



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

MIKIE SHERRILL  
Governor

DR. DALE G. CALDWELL  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Commissioner

### FINAL DECISION

#### April 28, 2026 Government Records Council Meeting

Kathleen Fraidstern  
Complainant

Complaint No. 2022-280

v.

Township of Maplewood (Essex)  
Custodian of Record

At the April 28, 2026, public meeting, the Government Records Council (“Council”) considered the April 21, 2026, 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 bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). The GRC will not address the Complainant’s additional timeliness assertions because the OPRA request was already “deemed” denial as of May 19, 2022.
2. The Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). However, the imposition of the attorney’s rate amounting to a \$700.00 special service charge is unreasonable. Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191 (October 28, 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012); Kubiel v. Toms River Dist. No. 1 Bd. of Fire Comm’rs (Ocean), GRC Complaint No. 2019-163 (Interim Order dated January 21, 2021). Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive e-mails based on the lowest paid Township employee capable of performing the work and provide the new special service charge to the Complainant for remittance.
3. **The Custodian shall comply with conclusion No. 2 above by providing the amount of the recalculated charge available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the**

**Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records within twenty (20) business days following receipt of said payment.**

4. **In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
5. The Custodian has borne her burden of proof that she lawfully denied access OPRA request item No. 8. Specifically, the Custodian certified in the SOI that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Custodian's failure to timely respond resulted in a "deemed" denial of access and the assessed special service charge was unreasonable. However, the ability to charge was warranted under N.J.S.A. 47:1A-5(c) and the Custodian lawfully denied access to OPRA request item No. 8. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of April 2026

John A. Alexy, Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2026**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2026 Council Meeting**

**Kathleen Fraidstern<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-280**

**v.**

**Township of Maplewood (Essex)<sup>2</sup>  
Custodial Agency**

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

1. E-mails between Township of Maplewood (“Township”) Committee members and Dr. Ronald Taylor between May 3, and 9, 2022
2. E-mails between Township Committee members and Nurse Julie Porter between May 3, and 9, 2022.
3. E-mails between Maplewood Department of Health (“MDOH”) and Nurse Julie Porter between March 1, 2022 and May 9, 2022.
4. “Communications, in electronic or other format” sent to Candice Davenport between March 1, 2022 and May 9, 2022 containing the word “outbreak(s).”
5. “Any communications, electronic or other format” received by Ms. Davenport between March 1, 2022 and May 9, 2022 containing the word “outbreak(s).”
6. “Any communications, electronic or other format” sent to Anna Markarova between March 1, 2022 and May 9, 2022 containing the word “outbreak(s).”
7. “Any communications, electronic or other format” received by Ms. Markarova between March 1, 2022 and May 9, 2022 containing the word “outbreak(s).”
8. Agenda, meeting notes, recordings and transcripts, and attendee lists for the May 6, 2022 meeting between the Township, Health departments, and South Orange Maplewood School District (“District”).

**Custodian of Record:** Elizabeth Fritzen

**Request Received by Custodian:** May 9, 2022

**Response Made by Custodian:** May 19, 2022

**GRC Complaint Received:** June 21, 2022

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

<sup>2</sup> Represented by Jennifer L. Credidio, Esq. of McManimon, Scotland & Baumann, LLC (Roseland, NJ). Previously represented by Roger J. Desiderio, Esq., of Bendit Weinstock, P.A. (West Orange, NJ).

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

### **Request and Response:**

On May 9, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to Assistant Michele Irby-Garry seeking the above-mentioned records. On May 19, 2022, the eighth (8<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing stating that an extension of time until May 26, 2022, was required to conduct a search and retrieval. On May 25, 2022, Ms. Irby-Garry responded in writing on behalf of the Custodian stating that an additional two (2) weeks, until June 9, 2022, was necessary to review potentially responsive correspondence. On June 8, 2022, the Custodian responded in writing stating that it was determined that some potentially responsive e-mails needed to be reviewed and redacted for personal information by the Township’s legal department. The Custodian stated that she is proposing a special service charge of \$700.00, representing five (5) to seven (7) hours of time for the review, and asked the Complainant to advise as to how she “would like the Township to proceed.”

