of \$32.25. Additionally, the second and third component of charging an hourly rate of up to \$63.20 for ten (10) hours of work for quality control is unreasonable. Thus, the components have been also revised to a total of one (1) hour at the rate of \$38.46. Therefore, the total recalculated special service charge is \$1,328.46, and the Custodian is only obligated to grant access once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. **The Custodian shall comply with conclusion No. 2 above by providing the amount of the recalculated charge 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>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director<sup>6</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.**
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

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<sup>4</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>5</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>6</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.

the Custodian's compliance with the Council's Interim Order.

5. 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 February 28, 2020, the Council distributed its Interim Order to all parties. On February 29, 2020, the Complainant e-mailed the Government Records Council ("GRC"), stating that he did not wish to pay the revised special service charge.

On March 5, 2020, the Custodian's Counsel responded to the Council's Interim Order. Counsel asserted that the Complainant's Counsel confirmed with her on March 2, 2020 that the Complainant did not wish to pay the revised special service charge. Counsel also included a certification from the Custodian in accordance with the Interim Order.

The Custodian then certified that prior to providing the Complainant with the revised special service charge, the Complainant e-mailed the Custodian declining to pay the charge, notwithstanding the recalculation. The Custodian certified that pursuant to the Council's Interim Order, access to the requested records would not be provided.

#### Analysis

##### Compliance

At its February 26, 2020 meeting, the Council ordered the Custodian to provide the Complainant with the recalculated special service charge. The Council also ordered the Custodian to provide a certification should the Complainant decline to pay the recalculated charge, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On February 28, 2020, 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 March 6, 2020.

On March 5, 2020, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided a certification stating that the Complainant declined to pay the revised special service charge.

Therefore, the Custodian complied with the Council's February 26, 2020 Interim Order because she responded to the Executive Director in the prescribed time frame, certifying that the Complainant did not wish to pay the revised special service charge.

##### 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)).

Here, the Custodian unlawfully redacted the unprotected names of employees listed in the payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Custodian lawfully redacted the names of students pursuant to 20 U.S.C. 1232g, the Family Education Rights and Privacy Act (“FERPA”), as well as the financial information of employees protected under Executive Order No. 26 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9(a). Furthermore, the Custodian complied with the Council’s April 18, 2018, March 26, 2019, and February 26, 2020 Interim Orders. 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.

### **Prevailing Party Attorney’s Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the

Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Mason Court noted that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the

relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant filed this action to dispute the Custodian’s excessive extensions of time to respond to his OPRA request. Upon receiving the Custodian’s response as part of the Statement of Information, the Complainant disputed the redactions made to the responsive records. While the Council held that the Custodian’s response was timely, the Council found that the Custodian’s redaction of employees’ names that were not protected under FERPA was unlawful.

Furthermore, while the Council held that the Custodian could impose a special service charge for revising the redacted records, the Council held that the Custodian’s estimated special service charge was unreasonable. Thus, even though the Complainant declined to accept the revised charge, the Custodian was still required to make the revised records available because of the complaint filing.

Therefore, pursuant to the Council’s February 26, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to revise the redacted records, and make them available to the Complainant upon receiving payment of the revised special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s February 26, 2020 Interim Order because she responded to the Executive Director in the prescribed time frame, certifying that the Complainant did not wish to pay the revised special service charge.
2. The Custodian unlawfully redacted the unprotected names of employees listed in the payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Custodian lawfully redacted the names of students pursuant to 20 U.S.C. 1232g, the Family Education Rights and Privacy Act, as well as the financial information of employees protected under Executive Order No. 26 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9(a). Furthermore, the Custodian complied with the Council’s April 18, 2018,

March 26, 2019, and February 26, 2020 Interim Orders. 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.

3. Pursuant to the Council's February 26, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian was ordered to revise the redacted records, and make them available to the Complainant upon receiving payment of the revised special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado  
Staff Attorney

April 3, 2020



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**

**February 26, 2020 Government Records Council Meeting**

Luis Rodriguez  
Complainant

Complaint No. 2016-86

v.

