



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-311

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. Fees for services rendered in conjunction with a denied motion for reconsideration are not chargeable to the Custodian. Jeff Carter v. Franklin Fire District #2 (Somerset), GRC 2011-228 (March 25, 2014). Thus, Counsel is not entitled to the 4.1 hours, or \$1,230 expenditure, on the motion for reconsideration. See Carter, 2011-28 (March 31, 2015 Interim Order); Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). This expenditure represents approximately 25% of the total fee requested.
3. The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth within the chart above, the Council finds that the time expended was not reasonable. Instead, the Council finds that 12.40 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$3,720.00, representing 12.40 hours of service at \$300 per hour.**
4. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.



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

Final Decision Rendered by the
Government Records Council
On The 30th Day of June, 2015

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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
June 23, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-311

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of any and all e-mails and/or correspondence between any agent of the Borough of South Bound Brook (“Borough”), including but not limited to Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tamas Ormosi, Councilpersons Blumenthalm, Quinlan, Shoffner, Duh, Dykes and Conner, any police department employee, the Custodian, Joseph Danielsen and Network Blade, LLC, regarding the subject internal revenue form W-9 from:

- January 1, 2009 – December 31, 2009.
- January 1, 2011 – December 31, 2011.
- January 1, 2012 – June 30, 2012.

Custodian of Record: Donald E. Kazar

Request Received by Custodian: September 26, 2013

Response Made by Custodian: October 8, 2013

GRC Complaint Received: October 22, 2013

Background

November 18, 2014, Council Meeting:

At its November 18, 2014, public meeting, the Council considered the November 10, 2013, Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s September 30, 2014, Interim Order because he responded in the extended time frame by providing all readily identifiable

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

records to the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.

2. Although the Custodian failed to respond timely to the Complainant's OPRA request and further unlawfully denied access to responsive records, the Custodian complied with the Council's September 30, 2014, Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's September 30, 2014, Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian complied with the Council's Order by providing existent records. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History

November 18, 2014, Council Meeting:

At its September 30, 2014, meeting, the Council ordered the Custodian to provide any readily identifiable records that existed at the time of the Complainant's OPRA request and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. After seeking an extension of time to respond, the Custodian responded on October 16, 2014, certifying that he located two (2) additional e-mails that were responsive to the request.

On November 18, 2014, the Council found that the Custodian complied with its September 30, 2014, Interim Order because he responded in the extended time frame, provided all readily identifiable records to the Complainant, and simultaneously provided certified confirmation of compliance to the Executive Director. In addition, the Council found that the Complainant was a "prevailing party" and was entitled to submit an application to the Council for an award of attorney's fees. *See*, Robert A. Verry v. Borough of South Bound Brook (Somerset), GRC 2013-311 (September 30, 2014, Interim Order).

March 31, 2015, Council Meeting:

Thereafter, on December 18, 2014, the Complainant filed a request for reconsideration of the Council's November 19, 2014, Interim Order based on a mistake and new evidence. The Council found that the Complainant failed to establish the requisite elements for reconsideration. By Interim Order dated March 31, 2015, the Council denied the Complainant's request for reconsideration. *See, Robert A. Verry v. Borough of South Bound Brook (Somerset)*, GRC 2013-311 (March 31, 2015, Interim Order).

Analysis

Compliance

At its November 18, 2014, meeting, the Council permitted the "Complainant or his attorney . . . to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)." The Council further added that the Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d)." On November 19, 2014, the Council distributed its Interim Order to all parties.

On December 18, 2014, following distribution of the Council's November 19, 2014, Interim Order, Counsel for the Complainant filed a motion for reconsideration. The Council denied the Complainant's motion for reconsideration by Order dated March 31, 2015. From receipt of the Council's March 31, 2015, Interim Order, the Complainant had twenty (20) business days to file an application for fees. Accordingly, the Complainant's application for fees was due by April 30, 2015. The Complainant timely filed and served an application for fees on April 27, 2015.

In turn, the Custodian had ten (10) business days from receipt of the order to file an objection to the fee application. The Custodian did not file an objection.

Prevailing Party Attorney Fee Award

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corrections, ("NJDPM") 185 N.J. 137, 152 (2005) (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). 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. *See generally* NJDPM, 185 N.J. 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” *Id.* at 153. (quoting Courier News v. Hunterdon Cty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found that the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006). Further, the Council found that a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fees and directed the Complainant to file an application for attorney’s fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting Rendine v. Pantzer, 141 N.J. 292, 324 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. *See* Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). The fee-shifting statutes do not contemplate that the losing party has to pay for the learning experience of attorneys for the prevailing party. *See*, HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atl. City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. *See* Walker, 415 N.J. Super. at 606 (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. *See* NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits

enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but cautioned that “[o]rordinarily the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying R.P.C. § 1.5(a))).

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

Rivera, at 11 (citing R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13(b) sets forth the information that counsel must provide in an application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

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

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$4,950, representing 16.5 hours of work at \$300 per hour. Counsel supports this hourly rate through a recitation of his experience and years in practice. Certification of John A. Bermingham, Esq. dated April 27, 2015, at ¶ 6 (Exhibit B).

The Council finds that \$300 is a reasonable fee for attorneys of Counsel's experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.) Accordingly, the Council finds that Counsel's hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.

b. Time Expend

In support of his request for fees, Counsel submitted a log of his time. For the period from "October 9, 2013, through April 15, 2015," Counsel billed a total of 16.4 hours for work on the file. This time included reviewing of file; conducting legal research; drafting complaint; reviewing of e-mail correspondence to and/or from the GRC and/or the client; communicating with the client regarding the action; drafting letter brief and request for reconsideration; and drafting certification (for fee application).

