



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 30, 2023 Government Records Council Meeting

Brian Kubiel
Complainant

Complaint No. 2019-163

v.

Toms River District No. 1
Board of Fire Commissioners (Ocean)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the Complainant withdrew the matter via e-mail on April 20, 2023. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of May 2023

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Brian Kubiel¹
Complainant**

GRC Complaint No. 2019-163

v.

**Toms River District No. 1
Board of Fire Commissioners (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@communityclaims.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.
2. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@sipeadjustmentgroup.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.

Custodian of Record: Richard Tutela⁴

Request Received by Custodian: July 3, 2019

Response Made by Custodian: July 15, 2019; July 26, 2019

GRC Complaint Received: August 13, 2019

Background

May 18, 2021 Council Meeting:

At its May 18, 2021 public meeting, the Council considered the May 11, 2021 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:

¹ Represented by Jonathan F. Cohen, Esq., of Plosia Cohen, LLC (Chester, NJ).

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.A. (Lakewood, NJ). Previously represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, NJ).

³ The request sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is Leonard Minkler.

1. Mr. Jesse Sipe failed to comply with the Council's March 30, 2021 Interim Order because he failed to timely provide the current Custodian with copies of the responsive text messages for review and simultaneously provide certified confirmation of compliance to the Executive Director.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's January 26, and March 30, 2021 Interim Orders to disclose the relevant records are enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. Mr. Jesse Sipe is in contempt of the Council's March 30, 2021 Interim Order by failing to provide the current Custodian with the text messages responsive to the Complainant's July 3, 2019 OPRA request. Accordingly, the complaint should be referred to the Office of Administrative Law for determination of whether Mr. Jesse Sipe knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and whether the Complainant is a prevailing party entitled to an award of attorney's fees and, if so, the appropriate amount.

Procedural History:

On May 19, 2021, the Council distributed its Interim Order to all parties. On June 23, 2021, Complainant's Counsel filed an order to enforce the Council's Interim Order in the New Jersey Superior Court against Mr. Sipe⁵ and the Toms River Board of Fire Commissioners, Fire District No. 1 ("Board"). On June 28, 2021, Complainant's Counsel e-mailed the GRC a signed copy of an Order to Show Cause. On August 3, 2021, Complainant's Counsel provided the GRC with a copy of Mr. Sipe's answers and crossclaim.

On March 2, 2022, the Government Records Council ("GRC") received a copy of the court's order granting Complainant's application to enforce the Council's Interim Order, along with Mr. Sipe's Notice of Motion to Stay ("NOM") said order. On March 29, 2022, Complainant's Counsel e-mailed the GRC stating that the NOM hearing was scheduled for April 14, 2022. Complainant's Counsel also inquired whether the GRC has transferred the matter to the Office of Administrative Law ("OAL"). That same day, Mr. Sipe also e-mailed the GRC inquiring whether the matter has been transferred. The GRC subsequently responded to both parties stating that transfer to the OAL was on hold pending the court's determination on the production of records.

On April 18, 2022, Complainant's Counsel e-mailed the GRC providing a copy of the court's order denying Mr. Sipe's NOM. Complainant's Counsel also again requested the GRC transfer the matter to the OAL. On May 26, 2023, Complainant's Counsel e-mailed the GRC noting there were no longer any pending matters in the Superior Court and he was still awaiting transfer to the OAL.

⁵ As of July 9, 2021, Mr. Sipe is represented by Walter E. Luers, Esq., of Cohen Lifland Pearlman Herrmann & Knopf, LLP (Saddle Brook, NJ).

On June 1, 2022, the complaint was transmitted to the OAL. On April 20, 2023, Complainant’s Counsel submitted a letter via e-mail to the OAL stating his desire to withdraw the matter. On May 4, 2023, the OAL returned the complaint back to the GRC marked “WITHDRAWAL.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because the Complainant withdrew the matter via e-mail on April 20, 2023. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

May 23, 2023



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

May 18, 2021 Government Records Council Meeting

Brian Kubiel
Complainant

Complaint No. 2019-163

v.