Kean University  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Supplemental 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 complied with the Council’s March 26, 2019 Interim Order because she responded in the prescribed extended time frames providing the Complainant with an estimated special service charge, as well as a certification as to whether the Complainant has accepted or rejected the estimate.
2. 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). However, the first component estimating ninety-six (96) hours of work to research, review, and redact the listed names in the records is unreasonable. See Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Thus, the first component has been revised to forty (40) hours at the hourly rate of \$32.25. Additionally, the second and third component of charging an hourly rate of up to \$63.20 for ten (10) hours of work for quality control is unreasonable. Thus, the components have been also revised to a total of one (1) hour at the rate of \$38.46. Therefore, the total recalculated special service charge is \$1,328.46, and the Custodian is only obligated to grant access once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. **The Custodian shall comply with conclusion No. 2 above by providing the amount of the recalculated charge 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 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.**

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.
5. 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 26<sup>th</sup> Day of February 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 28, 2020**

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<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.

<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**

**Supplemental Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-86**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1<sup>st</sup> OPRA Request

“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [“Kean”].”

2<sup>nd</sup> OPRA Request

“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** December 21, 2015

**Response Made by Custodian:** January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

**GRC Complaint Received:** March 24, 2016

**Background**

March 26, 2019 Council Meeting:

At its March 26, 2019 public meeting, the Council considered the March 19, 2019 *In Camera* 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 complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for *in camera*

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, Esq. (Clinton, NJ) (as of May 16, 2019).

<sup>2</sup> Represented by Deputy Attorney General Jennifer Hoof. Previously represented by Deputy Attorney General Kerry Sorzano.

review, and simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees not protected under the Family Education Rights and Privacy Act unredacted; or (2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Council Staff a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>3</sup>**
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, 2019, the Council distributed its Interim Order to all parties. On April 3, 2019, Custodian's Counsel requested an extension of time to respond to until April 25, 2019, which the GRC granted that same day.

On April 25, 2019, Custodian's Counsel provided the Complainant with a special service charge statement in accordance with the Council's Interim Order. Therein, Custodian's Counsel assessed an estimated \$3,554.82 for the special service charge. Custodian's Counsel broke down the estimate as follows:

- 96 hours for research, review and redaction at a rate of \$32.25, cost of \$3,096.
- 7 hours for quality control and monitoring at a rate of \$38.46, cost of \$269.22; and
- 3 hours for quality control and monitoring at a rate of \$63.20, cost of \$189.60.

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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."

That same day, the Complainant responded to the Custodian's special service charge statement, asking the GRC for a ten-day (10) extension of time to decide on whether to accept or reject the estimated charge. On April 30, 2019, the GRC granted the Complainant's request, and extended the deadline to respond to May 16, 2019. The GRC also extended the Custodian's deadline to notify the GRC whether the Complainant has accepted or rejected the special service charge to May 16, 2019. Lastly, the GRC stated that the Complainant may submit a formal challenge of the special service charge during the extended period.

On May 16, 2019, the Custodian provided the GRC with a certification in accordance with the Council's March 28, 2019 Interim Order. Therein, the Custodian certified that as of that date, the Complainant has neither submitted payment of the special service charge nor taken any other action since the deadline to respond was extended.

Later that same day, the Complainant responded in writing objecting to the special service charge estimate. Shortly thereafter, Complainant's Counsel entered his appearance on behalf of the Complainant and provided a formal objection to the imposed special service charge. Within the included brief, Complainant's Counsel initially asserted that the Custodian could not impose a special service charge because litigation has already commenced, and the neither the courts nor the GRC may impose a special service charge when the public agency did not demand same at the time of denial. Next, Complainant's Counsel asserted that even if a special service charge could be imposed at this stage, the amount assessed by the Custodian was unreasonable. Complainant's Counsel argued that the GRC should order the Custodian to justify the assessed charge through the submission of certified statements from those with personal knowledge.

On October 15, 2019, the GRC submitted a request for a 14-point analysis on the Custodian's imposition of a special service charge. On October 17, 2019, the Custodian requested an extension of time to respond through October 25, 2019, which the GRC granted. On October 24, 2019, the Custodian sought an additional extension of time through November 1, 2019, which the GRC granted the next day. On November 1, 2019, the Custodian provided the following 14-point analysis responses:

**1. What records are requested?**

**Response:** Pursuant to the March 26, 2019 Interim Order: November 2014 to January 2015 payroll account statements of Kean University.

