



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 25, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-192

v.

Pine Hill Board of Education (Camden)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 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. Because the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost actually incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.
2. The evidence of record indicates that the Custodian responded in writing to the Complainant's OPRA request on the same business day as receipt thereof, providing an estimate of \$10 to provide a copy of the requested audiotape. Moreover, the estimate of \$10.48 submitted by the agency's vendor is reasonable pursuant to N.J.S.A. 47:1A-5.c. Therefore, the Custodian herein has not knowingly and willfully violated OPRA nor unreasonably denied access to the requested record under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.
3. The Complainant failed to achieve the desired result of disclosure of a requested record at a lower fee. Because no change has come about as a result of the Custodian's actions, the Complainant is not a prevailing party as defined in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and as such is not entitled to prevailing party attorney's fees. *See, NJ Builders Association v. NJ*



Council on Affordable Housing, 390 N.J. Super. 166, 175 (App.Div. 2007) and N.J.S.A. 47:1A-6.

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 25th Day of February, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-192

v.

**Pine Hill Board of Education (Camden)²
Custodian of Records**

Records Relevant to Complaint: A copy of the audio recording of the most recent public meeting of the Pine Hill Board of Education.

Request Made: June 25, 2007

Response Made: June 25, 2007

Custodian: Carol Mascioli

GRC Complaint Filed: August 21, 2007

Background

June 25, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint on an official OPRA request form. The Complainant specifically requests that the Custodian provide him with the reproduction cost prior to fulfilling the Complainant's OPRA request.

June 25, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt. The Custodian acknowledges receiving the Complainant's OPRA request. The Custodian states that a copy of the audio recording from the June 19, 2007 meeting will cost \$10.00 and asks that the Complainant mail payment to the Pine Hill Board of Education ("Board"). The Custodian also states that a copy of the tape will be forwarded to the Complainant once payment is received.

July 9, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that the Complainant submitted an OPRA request on June 25, 2007 to which the Custodian responded by stating that there was a \$10.00 fee for duplicating audiotapes. The Complainant also contends that the Board's fee is extraordinarily high. The Complainant states that the requested media should be available for less than \$1.00.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers (Oxford, NJ).

² Represented by Ronald W. Sahli, Esq., of Sahli & Padovani (Hammonton, NJ).

The Complainant argues that OPRA requires government agencies to charge the actual cost of reproducing the record requested in the medium requested. The Complainant also argues that in Libertarian Party of Central Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the court overturned the defendant's fee schedule that charged \$55.00 for township minutes on an individual diskette and directed the trial court to conduct a hearing to determine the actual cost incurred by the municipality in producing township minutes on a computer diskette.

The Complainant requests that the Custodian advise the Complainant of the Board's actual cost in providing audiotapes of Board meetings to the public. If the \$10.00 charge is a special service charge pursuant to N.J.S.A. 47:1A-5.c., the Complainant requests that the Board articulate the extraordinary expenditure of time and effort required to accommodate the request.

July 11, 2007

Letter from the Custodian to the Complainant. The Custodian states that he has provided an itemized estimate of proposed charges, which he believes underestimates the actual costs of reproducing the record requested. The Custodian also states that after some discussion about the cost of reproduction associated with the Complainant's OPRA request and in a spirit of prompt compliance and fairness, the amount of \$10.00 was determined and the Complainant was advised of such.

The Custodian estimates the cost of reproduction as follows:

1. Audio Cassette Tape	\$1.99
2. Reproduction Equipment Costs	\$1.50
3. Priority Mail Postage	\$4.60
4. Delivery Confirmation Online	\$0.65
5. Sub Total	\$8.74
6. Approx. Reproduction Labor Costs (1 hour)	\$8.50
7. Max Total	\$17.24

The Custodian states that the proposed charge of \$10.00 is less than the actual cost. The Custodian also states that the Custodian quoted a fee below the actual cost in an effort to accommodate the seven (7) business day deadline under OPRA.

July 23, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that OPRA requires the Board to charge no more than the actual cost of copying the records requested pursuant to N.J.S.A. 47:1A-5.b. The Complainant contends that actual cost as defined by OPRA does not include overhead, cost of reproduction equipment, postage, delivery confirmation, or labor. Citing Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 25, 31 (1992); Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271, 280 (App. Div. 2005) and N.J.S.A. 47:1A-5.b., the Complainant contends that labor is not to be included in calculating actual costs. The Complainant asserts that the only legitimate cost listed in the July 11, 2007 letter is the cost of the audiotape, which at \$1.99 seems extraordinarily expensive to the Complainant since audiotapes retail at less than \$1.00. The Complainant further asserts that the Board appears to have calculated the

“direct cost” of making copies, which is not the appropriate standard under Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006). The Complainant argues that costs other than the audiotape are only calculated into actual cost if a request merits a special service charge under OPRA. The Complainant states that the Custodian has not claimed that a special service charge is warranted. The Complainant further states that such a charge is not justified in this case.

