



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**November 9, 2022 Government Records Council Meeting**

Brian F. McBride  
Complainant

Complaint No. 2021-53

v.

Township of Washington (Gloucester)  
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 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 did not fully comply with the Council’s August 30, 2022 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until thirty-one (31) business days after receiving the Order. Notwithstanding, the GRC need not address this issue any further because the Complainant declined to pay the special service charge and the Custodian certified that she received no payment from the Complainant. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. Although the Custodian failed to fully comply with the Council’s August 30, 2022 Interim Order, the Custodian’s proposed special service charge was reasonable and warranted. N.J.S.A. 47:1A-5(c). Additionally, the evidence of record does not indicate that the Custodian’s failure to comply with the Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the  
Government Records Council  
On The 9<sup>th</sup> Day of November 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: November 15, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 9, 2022 Council Meeting**

**Brian F. McBride<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-53**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails from any Township of Washington (“Township”) address ending in “@twp.washington.nj.us” to any recipient from January 1, 2017 to January 9, 2021 containing over sixty (60) specific keywords and phrases.

**Custodian of Record:** Christine Ciallella

**Request Received by Custodian:** January 10, 2021

**Response Made by Custodian:** February 25, 2021

**GRC Complaint Received:** March 3, 2021

**Background**

**August 30, 2022 Council Meeting:**

At its August 30, 2022 public meeting, the Council considered the August 23, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$5,586.00, comprising 285 hours at a rate of \$19.50 to locate, retrieve, and copy records responsive to the Complainant’s OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Furthermore, the Custodian demonstrated that the \$100.00 in copying costs estimated to provide the records electronically was the “actual cost.” See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

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

<sup>2</sup> Represented by Patrick J. Madden, Esq. of the Law Offices of Patrick J. Madden, LLC (Haddonfield, NJ).

2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering 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 deliver<sup>3</sup> to the Executive Director 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>4</sup>**
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.

#### Procedural History:

On August 31, 2022, the Council distributed its Interim Order to all parties. On October 17, 2021, the Government Records Council ("GRC") e-mailed the parties to request the status of the matter. That same day, the Complainant responded to the GRC via e-mail, stating he declined to pay the special service charge.

Thereafter on October 17, 2022, the Custodian's Counsel responded to the Council's Interim Order, providing a certification from the Custodian. The Custodian certified as of October 17, 2022, she has not received payment from the Complainant or a statement declining to purchase the records.

#### Analysis

#### Compliance

At its August 30, 2022 meeting, the Council ordered the Complainant to remit payment of the charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days of receiving the charge would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the Custodian ten (10) business days from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director, in accordance with R. 1:4-4.

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<sup>3</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>4</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."

On August 31, 2022, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business five (5) business days on Thursday, September 8, 2022, accounting for the Labor Day holiday.<sup>5</sup> Further, the Custodian was required to provide a certified confirmation of compliance by September 15, 2022.

In the instant matter, the GRC contacted the parties on October 17, 2022, seeking a status update on the matter since neither party provided correspondence through that date. The Complainant responded via e-mail that same day, stating he did not wish to pay the special service charge. Thereafter, on the thirty-first (31<sup>st</sup>) business day after receipt, the Custodian submitted her certification to the GRC. Therein, the Custodian certified that as of that date, the Complainant failed to provide payment or make known his refusal to pay the special service charge. Based on the foregoing, the Custodian did not fully comply with the Order due to a timeliness issue.

Therefore, the Custodian did not fully comply with the Council's August 30, 2022 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until thirty-one (31) business days after receiving the Order. Notwithstanding, the GRC need not address this issue any further because the Complainant declined to pay the special service charge and the Custodian certified that she received no payment from the Complainant. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly and 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. 1983)); 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)).

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<sup>5</sup> Labor Day was observed on September 5, 2022.

In the instant matter, although the Custodian failed to fully comply with the Council's August 30, 2022 Interim Order, the Custodian's proposed special service charge was reasonable and warranted. N.J.S.A. 47:1A-5(c). Additionally, the evidence of record does not indicate that the Custodian's failure to comply with the Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's August 30, 2022 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until thirty-one (31) business days after receiving the Order. Notwithstanding, the GRC need not address this issue any further because the Complainant declined to pay the special service charge and the Custodian certified that she received no payment from the Complainant. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.
  