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

**Response:** Payroll Account Statements totaling 109 pages, more than 50% of which contain approximately 85-90 names. In order to comply with the Interim Order, each name must be researched to determine if the individual is an employee not protected under the Family Education Rights and Privacy Act ("FERPA") and revised redactions to the records are required in accordance with FERPA.

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

**Response:** November 2014 to January 2015.

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

**Response:** As the records were originally provided to the Complainant in response to his OPRA request, the records are not archived in storage, do not need to be retrieved, and do not need to be returned to storage.

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

**Response:** There are a total of 963 full-time employees at Kean University (“University”).

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

**Response:** There are currently two (2) employees dedicated to OPRA related matters that are available to accommodate the records requested, consistent with the Interim Order. The University is actively searching to replaced Heather Brandao, Managing Administrative Assistant. As soon as a successor is named, there will be three (3) employees dedicated to OPRA related matters.

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

**Response:** The entirety of the records needs to be reviewed for redactions.

**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:** As the records were originally provided to the Complainant in response to his OPRA request, the records are not archived in storage, do not need to be retrieved, and do not need to be returned to storage.

**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. 12 below.

**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:** As the records were originally provided to the Complainant in response to his OPRA request, the records are not archived in storage, do not need to be retrieved, and do not need to be returned to storage.

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

**Response:** N/A

**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:** Laura Barkley-Haelig, Associate Director/Custodian of Records (\$63.20/hour), Meaghan Lenahan, Managing Assistant Director/Deputy Custodian of Records (\$38.46/hour), and Heather Brandao, Managing Administrative Assistant (\$32.25/hour).

As of November 1, 2019, Ms. Brandao's position has been vacant and the work that was anticipated to be done by Ms. Brandao will be done by the other named individuals. Despite the vacancy in the position, the University will honor the original lower hourly rates.

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

**Response:** The systems are typically available 33 hours out of a 35-hour work week. This estimate accounts for standard system maintenance and does not include unforeseen power outages or server failures.

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

**Response:** It is estimated that the scope of work, which includes the research and identification of student workers protected under FERPA, will take approximately 106 hours to produce and return the revised records, as detailed below:

- Research and application of any necessary redactions will take ninety (90) minutes per page of names, and forty-five (45) minutes per half-page of names. As such, initial review of the November 2014 statement is estimated to take a total of thirty-nine (39) hours; the December 2014 statement is estimated to take a total of twenty-four (24) hours, and the January 2015 statement is estimated to take a total of thirty-three (33) hours. This constitutes a grand total of ninety-six (96) projected hours of work for the three statements, which would have been performed by Heather Brandao, but will now be performed by Laura Barkley-Haelig and Meaghan Lenahan. As stated previously the University will honor the original lower hourly rates.
- Inspection and review of the documents for quality control by the Deputy Custodian of Records, Meaghan Lenahan, will take approximately seven (7) hours and an additional three (3) hours by the Custodian of Records, Laura Barkley-Haelig.

Therefore, a special service charge of \$3,554.82 is required based on the following scope of work and hourly rates:

- 96 hours for research, review and redaction at a rate of \$32.25, cost of \$3,096.00
- 7 hours for quality control and monitoring at a rate of \$38.46, cost of \$269.22
- 3 hours for quality control and monitoring at a rate of \$63.20, cost of \$189.60

On November 1, 2019, the Complainant submitted a response to the Custodian's analysis. The Complainant first argued that the estimated number of pages to be reviewed was inaccurate. The Complainant asserted that not all of the 109 pages referenced would contain student names. Additionally, the Complainant argued that the data contained in the pages are duplicative. The Complainant asserted that each monthly statement lists the same names, with the difference being the transactions added for each month. The Complainant therefore argued that the University should only charge for looking up each unique name, rather than every name across all three (3) months.

Lastly, the Complainant argued that even the lowest proposed rate is too high. The Complainant argued that determining whether someone was a student at the University is a ministerial task requiring only entry-level data entry skills of being able to read English and use a computer. Thus, the Complainant asserted that the applicable rate should be the minimum wage of \$10.00 per hour.