The Complainant requests that the Custodian reconsider his position. The Complainant states that if he does not hear from the Custodian by August 1, 2007, he will assume that the Custodian has not changed his position. If that is the case, the Complainant states that he will file an action with the Government Records Council or a court of appropriate jurisdiction.

July 30, 2007

Letter from the Custodian to the Complainant. The Custodian contends that the proposed charge for the requested audiotape was fair, reasonable and statutorily authorized. The Custodian maintains that the fee was lower than the actual costs. The Custodian also contends that the additional charge listed for the reproduction cost is covered under OPRA as a special service charge pursuant to N.J.S.A. 47:1A-6.c.,³ which states:

“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 records 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 records, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies...”

The Custodian asserts that the Complainant’s request requires an extraordinary expenditure of time and effort to accommodate the request because the Board is not able to reproduce the record requested without direct supervision and additional equipment cost. The Custodian also asserts that this cost was disclosed in prior correspondence. The Custodian states that the cost referred to in the July 11, 2007 letter is the cost that the Board would incur in an effort to ensure proper reproduction of the requested record. Further, Custodian asserts that N.J.S.A. 47:1A-6.d.⁴ states:

“If the public agency does not maintain the record in the medium requested, the Custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. *If a request is for a record:* 1) in a medium not routinely used by the agency; 2) not routinely developed or maintained by an agency; or 3) *requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of*

³ Correct cite is N.J.S.A. 47:1A-5.c.

⁴ Correct cite is N.J.S.A. 47:1A-5.d.

duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-6.d. (Emphasis added).

The Custodian further states that the proposed charge for the requested material was lowered to \$10.00 because it was reasonable and justified by common sense and OPRA’s definition of actual cost. The Custodian requests that the Complainant forward the payment.

August 22, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated June 25, 2007
- Letter from the Custodian to the Complainant dated June 25, 2007
- Letter from the Complainant to the Custodian dated July 9, 2007
- Letter from the Custodian to the Complainant dated July 11, 2007
- Letter from the Complainant to the Custodian dated July 23, 2007.

The Complainant states that he is bringing this claim because the Board overcharges citizens by 400% for copies of audiotapes. The Complainant also asserts that on June 25, 2007, he submitted an OPRA request for an audiotape copy of a recent Board meeting and the Custodian attempted to charge him \$10.00.

The Complainant states that in a letter dated July 9, 2007, the Complainant requested that the Custodian justify the fee charged. The Complainant contends that on July 11, 2007, the Custodian confirmed that the actual cost of an audiotape is \$1.99. The Complainant further contends that the Board justified its \$10.00 proposed charge by adding overhead, labor, amortized cost of copying equipment, postage, and delivery confirmation to the cost of reproduction. The Complainant states that on July 23, 2007, he requested that the Custodian reconsider the proposed \$10.00 charge in accordance with the legal authority cited in the July 23, 2007 letter.

The Complainant requests the following relief:

- 1) A declaration that the Custodian violated OPRA
- 2) An order compelling the Custodian to charge a fee for copies of audiotapes not in excess of the Board’s actual cost
- 3) An order fining the Custodian for knowingly and willfully violating OPRA
- 4) Attorney’s fees as provided by N.J.S.A. 47:1A-6.

September 5, 2007

Offer of Mediation sent to both parties.

September 6, 2007

The Complainant declines mediation. The Custodian agrees to mediation.

September 13, 2007

Request for the Statement of Information sent to the Custodian.

September 18, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- The Complainant's OPRA request dated June 25, 2007
- The Custodian's response to the Complainant OPRA request dated June 25, 2007
- Letter from the Custodian to the Complainant dated July 11, 2007
- Letter from the Complainant to the Custodian dated July 23, 2007
- Letter from the Custodian to the Complainant dated July 30, 2007
- The Custodian's signed agreement to mediate form dated September 6, 2007.

The Custodian asserts that he received the Complainant's OPRA request on June 25, 2007. The Custodian states that he responded to the Complainant's OPRA request on the same date via e-mail. The Custodian also asserts that on July 11, 2007, a letter was sent to the Complainant detailing the payment requirements pursuant to OPRA.