Toms River District No. 1
Board of Fire Commissioner (Ocean)
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 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. Mr. Jesse Sipe failed to comply with the Council’s March 30, 2021 Interim Order because he failed to timely provide the current Custodian with copies of the responsive text messages for review and simultaneously provide certified confirmation of compliance to the Executive Director.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s January 26, and March 30, 2021 Interim Orders to disclose the relevant records are enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. Mr. Jesse Sipe is in contempt of the Council’s March 30, 2021 Interim Order by failing to provide the current Custodian with the text messages responsive to the Complainant’s July 3, 2019 OPRA request. Accordingly, the complaint should be referred to the Office of Administrative Law for determination of whether Mr. Jesse Sipe knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and whether the Complainant is a prevailing party entitled to an award of attorney’s fees and, if so, the appropriate amount.

Interim Order Rendered by the
Government Records Council
On The 18th Day of May 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 19, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting**

**Brian Kubiel¹
Complainant**

GRC Complaint No. 2019-163

v.

**Toms River District No. 1
Board of Fire Commissioners (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@communityclaims.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.
2. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@sipeadjustmentgroup.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.

Custodian of Record: Richard Tutela⁴

Request Received by Custodian: July 3, 2019

Response Made by Custodian: July 15, 2019; July 26, 2019

GRC Complaint Received: August 13, 2019

Background

March 30, 2021 Council Meeting:

At its March 30, 2021 public meeting, the Council considered the March 23, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ Represented by Jonathan F. Cohen, Esq., of Plosia Cohen, LLC (Chester, NJ).

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.A. (Lakewood, NJ). Previously represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, NJ).

³ The request sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is Leonard Minkler.

1. While the current Custodian complied in essence with the Council's January 26, 2021 Interim Order, an issue arose in which Jesse Sipe refused to provide responsive records unless compensated for the estimated labor expended to locate and review same. Because there is no provision under OPRA permitting such a charge, Mr. Sipe shall provide responsive records to the current Custodian for review in accordance with the Council's January 26, 2021 Interim Order.
2. **Jesse Sipe shall comply with item conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, Mr. Sipe shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
3. Although the Custodian properly imposed a special service charge, the calculated charge was unreasonable. However, the current Custodian timely provided a recalculated charge to the Complainant, and provided those records possessed by the District without charge. 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.
4. The Council defers analysis of whether Jesse Sipe knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending Mr. Sipe's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Mr. Sipe's compliance with the Council's Interim Order.

Procedural History:

On March 31, 2021, the Council distributed its Interim Order to all parties. On April 8, 2021, Custodian's Counsel e-mailed Mr. Sipe stating that the Interim Order required production to be produced on or before April 7, 2021 and requesting an update. That same day, Mr. Sipe stated that he received the Council's Interim Order on April 6, 2021 and objected to the Council's findings. The Complainant also stated that he would respond directly with the GRC once he obtained counsel.

⁵ 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.

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

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

On April 12, 2021, the Government Records Council (“GRC”) requested an update from the parties on compliance. That same day, Custodian’s Counsel e-mailed the GRC stating that the Council’s Interim Order was copied to Mr. Sipe on March 31, 2021, but no responsive records had been received as of that date. Subsequently, Complainant’s Counsel e-mailed the GRC confirming that he was copied on the March 31, 2021 e-mail delivered to Mr. Sipe.

Analysis

Compliance

At its March 30, 2021 meeting, the Council ordered Mr. Sipe to provide the current Custodian with copies of the responsive text messages for review in accordance with the Council’s January 26, 2021 Interim Order. The Council further ordered Mr. Sipe to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On March 31, 2021, the Council distributed its Interim Order to all parties, providing Mr. Sipe five (5) business days to submit the recalculated special service charge to the Complainant. Thus, Mr. Sipe’s response was due by close of business on April 8, 2021, accounting for the Good Friday holiday.

