



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

Rotimi Owoh, Esq. (o/b/o African American
Data and Research Institute)

Complaint No. 2018-146

Complainant

v.

Borough of Fair Haven (Monmouth)
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:

1. The Custodian did not fully comply with the Council’s Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, although the Custodian’s Counsel timely notified the GRC that the Complainant has not responded to her May 20, 2020 e-mail, the Custodian did not submit her certification until ten (10) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not 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.

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**

**Supplemental Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of¹
African American Data & Research Institute)
Complainant**

GRC Complaint No. 2018-146

v.

**Borough of Fair Haven (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints prepared and filed by the Borough of Fair Haven Police Department (“FHPD”) from January 2016 through present.
2. Drug possession complaints prepared and filed by the FHPD from January 2016 through present.
3. FHPD’s “Arrest Listings” from January 2016 through present.
4. Drug paraphernalia complaints and summonses prepared by the FHPD from January 2016 through present.

Custodian of Record: Allyson M. Cinquegrana
Request Received by Custodian: July 16, 2018
Response Made by Custodian: July 16, 2018; July 18, 2018
GRC Complaint Received: July 23, 2018

Background

May 19, 2020 Council Meeting:

At its May 19, 2020 public meeting, the Council considered the May 12, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$155.00 comprised of ten (10) hours at a rate of \$15.50 to locate, retrieve, assemble, review, and redact 250 pages of records is warranted and reasonable here. N.J.S.A.

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Catherine Kim, Esq. of Cleary Giacobbe Alfieri Jacobs, LLC (Matawan, N.J.).

³ The Complainant sought additional records that are not at issue in this complaint.

- 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁴ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁵**
 3. The Custodian's offer of an extension of time in exchange for waiving the special service charge falls within the meaning of "a reasonable solution" that attempts to accommodate the interests of both parties. N.J.S.A. 47:1A-5(g); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181 (App. Div. 2007); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009); Aviles v. Perth Amboy Bd. of Educ. (Middlesex), GRC Complaint No. 2008-191 (November 2009).
 4. 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.
 5. 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 May 20, 2020, the Council distributed its Interim Order to all parties. That same day, the Custodian's Counsel e-mailed the Complainant requesting payment of the special service charge in accordance with the Council's Interim Order.

⁴ 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.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

On June 2, 2020, Counsel responded to the Council's Interim Order, asserting that the Borough requested payment of the special service charge on May 20, 2020. Counsel asserted that she informed the Complainant that the Borough expected a response within five (5) business days. Counsel asserted that as of June 2, 2020, the Complainant has failed to contact the Custodian or Counsel and express his willingness to pay the special service charge.

On June 18, 2020, the Custodian sent a letter to the GRC, certifying to Counsel's June 2, 2020 correspondence. The Custodian certified that neither she nor Counsel received a response from the Complainant regarding payment or rejection of the special service charge.

Analysis

Compliance

At its May 19, 2020 meeting, the Council ordered the Complainant to remit payment of the special service charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the Custodian ten (10) business days from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4.

On May 20, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on May 28, 2020. Further, the Custodian's response was due by close of business on June 4, 2020. Both deadlines accounted for the Memorial Day holiday.⁶

On May 20, 2020, the date of receipt of the Council's Order, Counsel sent an e-mail to the Complainant requesting payment of the special service charge or a statement rejecting same. On June 2, 2020, the eighth (8th) business day after receipt of the Order, Counsel e-mailed the GRC stating that the Complainant failed to respond to the May 20, 2020 correspondence, which therefore constituted a refusal to pay the special service charge. On June 18, 2020, the twentieth (20th) business day after receipt of the Order, the Custodian submitted her certification stating that the Complainant failed to provide payment or make known his refusal to pay the special service charge. Based on the foregoing, the Custodian did not fully comply with the Order due to a timeliness issue.

Therefore, the Custodian did not fully comply with the Council's Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, although Counsel timely notified the GRC that the Complainant has not responded to her May 20, 2020 e-mail, the Custodian did not submit her certification until ten (10) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

⁶ Memorial Day was observed on May 25, 2020.

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 Appellate Division 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, 71 (2008), the 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”(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 held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (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, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

The Complainant filed the instant complaint asserting that the Custodian improperly imposed a special service charge to locate and retrieve responsive records. However, the evidence of record indicates that the special service charge was warranted and reasonable. Thus, the Complainant has not achieved the desired result and is not a prevailing party in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no 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, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, although the Custodian’s Counsel timely notified the GRC that the Complainant has not responded to her May 20, 2020 e-mail, the Custodian did not submit her certification until ten (10) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.