September 25, 2007

The Complainant's response to the Custodian's SOI. The Complainant denies receiving the correspondence dated July 30, 2007. The Complainant contends that the Custodian failed to support his justification for the proposed special service charge because he did not utilize the fourteen (14) factor analysis used by the GRC to determine the validity of a proposed special service charge. The Complainant asserts that the Custodian fails to refute the authority cited by the Complainant in support of the Complainant's claim that labor is not computed into the actual costs of reproduction. The Complainant also states that according to the Board's website, it has a budget of \$28.3 million (\$12,788 per pupil). The Complainant asserts that copying an audiotape should be routine for a school district of the size and sophistication of the Pine Hill School District.

March 26, 2008

GRC's letter to Custodian seeking answers to the 14-point analysis used by the GRC to determine if the special service charge assessed by the Board for duplication of the record requested was lawful.

April 8, 2008

The Custodian supplies information in response to GRC's request for the 14-point analysis.

June 24, 2008

Letter from the GRC to the Custodian. The GRC requests that the Custodian provide the GRC with a copy of the quote from the outside vendor the Custodian intended to use to reproduce the record requested.

July 3, 2008

Fax from the Custodian to the GRC attaching an invoice from MTG Electronics & Pro-One, LLC. The invoice is dated June 23, 2007⁵ for duplication of an audiotape at a fee of ten dollars (\$10.00).

July 24, 2008

Letter from the GRC to the Custodian. The GRC advises the Custodian that the invoice provided pre-dates the OPRA request that is the subject of this complaint. The GRC requests that the Custodian provide the GRC with the invoice that relates directly to the OPRA request that is the subject of this complaint.

July 28, 2008

Letter from the Custodian to GRC. The Custodian states that the vender invoice provided to the GRC was not specifically for the Complainant's request but for a separate copying matter. The Custodian states that by relying on this prior quote, the Custodian was able to provide the Complainant with an immediate price. The Custodian further states that although this invoice is not for reproducing the record in question, the cost to duplicate the record requested is the same.

August 12, 2008

Letter from the Complainant to the GRC. The Complainant argues that the effort required to reproduce the record requested does not rise to an extraordinary level. The Complainant further argues that the Custodian, in order to avoid the cost of purchasing additional equipment, is attempting to shift its copying cost onto the public. The Complainant contends that the use of an outside vendor does not warrant shifting the cost of reproduction of a record onto the public unless the Custodian is required to exert extraordinary effort to fulfill the request.

August 14, 2008

Letter from the GRC to the Custodian. The GRC advises the Complainant of the receipt of the Complainant's July 28, 2008 correspondence. The GRC requests that the Custodian provide the GRC with the vendor invoice that was obtained for the particular OPRA request that is the subject of this complaint.

August 18, 2008⁶

Letter from the Custodian to the GRC attaching an estimate dated July 30, 2007 from its outside vendor MTG Electronics and Pro-One, LLC. for \$10.48. It lists the cost of the audio tape as \$2.49 and the cost for duplication as \$7.99. The Custodian states that at no time did the Custodian receive an outside vendor invoice with respect to the Complainant's OPRA request. However, the Custodian states that the Board possesses an estimate for the cost of reproduction.

⁵ This invoice is dated two days prior to the Complainant's OPRA request.

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

Analysis

Whether the \$10.00 charge assessed by the Custodian for duplicating the record requested is warranted and reasonable pursuant to OPRA?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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:

“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 ...*” (Emphasis added). N.J.S.A. 47:1A-5.c.

OPRA also states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added). N.J.S.A. 47:1A-5.d.

OPRA authorizes a custodian to charge the actual cost for duplication of a record where the cost of duplication is not enumerated or exceeds the cost set forth in OPRA. N.J.S.A. 47:1A-5.b. OPRA does not explicitly set a cost for duplicating records that are to be delivered to the requester in a non-paper format. However, OPRA does allow for the actual cost of duplication to be paid by the requester. *Id.* When the requester has made a request that requires “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.*

Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in *addition to the actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when additional effort is required to reproduce the requested record, the cost of such effort should be reasonable. *See Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006).

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff’s assertion is moot because the fee was never imposed and the requested records were available on the Township’s website free of charge. The court held that “...the appeal is not moot, and the \$55 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA.” The court stated that:

“[i]n adopting OPRA, the Legislature made clear that ‘government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.’ N.J.S.A. 47:1A-1. The imposition of a facially

inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5b.”