On April 12, 2021, the seventh (7th) business day after delivery, the GRC requested an update from the parties on compliance. That same day, Custodian’s Counsel responded to the GRC stating that the Council’s Interim Order was forwarded to Mr. Sipe on March 31, 2021. Complainant’s Counsel thereafter confirmed that he was copied on the e-mail containing the Council’s Order. Custodian’s Counsel included correspondence from Mr. Sipe dated April 8, 2021, stating his objections to the Council’s Order and would not respond directly until obtaining counsel.

Therefore, Mr. Sipe failed to comply with the Council’s March 30, 2021 Interim Order because he failed to timely provide the current Custodian with copies of the responsive text messages for review and simultaneously provide certified confirmation of compliance to the Executive Director.

Council’s June 30, 2020 Interim Order is Enforceable

“The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s January 26, and March 30, 2021 Interim Orders to disclose the relevant records are enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

Knowing & Willful

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

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

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

In Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107 (Final Decision dated November 28, 2007), the custodian was required to obtain government records held by a councilman. However, despite repeated requests from the custodian as well as the GRC the councilman refused to provide responsive records. The Council therefore referred the matter to the Office of Administrative Law to determine whether the councilman knowingly and willfully violated OPRA. Based on the totality of the circumstances, the Administrative Law Judge found that the councilman knowingly and willfully violated OPRA and imposed a civil penalty of \$1,000.00 under N.J.S.A. 47:1A-11(a).

In the current matter, the GRC found that Mr. Sipe had an obligation to provide the Custodian with the responsive text messages under OPRA, in compliance with the March 30, 2021 Interim Order. See Johnson, GRC 2007-107. However, Mr. Sipe refused to comply with the Council’s Interim Order, leaving the current Custodian unable to comply with the Council’s January 26, 2021 Interim Order requiring the production of records upon payment of a special service charge.

Therefore, because Mr. Sipe’s failure to respond to the Council’s March 30, 2021 Interim Order rendered the current Custodian unable to comply with the Council’s January 26, 2021 Interim Order, this complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether Mr. Sipe knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. See Johnson, GRC 2007-107. Additionally, the OAL should determine whether the Complainant is a prevailing party entitled to an award of attorney’s fees and, if so, the appropriate amount.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Mr. Jesse Sipe failed to comply with the Council's March 30, 2021 Interim Order because he failed to timely provide the current Custodian with copies of the responsive text messages for review and simultaneously provide certified confirmation of compliance to the Executive Director.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's January 26, and March 30, 2021 Interim Orders to disclose the relevant records are enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. Mr. Jesse Sipe is in contempt of the Council's March 30, 2021 Interim Order by failing to provide the current Custodian with the text messages responsive to the Complainant's July 3, 2019 OPRA request. Accordingly, the complaint should be referred to the Office of Administrative Law for determination of whether Mr. Jesse Sipe knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and whether the Complainant is a prevailing party entitled to an award of attorney's fees and, if so, the appropriate amount.

Prepared By: Samuel A. Rosado
Staff Attorney

May 11, 2021



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 30, 2021 Government Records Council Meeting

Brian Kubiel
Complainant

Complaint No. 2019-163

v.

Toms River District No. 1
Board of Fire Commissioners (Ocean)
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 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. While the current Custodian complied in essence with the Council’s January 26, 2021 Interim Order, an issue arose in which Jesse Sipe refused to provide responsive records unless compensated for the estimated labor expended to locate and review same. Because there is no provision under OPRA permitting such a charge, Mr. Sipe shall provide responsive records to the current Custodian for review in accordance with the Council’s January 26, 2021 Interim Order.
2. **Jesse Sipe shall comply with item conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, Mr. Sipe shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. Although the Custodian properly imposed a special service charge, the calculated charge was unreasonable. However, the current Custodian timely provided a recalculated charge to the Complainant, and provided those records possessed by the District without charge. Additionally, the evidence of record does not indicate that the

¹ 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.

