



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

Michael Doss
Complainant

Complaint No. 2017-217

v.

Borough of Bogota (Bergen)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss this complaint because the Complainant, through Counsel, withdrew it on June 5, 2020, noting that the parties reached a settlement. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of June 2020

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, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Prevailing Party Attorney's Fees*
Supplemental Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Michael Doss¹
Complainant**

GRC Complaint No. 2017-217

v.

**Borough of Bogota (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

September 27, 2017 OPRA request: Electronic copies via e-mail of all attorney invoices, time sheets, and vouchers received from Florio, Perrucci, Steinhardt, and Faber, LLC. ("FPSF") for work related to Doss v. Borough of Bogota, GRC Complaint Nos. 2013-315 (OAL Docket No. GRC 02857-15) and 2014-152 (OAL Docket No. 02863-15) from January 1, 2013 through September 26, 2017.

October 12, 2017 OPRA request: Electronic copies via e-mail of all attorney invoices, time sheets, and vouchers received from FPSF for work related to Doss, GRC 2013-315 and 2014-152 from September 27, 2017 through October 12, 2017.

Custodian of Record: Jeanne Cook

Request Received by Custodian: September 27, 2017; October 12, 2017

Response Made by Custodian: September 29, 2017; October 23, 2017

GRC Complaint Received: November 8, 2017

Background

January 7, 2020 Council Meeting:

At its January 7, 2020 public meeting, the Council considered the December 10, 2019 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's September 24, 2019 Interim Order because she responded in the prescribed time frame providing a refund to the Complainant and

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

² Represented by Craig P. Bossong, Esq., of Florio, Perrucci, Steinhardt, and Faber, LLC. (Rochelle Park, NJ). Previously represented by William R. Betesh, Esq., of Boggia & Boggia, LLC. (Ridgefield Park, NJ).

delivering unredacted and redacted invoices for an *in camera* review. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully redacted portions of the invoices at issue in this complaint pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6.**
3. The Custodian violated OPRA by failing to prove that the assessed special service charge was warranted or reasonable. N.J.S.A. 47:1A-(c). However, the Custodian lawfully denied access to the redacted portions of the responsive attorney invoices under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council’s September 24, 2019 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 an unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Council’s September 24, 2019 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, although the Complainant did not prevail on the redaction issue, he prevailed on the special service charge issue and was refunded \$53.25. 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On January 8, 2020, the Council distributed its Interim Order to all parties. On February 10, 2020, Complainant’s Counsel e-mailed the Government Records Council (“GRC”) seeking an extension of time through February 28, 2020 to allow the parties to continue fee negotiations. On the same day, the GRC granted said extension.

On February 28, 2020, the Complainant’s Counsel submitted a fee application. The GRC received no further correspondence from the parties.

Additional Submissions:

On June 5, 2020, Complainant's Counsel e-mailed a letter to the GRC, advising that the parties had settled the matter and that the complaint may therefore be dismissed with prejudice.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss this complaint because the Complainant, through Counsel, withdrew it on June 5, 2020, noting that the parties reached a settlement. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

June 23, 2020



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 7, 2020 Government Records Council Meeting

Michael Doss
Complainant

Complaint No. 2017-217

v.

Borough of Bogota (Bergen)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a unanimous vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s September 24, 2019 Interim Order because she responded in the prescribed time frame providing a refund to the Complainant and delivering unredacted and redacted invoices for an *in camera* review. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully redacted portions of the invoices at issue in this complaint pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6.**
3. The Custodian violated OPRA by failing to prove that the assessed special service charge was warranted or reasonable. N.J.S.A. 47:1A-(c). However, the Custodian lawfully denied access to the redacted portions of the responsive attorney invoices under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council’s September 24, 2019 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 an unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Council’s September 24, 2019 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, although the Complainant did not prevail on the redaction issue, he prevailed on the special service charge issue and was refunded \$53.25. 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 7th Day of January 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 8, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Michael Doss¹
Complainant**

GRC Complaint No. 2017-217

v.

**Borough of Bogota (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

September 27, 2017 OPRA request: Electronic copies via e-mail of all attorney invoices, time sheets, and vouchers received from Florio, Perrucci, Steinhardt, and Faber, LLC. (“FPSF”) for work related to Doss v. Borough of Bogota, GRC Complaint Nos. 2013-315 (OAL Docket No. GRC 02857-15) and 2014-152 (OAL Docket No. 02863-15) from January 1, 2013 through September 26, 2017.