The Complainant maintained that no special service charge should be imposed. Notwithstanding, the Complainant asserted that if a special service charge to be applied, the hourly rate should be reduced to \$10 per hour, and the number of hours utilized should be reduced to 30 hours from 96. The Complainant argued that no time should be included for "quality control," asserting that Kean provided no explanation for why quality control was needed, what that process would entail, or why 10 hours was needed to complete the task.

### Analysis

#### Compliance

At its March 26, 2019 meeting, the Council ordered the Custodian to either provide responsive records in accordance with the *in camera* review, or to submit an estimate for a special service charge to the Complainant. The Council also ordered the Custodian to submit a certification in accordance with N.J. Court Rules, R. 1:4-4 to the GRC informing whether the Complainant has accepted or rejected the special service charge amount. On March 28, 2019, 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 4, 2019.

On April 3, 2019, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian requested an extension of time to April 25, 2019 to respond to the Council's Interim Order. The GRC granted the extension that same day.

On April 25, 2019, the Custodian provided a special service charge estimate to the Complainant, in accordance with the Interim Order. That same day the Complainant requested an extension of time to decide on whether to accept or reject the special service charge estimate. On April 30, 2019, the GRC granted the Complainant's request, extending the deadline to May 16,

2019. The GRC also extended the Custodian's time to certify as to the Complainant's acceptance or rejection of the proposed special service charge estimate to May 16, 2019.

On May 16, 2019, the Custodian submitted a certification to the GRC. Therein, the Custodian certified that as of that date, she has not received payment from the Complainant or any correspondence pertaining to the special service charge estimate.

Therefore, the Custodian complied with the Council's March 26, 2019 Interim Order because she responded in the extended time frames providing the Complainant with an estimated special service charge, as well as a certification as to whether the Complainant has accepted or rejected the estimate.

### **Special Service Charge**

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

The responsive records at issue in this complaint are University payroll account statements for three (3) months. In its March 26, 2019 Interim Order, the Council found that the Custodian improperly redacted the names of every employee listed in those statements to ensure compliance with FERPA. The Custodian certified that the responsive records consist of a total of 109 pages, but that the names within those statements needed to be researched and checked to determine whether they were a student. The Custodian also certified that many of the pages contained between eighty-five (85) to ninety (90) names, and she estimated that it would take between forty-five (45) to ninety (90) minutes to research and review each page. Upon review, the records do not make it readily apparent whether an employee is a student, thereby requiring the Custodian to manually research each name in the record to confirm their status. Therefore, based upon the circumstances presented a special service charge is warranted.

The GRC now turns to reviewing the reasonableness of the proposed \$3,554.82 fee. That charge is broken into three (3) components. The first component reflects ninety-six (96) hours of time for the former Managing Administrative Assistant to review and redact 109 pages of records at an hourly rate of \$32.25. The second and third components reflect three (3) and seven (7) hours of time for the Deputy Custodian and Custodian to inspect and review the documents for quality control at an hourly rate of \$38.46 and \$63.20 respectively. The GRC will address the components separately below.

Regarding the first component, the GRC concludes that the ninety-six (96) hour charge at \$32.25 per hour to review 109 pages of records to redact student names is unreasonable. In Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011), the agency estimated just seven (7) hours of work to review and redact 411 pages of records for personal information, utilizing three (3) employees. Here, the Custodian is utilizing two (2) employees to review and redact 300 fewer pages. While the need to perform a careful review to ensure full compliance of FERPA is compelling, the Custodian does not adequately substantiate the need for up to ninety (90) minutes per page to determine whether each listed individual was a student. Therefore, the estimated number of hours spent should be revised to forty (40) to allow for the time needed to review each listed name in the initial statement and cross-reference for their appearance in subsequent statements.

However, the GRC does not agree with the Complainant that the hourly rate should be reduced based on the speculation that the work could be done by someone working at the minimum wage. Rather, the standard for estimating the labor cost is the hourly rate of the lowest paid employee capable of performing the work. Courier Post, 360 N.J. Super. at 202. The Complainant did not provide evidence that the University had such employees who fit the criteria, whereas the



Custodian certified that the hourly rate of \$32.25 was the lowest of those employees tasked with processing OPRA requests. Therefore, the total allowable charge for the first component based on the revised number of hours is \$1,290.00.