² "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."

³ 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.

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.

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

Interim Order Rendered by the
Government Records Council
On The 30th Day of March 2021

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 31, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Brian Kubiell¹
Complainant**

GRC Complaint No. 2019-163

v.

**Toms River District No. 1
Board of Fire Commissioners (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@communityclaims.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.
2. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@sipeadjustmentgroup.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.

Custodian of Record: Richard Tutela⁴

Request Received by Custodian: July 3, 2019

Response Made by Custodian: July 15, 2019; July 26, 2019

GRC Complaint Received: August 13, 2019

Background

January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the Council considered the January 19, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ Represented by Jonathan F. Cohen, Esq., of Plosia Cohen, LLC (Chester, NJ).

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.A. (Lakewood, NJ). Previously represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, NJ).

³ The request sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is Leonard Minkler.

1. The Custodian has borne his burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, the imposition of Mr. Van Dyke's hourly rate of \$185.00 is unreasonable. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199, 203-04 (App. Div. 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive text messages based on the lowest paid Township of Toms River employee capable of performing the work.
2. **The Custodian shall comply with conclusion No. 1 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 deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director⁷ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁵ 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.

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

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

Procedural History:

On January 27, 2021, the Council distributed its Interim Order to all parties. On February 4, 2021, the Government Records Council (“GRC”) requested an update from the Custodian on whether the recalculated charge was provided to the Complainant. That same day, Custodian’s Counsel submitted the recalculated special service charge to Complainant’s Counsel. Custodian’s Counsel also stated that the Toms River District No. 1 Board of Fire Commissioners (“District”) did not receive the Council’s Interim Order until February 1, 2021.

On February 5, 2021, Custodian’s Counsel submitted a revised calculation to Complainant’s Counsel. Complainant’s Counsel responded that same day, inquiring whether the District complied with the GRC’s criteria for providing a detailed analysis regarding the special service charge. Custodian’s Counsel replied stating that the Interim Order only required a recalculation based upon the District’s lowest paid employee capable of performing the work. Complainant’s Counsel later responded stating that the Complainant was in the process of hand-delivering a check in the amount of the recalculated special service charge.

On February 8, 2021, the current Custodian requested the production of responsive text messages from Jesse Sipe, a former District Commissioner. On February 9, 2021, Mr. Sipe responded by requesting a copy of the Council’s Order and the OPRA request. That same day, the current Custodian responded, providing the requested documents.

On February 16, 2021, Custodian’s Counsel contacted Mr. Sipe, requesting any responsive text messages. On February 18, 2021, Custodian’s Counsel requested the text messages a second time. That same day, Mr. Sipe responded to the current Custodian, stating that he would not provide the requested text messages unless compensated at a rate of \$300.00 per hour for an estimated 80 hours of labor. Custodian’s Counsel replied stating that imposing the charge was not permitted and asked if an extension of time was needed. Mr. Sipe responded stating that he would not provide the text messages unless compensated at the stated rate.

On February 19, 2021, Custodian’s Counsel submitted a certification from the current Custodian in response to the Council’s Interim Order. Therein, the current Custodian certified that upon receipt of the Interim Order, he searched the District’s files for responsive records, including reaching out to District employees and Commissioners. The current Custodian certified that of those individuals contacted, some provided responsive records which were then reviewed and provided to the Complainant.

The current Custodian also certified to his efforts to obtain responsive text messages from Mr. Sipe, providing copies of the correspondence between himself, Custodian’s Counsel, and Mr. Sipe. The current Custodian certified that because he was not granted access to the text messages held by Mr. Sipe, he refunded the special service charge back to the Complainant and did not impose a fee for records already provided. The current Custodian certified that he did everything in his power to produce responsive records, and provided those records maintained or received by the District.