October 12, 2017 OPRA request: Electronic copies via e-mail of all attorney invoices, time sheets, and vouchers received from FPSF for work related to Doss, GRC 2013-315 and 2014-152 from September 27, 2017 through October 12, 2017.

Custodian of Record: Jeanne Cook

Request Received by Custodian: September 27, 2017; October 12, 2017

Response Made by Custodian: September 29, 2017; October 23, 2017

GRC Complaint Received: November 8, 2017

Records Submitted for *In Camera* Examination: thirty-one (31) pages of unredacted invoices.

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

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

² Represented by William R. Betesh, Esq., of Boggia & Boggia, LLC. (Ridgefield Park, NJ). Previously represented by Craig P. Bossong, Esq., of Florio, Perrucci, Steinhardt, and Faber, LLC. (Rochelle Park, NJ).

1. The Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 2.5 hours represented an “extraordinary amount of time and effort.” Moreover, the \$20.00 per hour charge appeared to represent a flat rate attempt to recoup costs for Counsel’s time. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l Sch. High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002); Carluccio v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2008-10 (September 2009). Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost.” Thus, the Custodian must refund the total amount of the charge to the Complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009). If the Complainant already retrieved the previously refunded \$1.70, the Custodian must certify to this fact, provide to the Complainant the remaining outstanding amount (\$51.55), and provide supporting documentation.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. The GRC must conduct an *in camera* review of the unredacted invoices responsive to the Complainant’s September 27, 2017 OPRA request to determine the validity of the Custodian’s assertion that the redacted information was under OPRA as attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council’s Interim Order.**

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

5. The Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests on the basis that no additional records existed. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 26, 2019, the Council distributed its Interim Order to all parties. On October 3, 2019, the Government Records Council ("GRC") received the Custodian's response to the Interim Order. Therein, the Custodian certified that she issued a check to the Complainant in the amount of \$53.25, which she sent to Complainant Counsel based on Custodian Counsel's direction. The Custodian further certified that she was providing nine (9) copies of the redacted and unredacted invoices at issue here for an *in camera* review.

Analysis

Compliance

At its September 24, 2019 meeting, the Council ordered the Custodian to refund the Complainant the paid special service charge amount of \$53.25 (or \$51.55 if a prior refund was issued). Additionally, the Council order the Custodian to deliver nine (9) copies of both the redacted and unredacted invoices at issue in this complaint. Finally, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On September 26, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 3, 2019.

On October 3, 2019, the fifth (5th) business day after receipt of the Council's Order, the GRC received the Custodian's response. Therein, the Custodian certified that she sent to Complainant's Counsel a check in the amount of \$53.25. The Custodian also delivered nine (9) copies of the redacted and unredacted invoices required for an *in camera* review. Based on the forgoing, the Custodian satisfied the Council Order in timely manner.

Therefore, the Custodian complied with the Council's September 24, 2019 Interim Order because she responded in the prescribed time frame providing a refund to the Complainant and delivering unredacted and redacted invoices for an *in camera* review. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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. N.J.S.A. 47:1A-6.

OPRA provides that a “government record” shall not include “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1 (emphasis added). OPRA also addresses the impact of this exemption on attorney bills by providing that the exemption “shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege.” Id.

To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are as follows. The GRC begins by noting that the Custodian disclosed each invoice with redactions for information believed to fall within the attorney-client privilege. However, each redaction consists of a portion of an entry, as opposed to the whole invoice entry. Thus, some basic information in each entry was disclosed to the Complainant.

As for the redacted portions of the invoices, each contains a multitude of information that reasonably falls within the attorney-client privilege exemption. Specifically, the invoice entries include detailed descriptions of work conducted on certain matters or identifies the subject matter on which certain work was conducted. The redacted portions of the entries also provide strategic insight in the matters to which they refer. Thus, each entry is reasonably construed to contain attorney strategy and litigation information that falls within the attorney-client relationship. Further, the attorney in question clearly intended the redacted information to be confidential.

Accordingly, the Custodian lawfully denied access to the redacted portions of the responsive invoices because they fell within the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. For this reason, no additional disclosures are warranted.