On June 9, 2022, the Complainant e-mailed the Custodian advising that she contacted the Government Records Council (“GRC”) regarding the response and was provided guidance. The Complainant stated that she would like to proceed by having the Township identify an individual capable of identifying exempt personal information as outlined in N.J.S.A. 47:1A-1.1, redact the records, and disclose them electronically or charge the standard copying cost by close of business the next day. Having received no response, the Complainant sent a follow-up e-mail to the Custodian on June 14, 2022, asking whether the Township had located an individual capable of redacting the responsive records, to which the Custodian did not respond.

### **Denial of Access Complaint:**

On June 21, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that her OPRA request arose from the District’s handling of a COVID-19 outbreak and a series of meetings and correspondence between the Township, MDOH, the District, and certain citizens. The Complainant argued that, after extending the response time frame and assessing a \$700.00 special service charge, the Custodian failed to grant access, deny access, or obtain another extension of time to respond before the June 9, 2022 extended time frame expired. The Complainant further argued that the Custodian’s failure to respond to her June 9, and 14, 2022 follow-up e-mails was a failure to provide a specific lawful basis for not disclosing responsive records within the extended time frame.

The Complainant also alleged that the \$700.00 charge for what appeared to be the Township attorney’s review and redaction of personal information from the responsive records was unwarranted and unreasonable under N.J.S.A. 47:1A-5(c), Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191 (Law Div. 2002), and Carter v. Franklin Fire Dist. No. 1 (Somerset),

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

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GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012). The Complainant argued that the Township did not need the expertise of an attorney to identify personal information, and that she did not believe her OPRA request would result in an extraordinary amount of time and effort to fulfill. The Complainant contended that the Township did not complete a 14-point analysis, which would have provided the basis for the assessed fee.

The Complainant argued that the actions of the Custodian and several employees copied on pre-complaint correspondence constituted a knowing and willful violation of OPRA under N.J.S.A. 47:1A-11. The Complainant contended that the Township charged a special service charge and subsequently ignored her follow-up e-mails specifically to prevent the disclosure of records surrounding the COVID-19 issue. The Complainant opined that the Custodian either knowingly and willfully violated OPRA or she is likely unqualified to serve in a custodial position.

#### Statement of Information:

On July 28, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 9, 2022. The Custodian certified that a search performed based on each of the first seven (7) OPRA request items yielded 1,899 e-mails. The Custodian noted that any records responsive to OPRA request item No. 8, to the extent they exist, they would be held by the District. The Custodian certified that after two (2) extensions taken on May 19 and May 25, 2022, she responded in writing on June 8, 2022, assessing a special service charge of \$700.00 for between five (5) and seven (7) hours to review the e-mails and redact exempt information.

The Custodian contended that no denial of access occurred because the responsive e-mails have been compiled but have not been provided because they require review and redaction. The Custodian stated that the responsive e-mails clearly related to COVID-19 health issues and were targeted communications between the Township, multiple health officials, and the District. The Custodian argued that the necessary redactions are more than simple personal information redactions (except for potential telephone numbers), and notes that the Complainant has not disputed the e-mails are subject to redaction. The Custodian averred that the process would require Counsel to print each e-mail, to thoroughly review and redact exempt information in a visually obvious manner, and to make an additional copy.

The Custodian argued that the responsive records implicate significant privacy concerns associated with COVID-19 and individual health information, including that of children. The Custodian argued that those potential redactions are necessary to address personal identifying information of District students, including COVID-19 testing results and other exposure or “outbreak” information that could identify any persons. The Custodian further noted that Ms. Irby-Garry is no longer with the Township and that her position remains open. The Custodian contended that the open position, coupled with the time it would take to review and redact the responsive e-mails, would disrupt agency operations. The Custodian argued that all the forgoing is proof that Custodian’s Counsel was the more qualified and appropriate individual to conduct the necessary review and redaction.

The Custodian contended that OPRA requires her to protect a citizen’s reasonable expectation of privacy under N.J.S.A. 47:1A-1, and cited Bozzi v. City of Jersey City, 248 N.J.