2. Although the Custodian failed to fully comply with the Council's August 30, 2022 Interim Order, the Custodian's proposed special service charge was reasonable and warranted. N.J.S.A. 47:1A-5(c). Additionally, the evidence of record does not indicate that the Custodian's failure to comply with the Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

October 27, 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

August 30, 2022 Government Records Council Meeting

Brian F. McBride  
Complainant

Complaint No. 2021-53

v.

Township of Washington (Gloucester)  
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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 her burden of proof that the proposed special service charge of \$5,586.00, comprising 285 hours at a rate of \$19.50 to locate, retrieve, and copy records responsive to the Complainant’s OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Furthermore, the Custodian demonstrated that the \$100.00 in copying costs estimated to provide the records electronically was the “actual cost.” See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering 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 deliver<sup>1</sup> to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s**

<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.

**response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.<sup>2</sup>**

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.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of August 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: August 31, 2022**

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<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 30, 2022 Council Meeting**

**Brian F. McBride<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-53**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails from any Township of Washington (“Township”) address ending in “@twp.washington.nj.us” to any recipient from January 1, 2017 to January 9, 2021 containing over sixty (60) specific keywords and phrases.

**Custodian of Record:** Christine Ciallella

**Request Received by Custodian:** January 10, 2021

**Response Made by Custodian:** February 25, 2021

**GRC Complaint Received:** March 3, 2021

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

**Request and Response:**

On January 10, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 23, 2021, the Custodian responded in writing, stating fulfilling the request would require an extraordinary expenditure of time and effort, and therefore would impose a special service charge. The Custodian also provided a 14-point analysis to the Complainant as part of her response:

**1. What records are requested?**

**Response:** Electronic mail containing coarse or offensive language for 60+ keywords and phrases.

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

**Response:** To review more than 2,000+ e-mails. In order to accurately “filter” the

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

<sup>2</sup> Represented by Patrick J. Madden, Esq. of the Law Offices of Patrick J. Madden, LLC (Haddonfield, NJ).

<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.

aforementioned terms, the 2,000+ e-mails would have to be carefully reviewed, on an individual basis.

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

**Response:** January 1, 2017 to January 9, 2021.

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

**Response:** These records are stored in a computer records management system.

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

**Response:** 270 active employees.

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

**Response:** One or two Office Assistance Is

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

**Response:** Unsure at present time, as the review of each e-mail will be done individually. Redactions, if necessary (e.g., personal identifiers), may required additional service charge.

**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:** Office Assistant I, \$19.60 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:** Records Custodian – Christine Ciallella.

**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:** None.

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

**Response:** Lowest paid employee is Office Assistant 1; Two Office Assistants may be used to expedite delivery.

**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:** Dawn Passante, Office Assistant I; \$19.60 per hour.

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

**Response:** Each record must be individually retrieved and reviewed, and responsive records must be printed and copied for production to the requestor.

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

**Response:** As indicated above, the Township has identified over 2,000+ e-mail results for 60+ keywords and phrases in response to this request. The Township has engaged in a real-time exercise to determine the length of time necessary to review every e-mail (print and redact as necessary) and determine whether the e-mail references the keywords or phrases in question. However, the e-mail search tool is built to find words and/or phrases as they are entered, not in the context in which they are used. In most cases, the words referenced show in the results as part of a word. For example, one of the words will show up in the results as part of other words not germane to the first. In addition, there are many junk or spam e-mails that include some of these words or phrases. To complete this request, the Township has determined that seven (7) e-mails were able to be printed, reviewed, and redacted in a 60-minute period.

The Custodian stated that based upon the foregoing, the Township would expend 285 hours to review 2,000+ e-mails on an individual basis. The Custodian further stated that based upon the hourly rate of \$19.60, the total charge for providing the records would be approximately \$5,586.00. The Custodian also stated that there would be a copying cost of approximately \$100.00 for the 2,000 e-mails to be reviewed that may be revised based upon the exact number of e-mails.

On February 25, 2021, the Complainant responded to the Custodian, stating he would like to clarify and modify his request. The Complainant asserted that his request only sought "sent items" of each municipal employee, and not what they received. The Complainant asserted that the junk and spam folders were not part of his request. The Complainant then stated that he would omit the example word identified by the Custodian in the 14-point analysis from his request.