Analysis

Compliance

At its January 26, 2021 meeting, the Council ordered the Custodian to provide the Complainant with a recalculated special service charge. The Council also ordered the Complainant to accept or reject the charge within five (5) business days of receipt. The Council also ordered the Custodian to either provide the records within ten (10) business days from receiving payment or notify the GRC that the Complainant refused to purchase the records. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On January 27, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to submit the recalculated special service charge to the Complainant. Thus, the Custodian's response was due by close of business on February 3, 2021.

On February 4, 2021, the sixth (6th) business day after delivery, Custodian's Counsel responded to the GRC asserting that the District did not receive the Council's Interim Order until February 1, 2021. That same day, Custodian's Counsel submitted the recalculated special service charge to the Complainant, the third (3rd) business day after receipt. On February 5, 2021, Complainant's Counsel asserted that the Complainant hand-delivered a check in the amount of the recalculated charge.

Thereafter, on February 19, 2021, the current Custodian submitted a certification to the GRC. The current Custodian certified that that Mr. Sipe refused to provide the estimated 45,000 text messages in his possession without being compensated for the task of collecting and reviewing the messages beforehand. The current Custodian certified that as a result he refunded the Complainant the special service charge and did not charge for providing records already possessed by the District.

In Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107 (Final Decision dated November 28, 2007), the custodian was required to obtain government records held by a councilman. However, despite repeated requests from the custodian as well as the GRC, the councilman refused to provide responsive records. The Council therefore referred the matter to the Office of Administrative Law to determine whether the councilman knowingly and willfully violated OPRA. Based on the totality of the circumstances, the Administrative Law Judge found that the councilman knowingly and willfully violated OPRA and imposed a civil penalty of \$1,000.00 under N.J.S.A. 47:1A-11(a).

In the current matter, the current Custodian has a duty to obtain the requested records from Mr. Sipe. See Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006). However, Mr. Sipe refused to provide responsive records to the current Custodian, instead demanding compensation prior to performing a search for responsive records. When told that imposing such a charge was improper, Mr. Sipe still refused to provide responsive records. Thus, while the current Custodian's duty is to obtain the records, it is reasonable to believe that the delay in access to the requested text messages is not attributable to the actions of the current Custodian.

As to Mr. Sipe's demands, OPRA provides compensation to a public agency for the actual costs to duplicate a government record under N.J.S.A. 47:1A-5(b), and/or when the public agency believes a special service charge is warranted under N.J.S.A. 47:1A-5(c). There is no provision within the framework of OPRA which allows former public officials to receive compensation for producing government records in their possession which are subject to disclosure. Thus, the special service charge levied by the District remains as is, and Mr. Sipe is required to comply with the Council's Interim Order and produce responsive records to the current Custodian. Failure to do so may subject Mr. Sipe to a knowing and willful violation under OPRA. See Johnson, GRC 2007-107.

Therefore, while the current Custodian complied in essence with the Council's January 26, 2021 Interim Order, an issue arose in which Mr. Sipe refused to provide responsive records unless compensated for the estimated labor expended to locate and review same. Because there is no provision under OPRA permitting such a charge, Mr. Sipe shall provide responsive records to the current Custodian for review in accordance with the Council's January 26, 2021 Interim Order.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

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

Although the Custodian properly imposed a special service charge, the calculated charge was unreasonable. However, the current Custodian timely provided a recalculated charge to the Complainant, and provided those records possessed by the District without charge. 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.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While the current Custodian complied in essence with the Council's January 26, 2021 Interim Order, an issue arose in which Jesse Sipe refused to provide responsive records unless compensated for the estimated labor expended to locate and review same. Because there is no provision under OPRA permitting such a charge, Mr. Sipe shall provide responsive records to the current Custodian for review in accordance with the Council's January 26, 2021 Interim Order.
2. **Jesse Sipe shall comply with item conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, Mr. Sipe shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
3. Although the Custodian properly imposed a special service charge, the calculated charge was unreasonable. However, the current Custodian timely provided a recalculated charge to the Complainant, and provided those records possessed by the District without charge. 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.