274, 285 (2021). The Custodian further contended that OPRA also requires her to protect medical information not subject to public access pursuant to Michelson v. Wyatt, 379 N.J. Super. 611, 619-620 (App. Div. 2005) (citing Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”)). The Custodian argued that the New Jersey Supreme Court in Burnett v. Cnty. of Bergen, 198 N.J. 408, 438 (2009), held that the Complainant should bear the cost of redacting responsive records. The Custodian contended that the proposed \$700.00 charge is appropriate under OPRA and that the GRC should deny “[t]he relief sought” in this complaint.

#### Additional Submissions:

On August 3, 2022, the Complainant submitted a sur-reply to the SOI. The Complainant first argued that the Custodian’s attempt to identify additional redactable information not previously mentioned until the SOI is of no moment. The Complainant noted that she is not seeking medical information or student names.

The Complainant next argues that the Custodian’s assertion that she did not have time to conduct the review was not a legitimate reason to pass on Counsel’s cost to a requestor. The Complainant thus contended that the charge is not reasonable in the first instance. The Complainant noted that the Municipal Clerk’s Association of New Jersey’s “Clerk’s Desk Reference” provides tips on designating deputy custodians and argued that the Custodian failed to do this. Further, the Complainant argued that the Custodian has not asserted let alone proved that she is incapable of performing the necessary review and redactions.

The Complainant further argued that the Custodian’s assertion that the Township does not maintain records responsive to OPRA request item No. 8 is either a mistake or “a clear attempt to” mislead the GRC. The Complainant contended that Custodian’s Counsel was present at the meeting. The Complainant surmised that the only way the Township could not maintain records is if attendees were purposely directed to “take no notes, make no records, and have no written communication with” the District. The Complainant also noted that the impetus for the May 6, 2022 meeting was: public comments made at a May 3, 2022 Township meeting; an email discussing the May 3, 2022 meeting sent by the South Orange Village (“Village”) President on May 4, 2022; a video of a subsequent Village meeting showing Township officials were in attendance at the May 3, 2022 meeting; and a May 10, 2022 local article on the meeting noting the presence of Township officials at the May 3, 2022 meeting.

Finally, the Complainant noted that the Council has held that text messages are “government records” subject to disclosure pursuant to Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015), and that a custodian has an obligation to retrieve those records maintained in personal accounts.

On August 19, 2024, the GRC sent a letter to the Custodian seeking submission of a 14-point analysis. The GRC noted that the deadline to respond was August 26, 2024. On August 26, 2024, Custodian’s Counsel sought an extension of time to submit the requested 14-point analysis. On August 27, 2024, the GRC granted the extension, and on September 6, 2024, the Custodian submitted her 14-point analysis responding as follows:

**1. What records are requested?**

**Response:** Eight (8) categories of records, including e-mail correspondence with the District and MDOH, and in several items pertaining to the word “outbreak.”

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

**Response:** The Township located 1,899 e-mails, a substantial amount of which require review for potential redactions.

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

**Response:** Responsive e-mails range from March 1, 2022 to May 9, 2022.

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

**Response:** Not at this time.

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

**Response:** The Township Clerk’s Office at the time of the OPRA request comprised of two (2) full-time employees and one (1) shared employee. At that time, the Township was also on a hybrid schedule due to COVID-19. The Clerk’s Office is presently three (3) employees, including the Custodian.

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

**Response:** All three (3) employees reviewed the e-mails already but determined that they need the Township’s attorney to conduct a review for “qualitative privacy considerations, including to protect personal health data and juvenile information . . . .”

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

**Response:** The records mostly address health issues related to the COVID-19 pandemic, and specifically health matters with the District. The records contain medical information, information regarding minors, and other matters falling within the expectation of privacy pursuant to N.J.S.A. 47:1A-1; Executive Order No. 9 (Gov. Hughes, 1963) (continued in Executive Order No. 21 (Gov. McGreevey, 2002)); and EO 26. The sensitivity and qualitative nature of this information requires attorney review.

**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:** After the review is completed, it will take the Custodian and an assistant approximately five (5) hours to copy and assemble the redacted records at a junior level personnel rate of \$36.73 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:** Not applicable

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:** Not applicable.

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

**Response:** See No. 7 above.

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:** Custodian's Counsel at \$195.00 per hour. However, the rate at the time of the OPRA request was lower, and the Township is willing to apply the proposed special service charge accordingly.