Regarding the second and third components, the GRC is not persuaded by the Custodian's estimated total of ten (10) hours needed for quality control and monitoring the responsive records. Initially, the implication that the Deputy Custodian of Records is capable of this task undermines the imposition of the Custodian's hourly rate of \$63.20 for conducting the same task. Moreover, the GRC agrees with the Complainant that the Custodian did not provide enough detail as to the nature of the task and why a total of ten (10) hours was needed to review the statements once initial review and redaction was completed. However, because of the sensitive nature of the information to be redacted, the need for some form of quality control is warranted. Therefore, the total allowable charge for the second and third components should be revised to \$38.46 for one (1) hour spent reviewing the records for quality control.

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). However, the first component estimating ninety-six (96) hours of work to research, review, and redact the listed names in the records is unreasonable. See Rivera, 2009-285. Thus, the first component has been revised to forty (40) hours at the hourly rate of \$32.25. Additionally, the second and third component of charging an hourly rate of up to \$63.20 for ten (10) hours of work for quality control is unreasonable. Thus, the components have been also been revised to a total of one (1) hour at the rate of \$38.46. Therefore, the total recalculated special service charge is \$1,328.46, and the Custodian is only obligated to grant access once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

### **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 complied with the Council's March 26, 2019 Interim Order because she responded in the prescribed extended time frames providing the Complainant with an estimated special service charge, as well as a certification as to whether the Complainant has accepted or rejected the estimate.

2. 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). However, the first component estimating ninety-six (96) hours of work to research, review, and redact the listed names in the records is unreasonable. See Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Thus, the first component has been revised to forty (40) hours at the hourly rate of \$32.25. Additionally, the second and third component of charging an hourly rate of up to \$63.20 for ten (10) hours of work for quality control is unreasonable. Thus, the components have been also been revised to a total of one (1) hour at the rate of \$38.46. Therefore, the total recalculated special service charge is \$1,328.46, and the Custodian is only obligated to grant access once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. **The Custodian shall comply with conclusion No. 2 above by providing the amount of the recalculated charge 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>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director<sup>6</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.**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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<sup>4</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>5</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>6</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.

Prepared By: Samuel A. Rosado  
Staff Attorney

January 21, 2020<sup>7</sup>

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<sup>7</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.



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

March 26, 2019 Government Records Council Meeting

Luis Rodriguez  
Complainant

Complaint No. 2015-86

v.

Kean University  
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 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 complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees not protected under the Family Education Rights and Privacy Act unredacted; or (2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide to the Council Staff a statement with respect to the Complainant’s willingness or refusal to purchase the**

**requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>1</sup>**

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 26<sup>th</sup> Day of March, 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: March 28, 2019**

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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**

***In Camera* Findings and Recommendations of the Council Staff  
March 26, 2019 Council Meeting**

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-86**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1<sup>st</sup> OPRA Request

“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [“Kean”].”

2<sup>nd</sup> OPRA Request

“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** December 21, 2015

**Response Made by Custodian:** January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

**GRC Complaint Received:** March 24, 2016

**Records Submitted for *In Camera* Examination:** Nine (9) redacted and unredacted copies of the requested payroll statements made from November 2014 to January 2015.

**Background**

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 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:

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

<sup>2</sup> Represented by Deputy Attorney General Kerry Sorrano.

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's December 21, 2016 OPRA requests. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone v. NJ Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014); and Rodriguez v. Kean Univ., 2015-77 (September 2017).
2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that the payroll records were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) unredacted copies of the payroll portion of the records responsive to the request, a document or redaction index listing each of the responsive records<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 April 25, 2018, the Council distributed its Interim Order to all parties. On May 1, 2018, the Custodian sought an extension of time to respond, to which the GRC granted to until the end of business on May 9, 2018. On May 9, 2018 the Custodian responded to the Council's Interim Order.

The Custodian provided nine (9) unredacted copies of the request payroll statements in accordance with the Interim Order. On December 12, 2018, GRC requested from the Custodian nine (9) copies of the redacted records to adequately review the records. On January 31, 2019, the Custodian provided nine (9) said copies of the requested records.