The Complainant then stated that because there were 270 employees, he would limit his request to the "sent items" folder of the following employees: 1) Lisa Frattali; 2) Vincenzo Fulginiti; 3) Tobias Haley; 4) Gary Egizi; 5) Ben Swan; 6) Jason Gonter; 7) Joseph Micucci; 8) Joseph Rowson; 9) John DiStefano; 10) Kevin Convery; 11) Andrew Nichols.

Denial of Access Complaint:

On March 3, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he sought e-mail

correspondence sent by Township employees containing coarse, offensive, and/or discriminatory language. The Complainant argued that the Custodian expanded the request to include the entirety of each employee's account, inclusive of junk and spam folders. The Complainant asserted that the Custodian impermissibly imposed a special service charge as a result of expanding the scope of his request.

The Complainant added that the Township uses Google for Business, and therefore argued that it should be easy and inexpensive to search for responsive records. The Complainant requested to be allowed to "inspect" responsive records in a meeting with the Custodian and/or the Township's IT professional.

#### Supplemental Response:

On March 4, 2021, the Complainant forwarded to the GRC a letter sent to the Custodian regarding the matter. In that letter, the Complainant stated that he rescinded his letter of February 25, 2021 and modified his OPRA request back to its original state, apart from removing the one word from the list of keywords.

#### Statement of Information:

On March 25, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 10, 2021. The Custodian certified that she requested a search of the Township's e-mail system, and same was performed by the Township's outside IT professional. The Custodian certified that the Township performed an exercise to determine the amount of time it would take to respond to the Complainant's OPRA request. The Custodian certified that she responded in writing on February 23, 2021, stating that a special service charge would be imposed to fulfill the request.

The Custodian initially asserted that the request was invalid as it failed to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The Custodian asserted that the request sought the sent e-mails of every account issued by the Township containing a set of profane words and phrases rather than a particular subject or topic. The Custodian asserted that while terms are used to identify e-mails within the parameters set under Elcavage, the Complainant's use of terms was not to retrieve an identifiable document but determine whether Township employees were sending e-mails containing offensive language.

The Custodian further noted that the identified parameters would include any e-mail sent by a Township employee that included or forwarded an e-mail from an outside source. The Custodian noted that the Complainant himself has sent e-mails to Township addresses containing

some of the listed terms. The Custodian argued that while the Township proceeded in an effort to respond to the OPRA request and provide the Complainant with a special service charge to process same, the request was never proper in the first instance.

The Custodian next argued that the special service charge was appropriate given the nature of the request. The Custodian asserted that the Appellate Division permitted a special service charge where deputy attorney generals spent over 55 hours reviewing and redacting 15,000 e-mails. Fisher v. Div. of Law, 400 N.J. Super. 61, 65 (App. Div. 2008); see also Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002).

The Custodian first asserted that the program utilized by the Township did not permit the ability to limit searches to e-mails solely generated by Township employees. The Custodian provided an example where if an employee received an e-mail containing a listed term and then forwarded the e-mail, the employee's e-mail would be flagged for review even though the employee did not author the original message containing the term. The Custodian also asserted that the program would flag documents or attachments containing the terms as well. The Custodian therefore argued that these factors resulted in an extremely large number of e-mails flagged for review.

The Custodian next asserted that given the nature of the Complainant's request, she would need to review each flagged document in total to determine whether an OPRA exemption applied. The Custodian then asserted that many of the documents could include communications involving the Township's attorneys, and therefore required additional review for potentially privileged communications.

The Custodian maintained that the Township engaged in an exercise to estimate the time to process the request. The Custodian asserted that the exercise resulted in expending sixty (60) minutes to locate, review, and redact seven (7) e-mails. The Custodian thus argued that the estimated special service charge was valid.

#### Additional Submissions:

On March 25, 2021, the Complainant submitted a response to the Custodian's SOI. The Complainant first maintained that his request was valid and sought government records. The Complainant noted that in a separate litigation, the Superior Court ordered the Township to provide e-mails containing the last name of a resident. The Complainant also asserted that he submitted a separate request to the Township requesting the same records at issue but was limited to the sent folder of two (2) employees. The Complainant contended that the Township responded to that OPRA request and did not impose a special service charge.