⁸ 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.

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Prepared By: Samuel A. Rosado
Staff Attorney

March 23, 2021



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 26, 2021 Government Records Council Meeting

Brian Kubiel
Complainant

Complaint No. 2019-163

v.

Toms River District No. 1
Board of Fire Commissioners (Ocean)
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 borne his burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, the imposition of Mr. Van Dyke’s hourly rate of \$185.00 is unreasonable. Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199, 203-04 (App. Div. 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive text messages based on the lowest paid Township of Toms River employee capable of performing the work.
2. **The Custodian shall comply with conclusion No. 1 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 deliver¹ certified confirmation of compliance, in**

¹ 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.

accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director³ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of January 2021

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: January 27, 2021

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**Brian Kubieli¹
Complainant**

GRC Complaint No. 2019-163

v.

**Toms River District No. 1
Board of Fire Commissioners (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@communityclaims.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.
2. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@sipeadjustmentgroup.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River (“Township”)] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.

Custodian of Record: Richard Tutela

Request Received by Custodian: July 3, 2019

Response Made by Custodian: July 15, 2019; July 26, 2019

GRC Complaint Received: August 13, 2019

Background⁴

Request and Response:

On July 3, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 15, 2019, Mr. Van Dyke

¹ Represented by Jonathan F. Cohen, Esq., of Plosia Cohen, LLC (Chester, NJ).

² Represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, NJ).

³ The request sought additional records that are not at issue in this complaint.

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

Brian Kubieli v. Toms River District No. 1 Board of Fire Commissioners (Ocean), 2019-163 – Findings and Recommendations of the Executive Director

responded in writing on the Custodian's behalf stating that a special service charge would be assessed for both items due to the extraordinary time and effort to process the potential volume of records. Mr. Van Dyke stated that pursuant to Fischer v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008), the records would be reviewed by an attorney for redaction purposes at a rate of \$185.00 per hour.

On or before July 26, 2019, the Complainant replied to Mr. Van Dyke, stating that the response did not conform with the Government Records Council's ("GRC") requirements regarding the assessment of a special service charge. The Complainant requested a detailed estimate as required by the GRC. The Complainant also asked whether Commissioner Sipe destroyed any government records, and if so, what those records were and from which device or e-mail address. The Complainant also asked whether Commissioner Sipe was the Custodian of Records, and if so to provide dates in which he served in that role.

On July 26, 2019, Mr. Van Dyke responded to the Complainant. Mr. Van Dyke first stated that Commissioner Sipe has not destroyed any government records nor was he ever designated the Custodian of Record for the District of Toms River No. 1 Board of Fire Commissioners ("District").

Mr. Van Dyke next provided responses to the GRC's 14-point analysis as follows:

1. What records are requested?

Response: Text messages to and from Commissioner Sipe to other commissioners, employees of the District, volunteer members of companies within the district and employees of the Township.

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

Response: The request is for a period of thirty (30) months. Commissioner Sipe has provided information that he sends and receives approximately fifty (50) text messages in a day. The total text messages could be in excess of 45,000. All of them would have to be reviewed to determine which of them are actually government records.

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

Response: The request was for the period commencing on January 1, 2017 to the present.

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

Response: The requested text messages are not archived or stored by the district.

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

Response: The District has five (5) full time employees.

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

Response: The request will have to be handled by the attorney for the District in order to determine which text messages are in fact public records and which of those need to be redacted.

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

Response: Unknown at this time.

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

Response: The District pays attorneys at \$185.00 per hour.

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: It is not anticipated that another employee will monitor the process.

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: The records will be produced in hard copy form and will not need to be returned to an original storage place.

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

Response: An attorney review is required in order to determine which records are public, which records need to be redacted and to compile a log regarding the redactions. The analysis cannot be performed by anyone else due to possible nature of the information contained in the text message.

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: The attorney for the district, Peter J. Van Dyke, Esq. The hourly rate for the attorney for the district is \$185.00.