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<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>5</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."

## Analysis

### Compliance

At its April 24, 2018 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the requested payroll statements for *in camera* review within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Council Staff. On April 25, 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 May 2, 2018.

On May 1, 2018, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian requested an extension of time to respond. On May 2, 2018, the GRC granted the request and extended the deadline to respond to until May 9, 2018. On May 9, 2018, the Custodian responded to the Council's Interim Order, providing nine (9) unredacted copies of the requested records, an accompanying Vaughn Index, and a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.

### Unlawful Denial of Access

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

The records at issue are payroll account statements for the months of November and December 2014, and January 2015. The Complainant disputed the redactions made to the names of the employees identified within the records.

OPRA provides that "[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . ." N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581 (2011). These include "an individual's *name*, title, position, salary [and] *payroll record*." Id. (emphasis added). See also Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004) (defining a "payroll record" for purposes of OPRA as records relating to payment of a public employee).

However, OPRA provides that its provisions "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or *Executive Order* of the



Governor . . . any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9(a) (emphasis added).

Under Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”), “information describing a natural person’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness” shall not be considered government records subject to access. Therefore, payroll records containing financial information beyond what is required under N.J.S.A. 47:1A-10, may be redacted by the Custodian.

In the instant matter the GRC conducted an *in camera* examination of the submitted payroll statements. Throughout the statements, the Custodian redacted the names of individuals listed as well as associated bank account and routing numbers. The Custodian noted that the names included both students and employees. The Custodian contended that in order to ensure that information protected under the Family Education Rights and Privacy Act (“FERPA”) were not inadvertently disclosed, all names were redacted. However, FERPA protections do not apply to employees who are not also students. See 20 U.S.C. 1232g(a)(4)(B)(iii). Furthermore, the voluminous nature of the request does not permit a custodian to redact information that is otherwise subject to disclosure under OPRA.

Accordingly, the Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees not protected under FERPA unredacted; or (2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).

### **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 complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed extended time frame providing records for *in camera* review, and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the names of employees listed in the requested payroll account statements. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. Therefore, the Custodian must: (1) disclose to the Complainant the responsive records with the names of employees not protected under the Family Education Rights and Privacy Act unredacted; or (2) if the Custodian believes a special service charge is warranted, she

must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).

3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Council Staff a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>6</sup>**
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 19, 2019

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<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."



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

April 24, 2018 Government Records Council Meeting

Luis Rodriguez  
Complainant

Complaint No. 2016-86

v.

Kean University  
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 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 determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.
2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian’s assertion that the payroll records were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) unredacted copies of the payroll portion of the records responsive to the request, a document or redaction index listing each of the responsive records<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

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



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 24<sup>th</sup> Day of April, 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: April 25, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
April 24, 2018 Council Meeting**

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-86**

**v.**

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1<sup>st</sup> OPRA Request

“I request a copy of all November 2014 to January 2015 bank statements for the bank accounts of Kean University [“Kean”].”

2<sup>nd</sup> OPRA Request

“I request a copy of all check deposits (either individual deposits or a list of the them – for example, from a bank account register) made during November 2014 to January 2015 into all the bank accounts of Kean.”

**Custodian of Record:** Laura Barkley-Haelig

**Request Received by Custodian:** December 21, 2015

**Response Made by Custodian:** January 8, 2016; January 22, 2016; February 5, 2016; February 19, 2016; March 4, 2016; March 17, 2016

**GRC Complaint Received:** March 24, 2016

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

Request and Response:

On December 20, 2015, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On January 8, 2016, the Custodian responded in writing, seeking an extension of time to respond to the Complainant’s requests to until January 22, 2016. The Custodian then sought additional extensions of time on January 22, 2016, February 5, 2016, February 19, 2016, March 4, 2016, and March 17, 2016.

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

<sup>2</sup> Represented by Jennifer McGruther, DAG.

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

### Denial of Access Complaint:

On March 24, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since filing his initial requests, the Custodian has repeatedly extended the time to respond, without sufficient explanation. Moreover, the Complainant argued that the Custodian neither consulted with him nor sought his permission when announcing the extensions.