2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not 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.

Prepared By: Samuel A. Rosado
Staff Attorney

June 23, 2020



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

May 19, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African
American Data and Research Institute)
Complainant

Complaint No. 2018-146

v.

Borough of Fair Haven (Monmouth)
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council ("Council") considered the May 12, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$155.00 comprised of ten (10) hours at a rate of \$15.50 to locate, retrieve, assemble, review, and redact 250 pages of records is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver¹ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.²**

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. The Custodian's offer of an extension of time in exchange for waiving the special service charge falls within the meaning of "a reasonable solution" that attempts to accommodate the interests of both parties. N.J.S.A. 47:1A-5(g); N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181 (App. Div. 2007); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009); Aviles v. Perth Amboy Bd. of Educ. (Middlesex), GRC Complaint No. 2008-191 (November 2009).
4. 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.
5. 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 19th Day of May 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: May 20, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 19, 2020 Council Meeting**

**Rotimi Owoh, Esq., (On Behalf of
African American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2018-146

v.

**Borough of Fair Haven (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the Borough of Fair Haven Police Department (“FHPD”) from January 2016 through present.
2. Drug possession complaints prepared and filed by the FHPD from January 2016 through present.
3. FHPD’s “Arrest Listings” from January 2016 through present.
4. Drug paraphernalia complaints and summonses prepared by the FHPD from January 2016 through present.

Custodian of Record: Allyson M. Cinquegrana

Request Received by Custodian: July 16, 2018

Response Made by Custodian: July 16, 2018; July 18, 2018

GRC Complaint Received: July 23, 2018

Background⁴

Request and Response:

On July 16, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded in writing, acknowledging receipt of the request and that an extension of time to August 17, 2018 was needed to conduct a preliminary search for records. The Custodian stated that the

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Catherine Kim, Esq. of Cleary Giacobbe Alfieri Jacobs, LLC (Matawan, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of Fair Haven (Monmouth), 2018-146 – Findings and Recommendations of the Executive Director

Borough of Fair Haven (“Borough”) would follow up once the records have been assembled and a special service charge would be imposed.

On July 18, 2018, the Custodian responded in writing stating that the Borough located approximately 250 pages of records. The Custodian also stated that an extension of time to respond was needed until August 17, 2018. The Custodian also stated that a special service charge would be imposed due to the “extraordinary time and effort” needed to process the request. N.J.S.A. 47:1A-5(c). The Custodian asserted that the lowest paid Borough employee was the confidential secretary at \$15.50 per hour. The Custodian stated that the estimated time to complete the task was ten (10) hours, for a total labor charge of \$155.00. The Custodian stated that the total estimated charge was \$167.50, and the Borough required a 50% deposit of \$83.75 before processing the request. The Custodian stated that the Borough would require at least thirty (30) business days from receiving the deposit to assemble, review, and redact the records that may be responsive.

The Custodian also stated that in the interest of finding a reasonable solution to processing the Complainant’s OPRA request, the Borough would waive the special service charge if an extension of sixty (60) business days was granted. N.J.S.A. 47:1A-5. The Custodian stated that the Borough reserved the right to seek additional extensions if necessary.

On July 18, 2018, the Complainant responded to the Custodian, first stating that based on the number records received from other police departments, he believed the estimated special service charge was excessive and unreasonable for an estimated 250 pages. The Complainant also stated that an extension of sixty (60) business days to perform a task estimated to take ten (10) hours was also unreasonable. The Complainant stated that he was willing to grant a thirty (30) calendar day extension in exchange for waiving the special service charge.

On July 19, 2018, the Complainant e-mailed the Custodian, asking for a response to his July 18, 2018 correspondence. That same day, the Custodian responded to the Complainant, stating that regardless of the initial number of pages located, the time and effort taken to process the request would substantially disrupt the Borough’s operations. The Custodian stated that the allotted time was only an estimate and could change depending on the workload. The Custodian stated that if the Complainant wished to have the records within thirty (30) calendar days, he would need to provide the 50% deposit to her office.

Denial of Access Complaint:

On July 23, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s assertion that the special service charge was warranted as well as the request for sixty (60) business days to process the request in exchange for waiving the charge.

The Complainant asserted that the special service charge was excessive given that only 250 pages were involved. The Complainant argued that the Complainant’s contention that the charge was reasonable regardless of the number of pages ran afoul of the GRC’s 14-point analysis. The Complainant also argued that the Custodian’s request for a sixty (60) business day extension in exchange of imposing the special service charge was improper and submitted in bad faith.