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

**Response:** The Township has the technological means to copy and assemble the responsive records.

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

**Response:** It is estimated that Custodian's Counsel will need between five (5) and seven (7) hours to review and redact the responsive records. The Custodian and her assistant will then need an additional five (5) hours to prepare the records for disclosure.

### **Analysis**

#### **Timeliness**

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to



N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In this matter, the Complainant submitted her OPRA request on May 9, 2022, which Ms. Irby-Garry acknowledged receipt of on the same day. The Custodian responded on May 19, 2022, extending the response time frame through May 26, 2022. This complaint followed, where the Complainant contended that the Custodian failed to timely respond after June 9, 2022. In the SOI, the Custodian certified to her receipt date and response date as identified above, which represented eight (8) total business days. Thus, the actual "deemed" denial occurred on May 19, 2022, which was one (1) business day beyond the statutorily mandated time frame.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. The GRC will not address the Complainant's additional timeliness assertions because the OPRA request was already "deemed" denial as of May 19, 2022.

### **Special Service Charge**

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

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

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<sup>4</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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[Id. (emphasis added).]

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

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court examined the following factors to determine whether the records request involved an “extraordinary expenditure of time and effort” 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 and the number of employees available to process document requests; the availability of information technology and the agency’s copying capabilities; the nature, size and number of documents sought; and any other relevant facts. Id. at 202. Put briefly, “what may appear to be extraordinary to one school district might be routine to another.” Id.

Further, OPRA requires a custodian who “asserts that part of a particular record is exempt from public access . . . [to] delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and [to] 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 perform such redactions. Along these lines, the court in Courier Post noted that both subsections of N.J.S.A. 47:1A-5 “provide for the ‘custodian’ to redact, excise or delete the exempt information.” Courier Post, 360 N.J. Super. 203. Because the Legislature declined to include either “an attorney review clause” or “to create a special subclass for attorney bills and accord to them any kind of special treatment,” that court concluded “that the custodian is responsible for asserting the privilege and making the redaction.” Id. at 203-04.

The court’s holding in Courier Post 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. In line with this decision, the Council previously decided that an agency could not pass the cost of a contracted attorney’s time onto the requestor as part of a special service charge. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012); see also Kubiel v. Toms River Dist. No. 1 Bd. of Fire Comm’rs (Ocean), GRC Complaint No. 2019-163 (Interim Order dated January 21, 2021) (holding that while the custodian

could charge a special service charge for review and disclosure of text messages, he could not charge the attorney's hourly rate for review and redaction).

In complaints where the GRC is tasked with addressing a special service charge dispute, it must first decide whether the charge was warranted. If the charge was warranted, then the GRC must address whether the fee was reasonable. See, e.g., Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015).

The GRC initially notes the Complainant's OPRA request item Nos. 1 through 3 are invalid because they failed to include all the required criteria; specifically, the "content and/or subject" to be considered a valid request for communications. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). However, the Custodian did conduct a search for responsive records, identify 1,899 responsive e-mails, and impose a special service charge. In that situation, the GRC adheres to the decision in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), in which the Appellate Division held that the request contained sufficient information for record identification. See also 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.

As to the special service charge applied to records responsive to OPRA request item Nos. 1 through 7, the Custodian provided in her SOI a 14-point analysis that reflects the GRC's analytical framework outlined in Courier Post, 360 N.J. Super. 199, regarding the proper assessment of a special service charge. The Complainant's OPRA request sought correspondence between multiple individuals over approximately two (2) months containing the word "outbreak." The Custodian argued that the proposed charge of \$700.00 representing five (5) to seven (7) hours of time for the Township's attorney to review and redact 1,899 e-mails. The Custodian certified that the potential for the specialized nature of the potential redactions warranted the attorney's review at an hourly rate of \$195.00 per hour, which was lower at the time of the subject OPRA request, and which lower fee could be applied. Further, the Custodian noted that following redactions, it would require an additional five (5) hours for her and an assistant to copy and assemble the response at a rate of \$36.73 per hour.