The Complainant argued that by repeatedly extending the time to respond without explanation or providing a means for accommodation, the Custodian violated OPRA’s requirement that responses to requests must be within a reasonable time. See N.J.S.A. 47:1A-5(g).

### Statement of Information:

On April 27, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on December 21, 2015. Because they were received on the same date, the Custodian certified that she processed both requests simultaneously. The Custodian then certified that as a result of the holiday break, the requests were not forwarded to the Budget Office until January 5, 2016. The requests were then forwarded to the Office of General Accounting (“OGA”). The Custodian certified that relevant documents were identified by the OGA, but the request for “check deposits” were referred to the Office of Student Accounting (“OSA”) for further research. However, since the OSA had not provided any records by January 8, 2016, the Custodian sought an extension of time.

The Custodian certified that a follow-up e-mail was sent to OSA on January 21, 2016. The OAL responded via telephone with some additional information on the request for “check deposits.” The Custodian then certified that on January 22, 2016 she sent another extension letter to the Complainant in order to allow time to compile and review the documents for accuracy and any needed redactions. The Custodian certified that the number of relevant documents received in response to the requests totaled approximately 700 pages. The Custodian certified that each document required significant redactions to protect exempt material including bank account numbers, wire transfer information, student and personnel social security numbers, and other personally identifying information. Therefore, the Custodian certified that additional extension letters were sent between March 4, 2016 and April 14, 2016 to allow for the time needed to make these redactions.

The Custodian certified that on April 27, 2016, 679 pages of records were provided to the Complainant via e-mail in response to his OPRA requests. Specifically, the Custodian provided 221 pages of records pertaining to the 1<sup>st</sup> OPRA request, with redactions made pursuant to N.J.S.A. 47:1A-1.1(6) and N.J.S.A. 47:1A-1(24). For the 2<sup>nd</sup> OPRA request, the Custodian provided 458 pages of records, with redactions made pursuant to N.J.S.A. 47:1A-1.1(6) & (16), N.J.S.A. 47:1A-1(24), and FERPA.

The Custodian initially argued that since the Complainant has the requested records, the matter is not moot and should be dismissed. See Mason v. City of Hoboken, Docket No. A-0508-

06T5, 2008 N.J. Super. Unpub. LEXIS 1660, \*7 (App. Div. Jan. 29, 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request).

Regarding the requests, the Custodian stated that Kean has multiple bank accounts, and the Custodian located approximately 700 pages of relevant documents. Subsequently, the Custodian worked with the accounting department to ensure that bank account numbers, or other confidential information were redacted. Additionally, the Custodian asserted that other redactions were made to confidential student or personnel information, in accordance with the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99 (FERPA). The Custodian stated that every record had to be read with extensive detail to ensure that any of the above information was properly redacted.

The Custodian argued that extensions of time to respond to OPRA requests are appropriated under certain circumstances, stating they “reflect the Legislature’s intention to balance the requestor’s interest in prompt access to identifiable records and the operational needs of government.” N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div.), certif. denied, 190 N.J. 394 (2007). The Custodian noted that factors considered when assessing the reasonableness of extensions include whether or not the record is stored or archived, or “if a request for access would to a government record would substantially disrupt agency operations.” N.J.S.A. 47:1A-5(i). The Custodian also quoted: “[t]here is an obvious connection between the specificity of the request and custodian’s ability to provide a prompt reply.” N.J. Builders Ass’n, 390 N.J. Super. at 178.

In the instant matter, the Custodian argued that both requests required an extensive search across multiple bank accounts over a period of several months. The Custodian also argued that she endeavored to locate and identify the records and kept the Complainant apprised of the requests’ status.

In addition to the arguments set forth under Item 12, the Custodian certified as to the number of OPRA requests received by the Complainant in a 3½ year span. The Custodian certified that in that period she has received 369 OPRA requests from the Complainant and described them generally as being multi-part and complex. In addition to the OPRA requests, the Custodian certified that she was also handling Denial of Access Complaints filed by the Complainant during that period.