Knowing & Willful

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

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

In the matter before the Council, the Custodian violated OPRA by failing to prove that the assessed special service charge was warranted or reasonable. N.J.S.A. 47:1A-(c). However, the Custodian lawfully denied access to the redacted portions of the responsive attorney invoices under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council’s September 24, 2019 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 an unreasonable denial of access under the totality of the circumstances.

Prevailing Party 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 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.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, [certif. denied] (1984).

[Id. at 76.]

Here, the Complainant filed this complaint disputing the assessed special service charge. The Complainant also contended that the Custodian unlawfully redacted the responsive invoices. The Complainant further argued that the Custodian’s actions were knowing and willful in nature, and that he should be awarded prevailing party attorney’s fees. In the Statement of Information, the Custodian contended that she lawfully charged a fee to provide the invoices. The Custodian further argued that the redactions were lawful, that her actions were not knowing and willful in nature, and that the Complainant was not entitled to attorney’s fees.

In its September 24, 2019 Interim Order, the Council found that the assessed charge was not warranted or reasonable. The Council thus ordered the Custodian to refund the payment to the Complainant. The Council also ordered an *in camera* review of the invoices, On October 3, 2019, in compliance with the Order, the Custodian certified that she refunded the charge to the Complainant via Complainant’s Counsel. However, the *in camera* review has revealed that the Custodian lawfully redacted the responsive invoices. Notwithstanding, the evidence of record supports that the Complainant partially prevailed in this complaint and is entitled to an award of prevailing party attorney’s fees.

Therefore, pursuant to the Council’s September 24, 2019 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, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, although the Complainant did not prevail on the redaction issue, he prevailed on the special service charge issue and was refunded \$53.25. 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 24, 2019 Interim Order because she responded in the prescribed time frame providing a refund to the Complainant and delivering unredacted and redacted invoices for an *in camera* review. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully redacted portions of the invoices at issue in this complaint pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6.**
3. The Custodian violated OPRA by failing to prove that the assessed special service charge was warranted or reasonable. N.J.S.A. 47:1A-(c). However, the Custodian lawfully denied access to the redacted portions of the responsive attorney invoices under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian timely complied with the Council's September 24, 2019 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 an unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Council's September 24, 2019 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, although the Complainant did not prevail on the redaction issue, he prevailed on the special service charge issue and was refunded \$53.25. 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 24, 2019 Government Records Council Meeting

Michael Doss
Complainant

Complaint No. 2017-217

v.

Borough of Bogota (Bergen)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Council Staff 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 Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 2.5 hours represented an “extraordinary amount of time and effort.” Moreover, the \$20.00 per hour charge appeared to represent a flat rate attempt to recoup costs for Counsel’s time. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l Sch. High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002); Carluccio v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2008-10 (September 2009). Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost.” Thus, the Custodian must refund the total amount of the charge to the Complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009). If the Complainant already retrieved the previously refunded \$1.70, the Custodian must certify to this fact, provide to the Complainant the remaining outstanding amount (\$51.55), and provide supporting documentation.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

3. The GRC must conduct an *in camera* review of the unredacted invoices responsive to the Complainant's September 27, 2017 OPRA request to determine the validity of the Custodian's assertion that the redacted information was under OPRA as attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council's Interim Order.**
5. The Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests on the basis that no additional records existed. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of September 2019

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: September 26, 2019

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Michael Doss¹
Complainant**

GRC Complaint No. 2017-217

v.

**Borough of Bogota (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

September 27, 2017 OPRA request: Electronic copies via e-mail of all attorney invoices, time sheets, and vouchers received from Florio, Perrucci, Steinhardt, and Faber, LLC. (“FPSF”) for work related to Doss v. Borough of Bogota, GRC Complaint Nos. 2013-315 (OAL Docket No. GRC 02857-15) and 2014-152 (OAL Docket No. 02863-15) from January 1, 2013 through September 26, 2017.

October 12, 2017 OPRA request: Electronic copies via e-mail of all attorney invoices, time sheets, and vouchers received from FPSF for work related to Doss, GRC 2013-315 and 2014-152 from September 27, 2017 through October 12, 2017.