The court also stated that “...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition.” See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19 (1990). Further, the court stated that “...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff’s right of access and is not rationally related to the actual cost of reproducing the records.” *Id.*

In Martin O’Shea v. Township of Vernon GRC Complainant 2007-207 (March 2008), the complainant contended that the custodian’s charge of \$35.00 for his request for an audio recording of the Township Council’s meeting minutes dated May 14, 2007 violated OPRA because said charge was in excess of the actual cost of duplicating the records. The Complainant stated that the Township of Vernon passed an ordinance which set the fees for copies of sound recordings at \$35.00 for the first ninety (90) minutes and \$25.00 for each additional ninety (90) minutes or part thereof. The Council found that pursuant to N.J.S.A. 47:1A-5.b., Spaulding, supra, Libertarian Party of Central New Jersey, supra, Moore, supra, and Dugan, supra, the custodian must charge the actual cost of duplicating the requested records. As such, the custodian’s charge of \$35.00 for an audio recording of the requested meeting minutes was unreasonable and in violation of N.J.S.A. 47:1A-5.b. The custodian was ordered to provide the requested records to the complainant and charge the actual cost of the audiotape and shall not include the cost of labor or other overhead expenses associated with making the copy.

In the matter now before the Council, the Custodian responded to the Complainant’s OPRA request by stating that there would be a \$10 fee for the costs of reproducing the record requested. Moreover, the Custodian certifies that the Board does not have the equipment to duplicate the record requested, which is an audiotape of the most recent public meeting of the Board. The Custodian has provided the GRC with a cost estimate from MTG Electronics and Pro-One, LLC which states that the estimated cost to reproduce the record requested by the Complainant will be \$2.49 for the audiotape and \$7.99 for duplication.

The Complainant disputes the Custodian’s assertion that a special service charge is warranted, stating that according to the Board website it has a budget of \$28.3 million (\$12,788 per pupil). The Complainant contends that copying an audiotape should be routine for a school district of the size and sophistication of the Pine Hill School District. The Complainant also states that the Custodian should only charge for the cost of the audiotape.

The evidence of record indicates that the Board does not have the resources to duplicate the requested record itself and must therefore contract with an outside vendor to do so. A special charge in addition to the actual cost of duplication is therefore permissible pursuant to N.J.S.A. 47:1A-5.c. OPRA requires that such a charge be

reasonable and based on the cost actually incurred by the agency for the programming, clerical and supervising assistance required. *Id.* The Custodian has submitted an invoice from its vendor that indicates that the proposed cost of duplicating the requested record is \$2.49 for the audiotape and \$7.99 for duplication. The Complainant has failed to submit any credible evidence that the proposed charge of \$10.48 is unreasonable.

Because the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost to be incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 (Berg); 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 this case, the Custodian proposed to charge the Complainant a \$10.00 fee to reproduce the record requested. The Complainant objected to this fee because he felt that

he should only have been charged for the cost of the tape, which was \$1.99. The Complainant argues that the high fee acts as an unreasonable restriction upon his right to access the records requested and thus violates OPRA. As previously discussed herein, under OPRA, the Custodian may charge \$10.48 for copying the record requested by the Complainant.

The evidence of record indicates that the Custodian responded in writing to the Complainant's OPRA request on the same business day as receipt thereof, providing an estimate of \$10 to provide a copy of the requested audiotape. Moreover, the estimate of \$10.48 submitted by the agency's vendor is reasonable pursuant to N.J.S.A. 47:1A-5.c. Therefore, the Custodian herein did not knowingly and willful violate OPRA nor unreasonably deny access to the requested record under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J. Stat. Ann. § 47:1A-6 and N.J. Stat. Ann. § 47:1A-7(f), against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal

efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

In the matter before the Council, the Complainant failed to achieve the desired result of disclosure of a requested record at a lower fee. Because no change has come about as a result of the Custodian's actions, the Complainant is not a prevailing party as defined in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and as such is not entitled to prevailing party attorney's fees. *See*, NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App.Div. 2007) and N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost actually incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.
2. The evidence of record indicates that the Custodian responded in writing to the Complainant's OPRA request on the same business day as receipt thereof, providing an estimate of \$10 to provide a copy of the requested audiotape. Moreover, the estimate of \$10.48 submitted by the agency's vendor is reasonable pursuant to N.J.S.A. 47:1A-5.c. Therefore, the Custodian herein has not knowingly and willfully violated OPRA nor unreasonably denied access to the requested record under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.
3. The Complainant failed to achieve the desired result of disclosure of a requested record at a lower fee. Because no change has come about as a result of the Custodian's actions, the Complainant is not a prevailing party as defined in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and as such is not entitled to prevailing party attorney's fees. *See*, NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App.Div. 2007) and N.J.S.A. 47:1A-6.

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