Counsel billed 4.1 hours of service for a fee of \$1,230 in connection with the request for reconsideration. The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. *See, Verry v. Borough of South Bound Brook (Somerset)*, GRC 2013-311 (September 30, 2014, and March 31, 2015, Interim Orders). The reconsideration motion, which the GRC denied, was filed after the ruling of prevailing party status and, as such, provided no further benefit to the Complainant. Verry, GRC 2013-311 (March 31, 2015).

Fees for services rendered in conjunction with a denied motion for reconsideration are not chargeable to the Custodian. Jeff Carter v. Franklin Fire District #2 (Somerset), GRC 2011-228 (March 25, 2014) (The reconsideration motion, having been filed after the ruling of prevailing party status and having been denied, provided no further benefit to the Complainant.) Thus, Counsel is not entitled to the 4.1 hours, or \$1,230 expenditure, on the motion for reconsideration. *See Carter*, 2011-28 (March 31, 2015, Interim Order); Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). This expenditure represents approximately 25% of the total fee requested.

In accordance with N.J.A.C. 105-2.13(b), Counsel's time-sheets provide descriptions of the work performed. N.J.A.C. 105-2.13(b)(5); Certification of John Bermingham dated April 27, 2015. Most of Counsel's entries are broken into time increments of one tenth of an hour, with an

accompanying description of the work performed. Id. The time entries memorialize communications, both oral and written, and identify the entity or individual with whom Counsel communicated. Similarly, the notations for reviewing and drafting of pleadings identify the specific document examined or drafted and the time spent on the task.

However, on October 12, 2013, Counsel billed one (1) full hour to “[r]eview exhibits and research relevant law” without further describing in detail what was reviewed. Shortly thereafter, on October 19, 2013, Counsel billed an additional six (6) hours to “[d]raft the DOA [Denial of Access Complaint].” *See* Birmingham certif. ¶ 6, Exhibit B. Notwithstanding the fact that Counsel seeks six (6) hours for drafting the denial of access complaint, he certifies that he was “*required to review the DOA complaint filed by the Complainant.*” Further, in a letter to the GRC October 21, 2013 (which postdates the filing of the complaint date), Counsel requests that the GRC accept his letter “with respect to my client’s . . . DOA complaint.”

The record demonstrates that Counsel did not file the DOA, but rather his client did. From a review of the fee application, together with the pleadings filed in the instant matter, it appears that the that the October 19, 2013, time entry designated as “[d]raft of DOA Complaint” refers to the preparation of Counsel’s October 21, 2013, letter to the GRC.

In his October 21, 2013, letter, Counsel argues that the Council should find a knowing and willful violation. The Council notes that a finding of a knowing and willful violation can only be made following an unlawful denial of access. *See generally, Dudley Burdge v. NJ Civil Service Commission*, GRC Complaint No. 2014-168 (knowing and willful analysis deferred pending a determination that the Custodian unreasonably denied access under the totality of the circumstances). The Council does not comment on the strategy of an attorney’s representation of his client; however, the Council recognizes that that any fees awarded will be paid from public funds. *See, HIP, 291 N.J. Super.* at 167.

By necessity, a review of a fee application must be conducted on a case-by-case basis. Although the fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b), the GRC finds the total hours excessive.

The GRC conducted a review of the fee application submitted. Each time entry was reviewed and considered. The time expended by Counsel was evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a). The recommendations of the Executive Director following that review are set forth in the following table:

Date of time entry	Description of Service	Time Expended (in tenths of an hour)/ and Amount Billed at \$300/hour in dollars		Findings from Fee Application Review	Adjusted Entry: Time allowed and total Amount at \$300.00/hour	
10/17/2014	Draft of letter brief—Request for reconsideration	4.00	300.00	Prevailing party determination made prior to motion for	0.00	0.00

				reconsideration which was denied.		
12/1//2014	File of letter brief [in support of motion for reconsideration.]	.01	300.00	Prevailing party determination made prior to motion for reconsideration which was denied.	0.00	0.00
Total:		4.1	1,230.00		0.00	0.00

The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth within the chart above, the Council finds that the time expended was not reasonable. The Council finds that 12.40 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$3,720.00, representing 12.40 hours of service at \$300 per hour.**

2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council finds that \$300 is a reasonable fee for attorneys of Counsel’s experience representing clients before the GRC. Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013). Accordingly, the Council finds that Counsel’s hourly rate should be assessed at \$300 to reflect his experience and the local prevailing rates for representation of clients in OPRA matters.
2. Fees for services rendered in conjunction with a denied motion for reconsideration are not chargeable to the Custodian. Jeff Carter v. Franklin Fire District #2 (Somerset), GRC 2011-228 (March 25, 2014). Thus, Counsel is not entitled to the 4.1 hours, or \$1,230 expenditure, on the motion for reconsideration. *See Carter*, 2011-28 (March 31, 2015 Interim Order); Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). This expenditure represents approximately 25% of the total fee requested.
3. The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth within the chart above, the Council finds that the time expended was not reasonable. Instead, the Council finds that 12.40 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham, Counsel to the Complainant, for the amount of \$3,720.00, representing 12.40 hours of service at \$300 per hour.**

4. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Dawn R. SanFilippo
Deputy Executive Director

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015