Custodian of Record: Jeanne Cook

Request Received by Custodian: September 27, 2017; October 12, 2017

Response Made by Custodian: September 29, 2017; October 23, 2017

GRC Complaint Received: November 8, 2017

Background³

Request and Response:

On September 27, 2017, the Complainant submitted the first (1st) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 29, 2017, the second (2nd) business day after receipt of the OPRA request, the Custodian responded in writing stating that disclosure of the records would require 2.5 hours for printing and redaction. The Custodian thus stated that she was accessing a special service charge of \$53.25 (\$50.00 for 2.5 hours of work and \$3.25 for 65 pages of copies). The Custodian requested that the Complainant

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

² Represented by Craig P. Bossong, Esq., of Florio, Perrucci, Steinhardt, and Faber, LLC. (Rochelle Park, NJ).

³ 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.

remit a deposit in the full amount prior to beginning the necessary work. On October 3, 2017, the Complainant e-mailed the Custodian stating that he would remit payment upon receipt of the records. The Complainant asked the Custodian to provide a date on which he could retrieve the responsive records. On October 4, 2017, the Custodian e-mailed the Complainant again requesting that he remit payment before any work began. The Complainant responded insisting that he would remit payment upon picking up the responsive records.

On October 11, 2017, the Custodian responded in writing advising that attached were 31 pages of responsive records (instead of 65), as some of the pages counted were duplicates. The Custodian stated that the Complainant was entitled to a refund of \$1.70, which could be available via U.S. mail or pickup.

On October 12, 2017, the Complainant submitted the second (2nd) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 23, 2017, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing disclosing a one-page invoice dated October 5, 2017.

Denial of Access Complaint:

On November 8, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).

The Complainant first asserted that regarding the September 27, 2017 OPRA request, the Custodian improperly assessed a special service charge because same did not require an extraordinary expenditure of time or effort. N.J.S.A. 47:1A-5(c). The Complainant argued that relevant case law regarding special service charges did not support the imposition of such a fee here. See Burnett v. Cnty. of Bergen, 198 N.J. 408 (2008); Fisher v. Div. of Law, 400 N.J. Super. 61, 65 (App. Div. 2008).; Courier Post v. Lenape Reg’l Sch. High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002). The Complainant noted that the GRC’s previous case law did not support special service charges for as a little as several hours. Diamond v. Twp. of Old Bridge, GRC Complaint No. 2003-15 (February 2004) (denying a charge for four (4) hours); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-105, *et seq.* (Interim Order dated December 20, 2011) (denying a charge for a collective 1.5 to 3 hours for counsel to review and redact records); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281, *et seq.* (Interim Order dated October 28, 2014) (denying a charge for a collective eight (8) hours of work).

The Complainant argued that the Custodian’s effort here was constrained to 2.5 hours for printing and redacting 65 pages. The Complainant noted that he did not ask for paper copies and the Custodian ultimately disclosed the records electronically. The Complainant further noted that the actual disclosure resulted in 31 pages of records sent electronically to the Complainant. The Complainant thus argued that applying all relevant case law here supported that the special service charge was unwarranted. The Complainant further contended that the Custodian did not provide him an opportunity to accept or reject the fee as required under OPRA. N.J.S.A. 47:1A-5(c). The Complainant also argued that requiring the him to submit a deposit violated OPRA because he did

not anonymously file his OPRA request. N.J.S.A. 47:1A-5(f); Wolosky v. Twp. of Mine Hill (Morris), GRC Complaint No. 2010-161 (Interim Order dated December 20, 2011).

The Complainant next asserted that the Custodian's response to both OPRA requests was incomplete. The Complainant first asserted that he received no invoices for 2013 and 2014 in response to the September 27, 2017 OPRA request; he is certain that additional invoices existed because he was a party to the identified complaints. The Complainant also argued that he sought invoices for multiple matters, including interlocutory appeals, and that the disclosed invoices appeared incomplete. The Complainant contended that the disparity in the pages of records located against those provided supported that the Custodian's response was incomplete. The Complainant argued that the Custodian similarly failed to produce a complete record in response to the October 12, 2017 OPRA request. The Complainant argued that the Custodian could not pick and choose what she wished to provide; OPRA required her to disclose all records that existed.