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

Response: Technology issues should not be a concern.

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 anticipated that the request will take at least thirty (30) hours. This estimate is based upon the attorney categorizing and printing out the relevant text messages, redacting and preparing a redaction log, and then producing the redacted version to the requestor at the rate of one (1) month of records per hour.

On July 30, 2019, the Complainant responded to Mt. Van Dyke, stating that OPRA's fee provisions did not reference legal fees for an attorney's role in assisting with processing an OPRA request. The Complainant stated that the Custodian of Records has the authority to redact records. The Complainant also requested the identity of the public official who responded to the request.

Additionally, the Complainant asserted that the estimated charge was unreasonable. The Complainant stated that in an unrelated request, the District produced 1,700 pages of records at a cost of approximately \$65.00. The Complainant stated that no fee was charged for the redactions despite Mr. Van Dyke's participation.

Denial of Access Complaint:

On August 13, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that while the District did not deny that Commissioner Sipe's text messages contained public records, no effort was made to produce them based upon the potential volume.

The Complainant asserted that the special service charge is based solely upon the work conducted by the District's attorney. The Complainant argued that Mr. Van Dyke did not explain why no one else could review and redact the records, and did not cite any caselaw where a public agency could require a requestor to pay its legal fees as a special service charge. The Complainant also argued that Mr. Van Dyke speculated that it would take thirty (30) hours to process the request, without having obtained the text messages.

Statement of Information:⁵

On December 12, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on July 3, 2019. The Custodian certified that Mr. Van Dyke responded on his behalf in writing on July 15, 2019, stating that a special service charge would be necessary to review and redact the requested text messages. The Custodian certified that on July 26, 2019, Mr. Van Dyke provided a 14-point analysis regarding the special service charge.

The Custodian maintained that a special service charge was needed to process the requested text messages, relying on the responses given by Mr. Van Dyke on July 15 and 26, 2019.

⁵ The complaint was referred to mediation on August 26, 2019. The complaint was referred back from mediation on December 3, 2019.
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Additional Submissions:

On December 13, 2019, the Complainant e-mailed the GRC in response to the Custodian's SOI. The Complainant argued that the Custodian should submit a revised SOI, asserting that the it did not sufficiently address the outstanding issues in the matter. The Complainant asserted that the SOI did not state whether a search was conducted as to how many potentially responsive text messages were at issue. The Complainant also asserted that the SOI did not provide a justification for charging based upon the attorney's hourly rate.

On January 3, 2020, the GRC requested the Custodian submit a revised SOI, specifically for Item Nos. 9, 10, and 12. The GRC stated that the SOI did not provide sufficient information regarding the Complainant's request for text messages as well as the justification for the special service charge.

On January 9, 2020, the Custodian responded to the GRC's request. The Custodian reproduced the responses to the 14-point analysis via certification from Mr. Van Dyke. The Custodian also certified that none of the 45,000 text messages were provided. The Custodian did not elaborate further on the special service charge.

Analysis

Special Service Charge

Initially, the GRC notes that the Complainant's July 3, 2019 OPRA request sought text messages between two (2) e-mail addresses and employees of the District and Township from January 1, 2017 through July 3, 2019. The request items are invalid on their face because they failed to meet the necessary criteria for a valid request for test messages. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Alt v. City of Vineland (Cumberland), GRC Complaint No. 2013-205 (June 2014). However, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014). Here, the Custodian was able to provide an estimated number of responsive records. Based on this, the GRC declines to determine the OPRA request is invalid and will proceed to addressing the threshold special service charge issue.

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

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public

agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .*

[Id. (emphasis added).]

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

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

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

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

[F]or the “custodian” to redact, excise or delete the exempt information. The Legislature could have enacted an attorney review clause, but it did not. Neither did it create a special subclass for attorney bills and accord to them any kind of special treatment. It appears rather conclusively that the custodian is responsible for asserting the privilege and making the redaction.