### Additional Submissions

On May 17, 2016, the Complainant responded to the Custodian’s April 27, 2016 response to his request, arguing that a delay of nearly four (4) months later is too long and not timely. Additionally, the Complainant noted that the Custodian did not include a Vaughn index to accompany the redacted records. Lastly, the Complainant noted that provided payroll account records have the employee’s names redacted. The Complainant argued that the redactions are a violation of N.J.S.A. 47:1A-10’s provisions which allow for disclosure of an employee’s name, salary, and payroll information, among other data.

The Complainant also asked that Kean write out the exemptions claimed for redactions regarding the OPRA requests, rather than by number to avoid confusion over what specific exemptions are being asserted.

## Analysis

### Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4<sup>th</sup>) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to



respond to the complainant’s OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.” See also Rodriguez v. Kean Univ., 2015-77 (September 2017).

In the instant matter, the Custodian sought multiple extensions for the Complainant’s December 21, 2015 OPRA requests as follows:

<b>Date of Request for Extension</b>	<b>New Deadline for Response</b>	<b>Reason for Extension</b>
January 8, 2016	January 22, 2016	So that the OPRA request may “be appropriately processed.”
January 22, 2016	February 5, 2016	So that the OPRA request may “be appropriately processed.”
February 5, 2016	February 19, 2016	So that the OPRA request may “be appropriately processed.”
February 19, 2016	March 4, 2016	So that the OPRA request may “be appropriately processed.”
March 4, 2016	March 17, 2016	So that the OPRA request may “be appropriately processed.”
March 17, 2016	March 31, 2016	So that the OPRA request may “be appropriately processed.”
March 31, 2016	April 14, 2016	So that the OPRA request may “be appropriately processed.”
April 14, 2016	April 27, 2016	So that the OPRA request may “be appropriately processed.”

The subject OPRA requests sought bank statements and check deposits for all of Kean’s bank accounts over three (3) month period. The Custodian extended the response time on eight (8) occasions for approximately 76 business days, accounting for public holidays. As noted above, a requestor’s approval is not required for a valid extension. However, to determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the

custodian's ability to respond effectively to the request.<sup>4</sup> Id. Although the Custodian does not require permission to extend the time to respond to an OPRA request, the burden remains with the Custodian to justify the need for such extension(s). That burden increases when the extension of time is measured in months rather than days.

In the instant matter, the Custodian has met her burden. Although the extensions were numerous, they are a fraction compared to the nineteen (19) extensions made in Rodriguez, GRC 2015-77. Additionally, the Custodian's SOI adequately explains why fulfilling the request necessitated the extensions. Specifically, the Custodian identified the number of agencies she needed to confer with to locate the records, and the total number of records (700) compiled prior to review. The Custodian also adequately described the actions taken to keep up to date on the status of the requests. Furthermore, the approximately seven (7) weeks taken to review the 700 pages of bank statements and check deposits for redactions, coping, and scanning was reasonable, when considering the nature and sensitivity of the information normally contained in such information, such as account numbers, wire transfer information, student information, and social security numbers.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's December 21, 2016 OPRA requests. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. See Ciccarone, GRC 2013-280; and Rodriguez, GRC 2015-77.

### **Unlawful Denial of Access**

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

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>5</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of

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<sup>4</sup> "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

<sup>5</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian argued produced 679 pages responsive records to the Complainant’s OPRA request. In her SOI, the Custodian stated that the redactions made to some of the records were identifying information, social security numbers, and account numbers. However, the Complainant argued that of the total production, the payroll records redacted the names of employees, which should be disclosed under N.J.S.A. 47:1A-1(10).

Accordingly, the GRC must conduct an *in camera* review of the responsive records to validate the Custodian’s assertion that the redactions contained in the portion of the responsive records pertaining to payroll documents were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff, 379 N.J. Super. at 346, N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-1(10).

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The determination of whether the Custodian unlawfully denied access to the responsive records due to the numerous extensions of time is deferred, pending analysis of the redacted records.

2. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that the payroll records were exempt from disclosure as containing financial account information, social security numbers, or other personally identifying information. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) unredacted copies of the payroll portion of the records responsive to the request, a document or redaction index listing each of the responsive records<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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

April 17, 2017

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<sup>6</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>7</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>8</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."