The Complainant also contended that the Custodian unlawfully redacted the invoices disclosed in response to the September 27, 2017 OPRA request. The Complainant acknowledged that OPRA allowed custodians to redact attorney billing records where information was protected under the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(g). The Complainant argued, however, that custodian had to show that information was a confidential communication between an attorney and their client in the course of a professional relationship. N.J.R.E. 504(1); State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989).⁴

The Complainant finally asserted that the Custodian's actions clearly rose to the level of a knowing and willful violation. N.J.S.A. 47:1A-11. The Complainant argued that the egregious nature of the special service charge and discrepancy in the number of responsive records presented clear-cut examples of a knowing and willful violation. The Complainant further requested that the Council should also find him a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6; Mason v. City of Hoboken, 196 N.J. 51, 79 (2008).

Statement of Information:

On December 4, 2017, the Custodian filed a Statement of Information ("SOI") attaching a legal certification from Custodian's Counsel. The Custodian certified that she received the Complainant's OPRA requests on September 27, and October 12, 2017 respectively. The Custodian certified that her search included forwarding the OPRA requests to Custodian's Counsel for review and redactions. The Custodian affirmed that Custodian's Counsel performed a search of FPSF's billing system for matter numbers 0002 (Labor/Litigation) and 0008 (Doss), which yielded 65 pages of records. Counsel's Cert. ¶ 8-9. The Custodian certified that of the 65 pages of billing records, 31 pages were responsive; ten (10) months in 2015 contained no relevant billing entries. Counsel Cert. ¶11-12. The Custodian noted that in preparing the SOI, she also checked all invoices from 2015 to present because that is when the Borough began contracting with FPSF. The Custodian certified that she responded in writing on September 29, and October 12, 2017 respectively disclosing responsive attorney billing records redacted for attorney-client privileged information. Counsel's Cert. ¶ 15.

⁴ The Complainant provided no direct argument as to why he believed the Custodian unlawfully denied access to the redacted portions of the invoices.

The Custodian first argued that she properly charged the Complainant a special service charge under N.J.S.A. 47:1A-5(c) to disclose records responsive to the Complainant's September 27, 2017 OPRA request. Counsel argued that the OPRA request sought invoices dating back to 2015; thus, she was required to contact FPSF. The Custodian averred that she provided prior notice to the Complainant, as required in N.J.S.A. 47:1A-5(c), and that the Complainant did not object to the charge. The Custodian also argued that the Complainant improperly characterized payment of the charge as an improper deposit.

Further, the Custodian contended that the charge did not run afoul of Courier Post, 360 N.J. Super. 191, for two reasons. The Custodian first asserted that she charged \$20.00 an hour, instead of Counsel's hourly rate, to review and redact the responsive records. The Custodian next argued that the Courier Post court contemplated a custodian's ability to charge for redactions. Id. at 204. The Custodian also contended that this case was more on point with Fisher, 400 N.J. Super. 61 because Custodian's Counsel was in the best position to locate, review, and redact the responsive invoices. The Custodian argued that the charge was reasonable based on the two and a half hours expended to locate, redact, and disclose the responsive records spanning four (4) years. The Custodian also argued that copy costs were required because Counsel could not redact the original bills. The Custodian thus argued that, regardless of whether she disclosed records electronically, a copy cost was associated with the redactions. Burnett v. Cnty. of Bergen, 198 N.J. 408, 438 (2009) (citing N.J.S.A. 47:1A-5(c)).

The Custodian additionally argued that the Complainant's contention about incomplete records was erroneous. The Custodian certified that FPSF did not contract with the Borough until January 3, 2015. See Counsel Cert. ¶ 1. The Custodian thus certified that no invoices in the Doss matters existed prior to that date. The Custodian further averred that Counsel performed a reasonable search as described above to locate responsive bills. Counsel's Cert. ¶ 9-14. The Custodian thus affirmed that she provided the Complainant all records that existed.

The Custodian finally argued that she did not knowingly and willfully violate OPRA. The Custodian contended that her position is that she did not violate OPRA in the first place. The Custodian argued that she endeavored to locate, redact, and disclose responsive records to the Complainant. The Custodian argued that disclosure alone meant that "there unequivocally [could] not be a knowing and willful violation of OPRA." The Custodian further asserted that the Complainant should not be awarded prevailing party attorney's fees because he could not prevail here.