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

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

Here, the Custodian provided in response to the Complainant a 14-point analysis that reflects the analytical framework outlined in Courier Post, 360 N.J. Super. 199, regarding the proper assessment of a special service charge. The Custodian certified that the process would take approximately thirty (30) hours. The Custodian certified that Mr. Van Dyke, the District’s attorney, has the expertise necessary to comply with the request at \$185.00 per hour. The Complainant’s July 3, 2019 OPRA request sought text messages sent to and from certain e-mail addresses and employees of the District and Township from January 1, 2017 to July 3, 2019. The Custodian certified that a complete response estimated 45,000 text messages to be reviewed. Further, the Custodian noted none of the messages were stored at the Township, and there were no costs associated with retrieving same.

A review of the forgoing supports that the District’s expenditure of 30 hours represents an extraordinary amount of time and effort to produce responsive records given the number of records and size of the agency. See Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). The GRC is further persuaded by the need for the text messages to be reviewed for redactions. Based on the forgoing, the GRC is persuaded that, in principle, a special service charge is warranted in this complaint.

However, while the GRC has determined that a special service charge is warranted here, the GRC is not persuaded that the Custodian can charge for Mr. Van Dyke’s time to review the text messages for two (2) reasons. First, the court’s ruling in Courier Post, 360 N.J. Super. at 203-04, is clear that the District cannot pass Mr. Van Dyke’s cost for review and redaction of the text messages onto the Complainant. See also Carter, GRC 2011-71. Second, the GRC questions that Mr. Van Dyke’s expertise was required to review and redact said messages. The Courier Post court articulated such a question in the instance of attorney billing records, which may necessarily be more complicated to review than text messages. Simply put, the GRC does not agree that the most appropriate reviewer and redactor of text messages needed to be an attorney.

Mr. Van Dyke cited to Fisher, 400 N.J. Super. 61,⁶ in support of charging an attorney’s fee for review and redaction of records. However, the facts here depart from Fisher on two (2) significant bases. The court discussed these factors in affirming the Council’s decision in that the custodian could charge the hourly rate for deputy attorney generals (“DAG”) to locate and review potentially responsive e-mails. (App. Div. 2008). First, the records sought were maintained by DAGs. The court noted that Fisher could be distinguished from Courier Post in that “[t]his is not a case where the government records have already been retrieved and a public agency seeks to impose a ‘special service charge’ solely for the purpose of outside counsel determining whether

⁶ Affirming Fisher v. Dep’t of Law & Pub. Safety, Div. of Law, GRC Complaint No. 2004-55 (August 2006) Brian Kubiak v. Toms River District No. 1 Board of Fire Commissioners (Ocean), 2019-163 – Findings and Recommendations of the Executive Director

the records contain privileged material that should be redacted.” Id. at 72. Second, the hourly rate for those DAGs was “substantially less than the . . . annual salary” of the custodian. Id. at 74.

Based on the forgoing, the special service charge of \$5,550.00 for thirty (30) hours of work is unreasonable. In order to cure this issue, the Custodian will need to recalculate this portion of the fee to reflect the lowest paid employee’s hourly rate to review and redact the responsive executive session minutes.

Accordingly, the Custodian has borne his burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera, GRC 2009-311. However, the imposition of Mr. Van Dyke’s hourly rate of \$185.00 is unreasonable. Courier Post, 360 N.J. Super. at 199, 203-204. See also Carter, GRC 2011-71. Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive text messages based on the lowest paid Township employee capable of performing the work.

Knowing & Willful

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

Prevailing Party Attorney’s Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, the imposition of Mr. Van Dyke’s hourly rate of \$185.00 is unreasonable. Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199, 203-04 (App. Div. 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive text messages based on the lowest paid Township of Toms River employee capable of performing the work.
2. **The Custodian shall comply with conclusion No. 1 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 deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director⁹ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.

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

Prepared By: Samuel A. Rosado
Staff Attorney

January 19, 2021

⁷ 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.

⁸ "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."

⁹ 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.

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