The Complainant further asserted that he should not be required to bear the cost of the Custodian's inability to properly search the Township's e-mail account for responsive records. The Complainant asserted that the Township's e-mail account should have the ability to conduct a limited search so that results would not return thousands of e-mails to review. The Complainant further asserted that his request was limited only to e-mails contained in employee's "sent items" folder and should not include e-mails contained in any other folder. The Complainant noted that

the Custodian did not provide certifications from IT professionals explaining why the Township's has a limited ability to narrow e-mail searches.

On March 31, 2021, the Custodian submitted a response to the Complainant's reply. The Custodian initially asserted that in the separate litigation mentioned by the Complainant, the search term was limited to one pronoun, "Wassmuth," and thus returned far fewer potentially responsive documents than the instant OPRA request. The Custodian also maintained that the Complainant's request did not seek identifiable government records due to the numerous and random keywords used.

The Custodian also contended that even if the Township limited its search to e-mails sent by Township employee accounts, the request still sought all e-mails sent by any Township account containing the identified keywords. The Custodian asserted that there was no way to limit the search to e-mails generated directly by Township employees versus e-mails that were generated by another party but forwarded by a Township account.

On March 31, 2021, the Complainant submitted a response to the Custodian. The Complainant noted that the Township did not provide a certification from their IT professionals regarding the Township's search abilities.

### Analysis

#### 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. 191. 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.

Moreover, OPRA provides that providing access to records electronically "shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs." N.J.S.A. 47:1A-5(b). See also McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). However, the foregoing does not necessarily mean that a custodian can never charge for electronic delivery unless supplies are involved. For example, the Council previously held that a custodian could charge a per-page copy cost for redacted records if the agency did not have ability to electronically redact same. Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, it follows that requestors seeking records electronically may be subject to the imposition of actual costs for duplication of records. N.J.S.A. 47:1A-5(b)-(c).

The GRC initially notes that although the Custodian initially argued that the request was invalid, he was able to conduct a search for responsive records and identified more than 2,000 potentially responsive records and impose a special service charge. In those situations, the GRC adheres to the Appellate Division in 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 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Therefore, the GRC shall proceed with determining whether the special service charge was warranted and reasonable.

Here, the Custodian provided in response to the Complainant's request a 14-point analysis that reflects the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Complainant's OPRA request sought e-mail correspondence over a four (4) year period sent by any Township e-mail account which contained one or more of over sixty (60) words and phrases. The Custodian certified that a search resulted in more than 2,000 potentially responsive e-mails, and that processing the records would take

approximately 285 hours, calculated based upon a sample review of seven (7) e-mails in a sixty (60) minute period. The Custodian certified that the Township's Office Assistant would perform the work at the hourly rate of \$19.50, for a total estimated charge of \$5,586.00.

A review of the forgoing supports the finding that a special service charge was warranted based upon the nature of the request, the volume of responsive records to be reviewed, and the estimated expenditure of 285 hours to process the request. See Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). An additional factor includes the potential wide variety of subject matters within the located e-mails requiring additional review by counsel for potential redactions. The Custodian certified that because of the potential redactions, the Township conducted an exercise that revealed the estimated number of e-mails reviewed per hour.

Moreover, the Custodian demonstrated that the e-mails required copying costs. As was the case in Paff, GRC 2010-09, the Custodian certified that the e-mails had to be printed in order to be redacted. Therefore, the estimated cost of \$100.00 is supported by the evidence of record here.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$5,586.00, comprising 285 hours at a rate of \$19.50 to locate, retrieve, and copy records responsive to the Complainant's OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-285. Furthermore, the Custodian demonstrated that the \$100.00 in copying costs estimated to provide the records electronically was the "actual cost." See Paff, GRC 2010-09. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$5,586.00, comprising 285 hours at a rate of \$19.50 to locate, retrieve, and copy records responsive to the Complainant's OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Furthermore, the Custodian demonstrated that the \$100.00 in copying costs estimated to provide the records electronically was the "actual cost." See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the



Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering 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 deliver<sup>4</sup> to the Executive Director 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>5</sup>**
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.

Prepared By: Samuel A. Rosado  
Staff Attorney

August 23, 2022

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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."