Analysis

Special Service Charge

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

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary

document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .*

[Id. (emphasis added).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post, 360 N.J. Super. 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 noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Additionally, in complaints where the complainant paid an assessed fee and the Council subsequently determined that the fee was unwarranted or unreasonable, the Council has ordered the public agency to refund monies to complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009) (citing Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008)) (holding that the assessed special service charge was unreasonable and ordering the Custodian to refund the difference between the \$5.00 fee and the actual cost of \$0.96 (or \$4.04)). See also White v. Monmouth Reg’l High Sch., GRC Complaint No. 2012-218 (Interim Order dated July 23, 2013).

Moreover, OPRA provides that providing access to records electronically “shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.” N.J.S.A. 47:1A-5(b); see also McBride v. Borough of

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

In the Denial of Access Complaint at issue here, Complainant disputed the assessed special service charge of \$53.25 for 2.5 hours of time associated with providing the records responsive to the September 27, 2017 OPRA request.⁵ The Complainant argued that the fee was unwarranted given the little amount of time spent on the request. The Complainant argued that GRC case law did not support 2.5 hours of time as an “extraordinary amount of time and effort” and cited to multiple complaints where the Council invalidated fees for comparable hours. The Complainant also contended that the Custodian charged a copy cost for records only to disclose them electronically.

Conversely, the Custodian argued in the SOI that the fee was warranted and reasonable. The Custodian argued that the request sought records spanning more than four (4) years. The Custodian further argued that she was required to contact Counsel to search for, review, and redact responsive invoices. The Custodian certified that she estimated 2.5 hours to perform these duties. The Custodian affirmed that sixty-five (65) pages of bills were located and needed to be copied prior to redaction. The Custodian certified that instead of charging Counsel’s hourly rate, which was prohibited by Courier Post, she charged \$20.00 per hour plus copy costs, for a total of \$53.25. The Custodian also certified that upon completion of the review and redaction, she disclosed thirty-one (31) responsive records electronically with redactions.

The GRC must determine whether the assessed charge was reasonable and warranted. When special service charges are at issue, the GRC will typically require a custodian to complete a 14-point analysis questionnaire prior to deciding on the charge issue. However, the facts of this complaint as presented to the GRC do not require the submission of such a questionnaire.

Here, the Complainant’s September 27, 2017 OPRA request sought billing invoices over a period of four (4) years and approximately nine (9) months. In the SOI, the Custodian did not certify that the records were archived; rather, she had to reach out to Counsel to perform a reasonable search. However, the Custodian also acknowledged that FSPF did not begin contracting with the Borough until 2015. Thus, from the outset of the OPRA request, the time frame within which responsive records could have existed shortened by two (2) years. Accounting for one bill per month, the full universe of potentially responsive records within the shortened time frame comprised thirty-three (33) invoices. The Custodian ultimately ended up disclosing eighteen (18) invoices totaling 31 pages, some without redactions. It should be noted that the Custodian advised the Complainant on October 11, 2017 that she would refund him \$1.70. However, there is no additional evidence in the record to support whether the Complainant ever received this refund.

⁵ The Custodian did not assess a special service charge in response to the Complainant’s October 12, 2017 OPRA request.

A review of the forgoing does not support that the expenditure of 2.5 hours represents an “extraordinary amount of time and effort” to produce the thirty-one (31) responsive pages of records (with minor redactions). See Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). The GRC is further persuaded by the fact that the OPRA request time frame was lessened by two (2) years due to FPSF’s contract period beginning in 2015 and that Counsel was able to easily obtain and review the bills.

The GRC also questions the \$20.00 charge in that it was not linked to any actual hourly rate of a Borough employee. Instead, the fee appeared to resemble the Borough’s use of a flat rate to recoup Counsel’s costs to address the subject OPRA request. The GRC notes that the Council previously held that a flat rate fee was not supported under OPRA. Carluccio v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2008-10 (September 2009) (citing Janney, GRC 2006-205).

Moreover, the Custodian has provided no evidence in the record to support that the bills required copying costs, as was the case in Paff, GRC 2010-09. While the GRC can appreciate that agencies must protect their original records, there is no evidence in the record that the bills either: 1) did not exist electronically as well as in paper format, and 2) that either Counsel or the Custodian could not redact them electronically. For these reasons, neither associated copy costs of \$3.25 or \$1.55 (after the alleged refund) is not supported by the evidence of record here.