Based on the 14-point analysis and SOI provided by the Custodian, the GRC is persuaded that the facts here are like those in Rivera, GRC 2009-311. In Rivera, the agency size was seventy-five (75) and the employees capable of performing the necessary work was five (5), whereas here the agency size is fifty-eight (58) and the number of employees capable of performing the necessary work is two (2). Additionally, the number of e-mails responsive to the request and requiring review here is 1,899. Based on the forgoing, the GRC is persuaded that a special service charge is warranted here.

Although the GRC has determined that a special service charge is warranted here, the GRC is not persuaded that the Custodian is permitted to charge for the attorney's time to review the e-mails for two (2) reasons. First, the Courier Post court was clear that the Township cannot pass the attorney's cost for review and redaction of the e-mails onto the Complainant. Courier Post, 360 N.J. Super. at 203-04; See also Carter, GRC 2011-71; Kubiel, GRC 2019-163. Second, the GRC

questions whether the attorney's expertise was required to review and redact the responsive records. The Courier Post court addressed this question in the context of attorney billing records, which may be as complicated to review as the e-mails at issue here. Simply put, the GRC does not agree that the most appropriate reviewer and redactor of the e-mails needs to be an attorney.

Based on the forgoing, the special service charge of \$700.00 for five (5) to seven (7) hours of work is unreasonable. To cure this issue, the Custodian must recalculate this fee to reflect the lowest paid employee's hourly rate to review and redact the e-mails.

Accordingly, the Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera, GRC 2009-311. However, the imposition of the attorney's rate amounting to a \$700.00 special service charge is unreasonable. Courier Post, 360 N.J. Super. 191. See also Carter, GRC 2011-71; Kubiel, GRC 2019-163. Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive e-mails based on the lowest paid Township employee capable of performing the work and provide the updated special service charge to the Complainant for remittance.

### **Unlawful Denial of Access**

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

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that no records responsive to OPRA request item No. 8 existed "would be held by the District." The Complainant argued that this claim is an attempt to mislead the GRC. The Complainant contended that Custodian's Counsel was at the meeting, and that the only way the Township would have failed to maintain records is if there was a directive to the District to "take no notes, make no records, and have no written correspondence." Upon review, the GRC is persuaded that no unlawful denial of access has occurred. There is nothing in the record evidence contradicting the Custodian's certification that no responsive records exist for OPRA request item No. 8. To the extent the District hosted the May 6, 2022 meeting, it is reasonable that the Township would not maintain any agendas, transcripts, or recordings.<sup>5</sup> Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

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<sup>5</sup> The GRC notes that, if notes did exist, they are exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; O'Shea v. West Milford Twp. Bd. of Educ., 391 N.J. Super. 534, 540 (App. Div. 2007).

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access OPRA request item No. 8. Specifically, the Custodian certified in the SOI that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### **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 that, “[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)).

In the matter before the Council, the Custodian's failure to timely respond resulted in a “deemed” denial of access and the assessed special service charge was unreasonable. However, the ability to charge was warranted under N.J.S.A. 47:1A-5(c) and the Custodian lawfully denied access to OPRA request item No. 8. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily

- mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). The GRC will not address the Complainant’s additional timeliness assertions because the OPRA request was already “deemed” denial as of May 19, 2022.
2. The Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). However, the imposition of the attorney’s rate amounting to a \$700.00 special service charge is unreasonable. Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191 (October 28, 2002). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012); Kubiel v. Toms River Dist. No. 1 Bd. of Fire Comm’rs (Ocean), GRC Complaint No. 2019-163 (Interim Order dated January 21, 2021). Thus, the Custodian must recalculate the cost of reviewing and redacting the responsive e-mails based on the lowest paid Township employee capable of performing the work and provide the new special service charge to the Complainant for remittance.
  3. **The Custodian shall comply with conclusion No. 2 above by providing the amount of the recalculated charge available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant’s failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records within twenty (20) business days following receipt of said payment.**
  4. **In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
  5. The Custodian has borne her burden of proof that she lawfully denied access OPRA request item No. 8. Specifically, the Custodian certified in the SOI that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
  6. The Custodian’s failure to timely respond resulted in a “deemed” denial of access and the assessed special service charge was unreasonable. However, the ability to charge was warranted under N.J.S.A. 47:1A-5(c) and the Custodian lawfully denied access to OPRA request item No. 8. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do

not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

April 21, 2026