Accordingly, the Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 2.5 hours represented an “extraordinary amount of time and effort.” Moreover, the \$20.00 per hour charge appeared to represent a flat rate attempt to recoup costs for Counsel’s time. See N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Carluccio, GRC 2008-10. Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost.” Thus, the Custodian must refund the total amount of the charge to the Complainant. See Coulter, GRC 2008-220. If the Complainant already retrieved the previously refunded \$1.70, the Custodian must certify to this fact, provide to the Complainant the remaining outstanding amount (\$51.55), and provide supporting documentation.

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.

Redactions

OPRA provides that “[a] government record shall not include . . . any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. However, the provision further provides that “[t]his paragraph shall not be construed as exempting from access attorney . . . bills or invoices except

that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege.” Id.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁶ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Complainant’s September 27, 2017 OPRA request⁷ sought attorney billing records pertaining to the Doss matters from 2013 through the date of the second OPRA request. In response, the Custodian disclosed 31 pages of invoices containing multiple redactions under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. In the SOI, the Custodian argued that she properly denied access to the records under the attorney-client privilege exemption but provided no additional detail as to the content of the redactions. Thus, a “meaningful review” is necessary to determine whether the redactions constituted attorney-client privileged information. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See *e.g.* Law Offices of Walter M. Luers, Esq., LLC (O.B.O. C.C.) v. Eastern

⁶ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

⁷ The Custodian disclosed the invoice responsive to the Complainant’s October 12, 2017 OPRA request without redactions.

Camden Cnty. Reg'l Sch. Dist., GRC Complaint No. 2015-15 (Interim Order dated October 27, 2015).

Therefore, the GRC must conduct an *in camera* review of the unredacted invoices responsive to the Complainant's September 27, 2017 OPRA request to determine the validity of the Custodian's assertion that the redacted information was under OPRA as attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Remaining Allegations

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant argued in the Denial of Access Complaint that the Custodian failed to provide additional invoices responsive to each OPRA request. In support of his argument, the Complainant noted that he was a party to both Doss complaints and believed the records were incomplete. The Complainant also argued that the Custodian failed to provide responsive invoices for 2013 and 2014.

In the SOI, the Custodian certified that the Borough disclosed all responsive records that existed. The Custodian certified that no 2013 or 2014 invoices from FPSF existed because they did not contract with the Borough until January 2015. The Custodian included a copy of resolutions from 2013, 2014, and 2015 to support this position. Additionally, the Custodian and Counsel provided a detailed explanation of their search for invoices. That search included pulling invoices for two (2) different codes and then performing a review for any Doss matter entries. The Custodian and Counsel both certified to the number of invoices they deemed responsive based on their review.

Upon review of the evidence of record and arguments submitted by both parties, the GRC is satisfied that the Custodian provided all responsive records. While the Complainant posited that additional invoices should have existed, he did not provide any evidence to refute the Custodian's detailed certification. Further, there is no other evidence in the record that refutes the Custodian's certification that no additional records existed. Thus, no unlawful denial of access occurred here because the Custodian disclosed all records responsive to the Complainant's OPRA request.

Therefore, the Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests on the basis that no additional records existed. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant. Danis, GRC 2009-156, *et seq.*

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 2.5 hours represented an "extraordinary amount of time and effort." Moreover, the \$20.00 per hour charge appeared to represent a flat rate attempt to recoup costs for Counsel's time. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l Sch. High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002); Carluccio v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2008-10 (September 2009). Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the "actual cost." Thus, the Custodian must refund the total amount of the charge to the Complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009). If the Complainant already retrieved the previously refunded \$1.70, the Custodian must certify to this fact, provide to the Complainant the remaining outstanding amount (\$51.55), and provide supporting documentation.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
3. The GRC must conduct an *in camera* review of the unredacted invoices responsive to the Complainant's September 27, 2017 OPRA request to determine the validity of the Custodian's assertion that the redacted information was under OPRA as attorney-client

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

privileged material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **The Custodian shall deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), nine (9) copies of the redacted records, a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council's Interim Order.**
5. The Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests on the basis that no additional records existed. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 17, 2019

¹¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

¹² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.