The Complainant requested that the Council find the Custodian in violation of OPRA for charging excessive fees and not complying with the 14-point analysis required for imposing a special service charge. The Complainant also requested the Council to award him prevailing party attorney's fees.

Statement of Information:

On August 7, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 16, 2018. The Custodian certified that a preliminary search yielded approximately 250 pages of records. The Custodian certified that she responded in writing on July 18, 2018, stating that a special service charge and thirty (30) business days were needed to process the request. The Custodian certified that the Borough offered the Complainant the alternative option of allowing sixty (60) business days to process the request in exchange of imposing the special service charge.

Regarding the special service charge, the Custodian asserted that in accordance with N.J.S.A. 57:1A-5(c), a custodian may impose a special service charge when fulfilling an OPRA request requires an "extraordinary expenditure of time and effort." The Custodian asserted that the determination of what constituted an "extraordinary expenditure of time and effort" was discussed in Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191 (Law Div. 2002). The Custodian argued that Courier Post outlined a variety of factors to be analyzed and discussed on a case-by-case basis. The Custodian asserted that the court in Courier Post held that a request for invoices and itemized attorney bills submitted by law firms over a six (6) year period warranted a special service charge. Id. at 195.

As part of the SOI, the Custodian provided the following responses to the 14-point analysis questions:

1. What records are requested?

Response:

- a. Copies of Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints prepared and filed by the FHPD from January 2016 through present.
- b. Drug possession complaints prepared and filed by the FHPD from January 2016 through present.
- c. FHPD's "Arrest Listings" from January 2016 through present.
- d. Drug paraphernalia complaints and summonses prepared by the FHPD from January 2016 through present.

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

Response: 250 pages of (i) DWI/DUI complaints summonses and tickets; (ii) drug possession complaints, summonses and tickets; (iii) FHPD's "Arrest Listings"; and (iv) drug paraphernalia complaints, summonses and tickets.

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

Response: January 2016 to present (date of OPRA request – July 16, 2018)

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

Response: Some are available through computer database, while others are in storage.

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

Response: Total of nineteen (19) employees.

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

Response: The FHPD currently employs two (2) clerks, who work on different shifts and days. Depending on the workload and demand, the Borough may require both to work on the same day and shift. However, the Borough currently only employs one (1) clerk.

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

Response: The requested records contain social security number, date of birth, driver license numbers, addresses, and other confidential information. Some records may also involve juveniles.

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?

Response: The clerk (Ms. Bonnie Ferris) at \$15.50 will require at least ten (10) hours to locate, retrieve, and assemble the records for copying.

9. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?

Response: The Lieutenant, at \$57.59, will require approximately three (3) hours to monitor/exam the requested records. The Custodian excluded the cost for the Lieutenant as a courtesy to the Complainant.

10. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to return records to their original storage place?

Response: The time is included within the total time provided in response to No. 8.

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

Response: The two (2) clerks employed by the Borough do not have concurrent shifts. FHPD does not have an employee specifically assigned only as the records clerk/custodian. The current clerk for the FHPD is also responsible for the following:

- a. Stationed at the front desk as a receptionist for the FHPD;
- b. Answer phone calls to the FHPD;
- c. Receive and process record requests, including OPRAs; and
- d. Secretary to the Chief of Police.

Due to the clerk's daily responsibilities, she is not permitted to leave the front desk unattended for more than a few minutes. The clerk is consistently required to be present at the front desk.

Because some of the records are in storage, the Borough will need to schedule both clerks to fulfill the request. The request requires significant amount of time to locate, retrieve, and assemble the records for copying, then for redacting.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

Response: Per the response letter dated July 18, 2018, the Custodian will utilize the department's clerical staff, Bonnie Ferris, with the lowest hourly rate (\$15.50).

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

Response: Technological capabilities are available.

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

Response:

EMPLOYEE	WORK REQUIRED
Chief of Police	Two (2) hour (no charge) review of request and responsive records for redactions.
Lieutenant	Three (3) hour (no charge) review of request and responsive records for redactions.
Clerk (Ms. Ferris)	Ten (10) hours (\$15.50 per hour) to locate, retrieve, and assemble the records for copying. Review records for redactions.

The Custodian included a certification from Ms. Ferris, who confirmed her duties and responsibilities with the FHPD. Mr. Ferris certified that she was the only qualified employee able to review and redact the records, with the lowest hourly rate among the FHPD's clerical staff. Ms.

Ferris certified that her responsibilities required her to maintain her post and must provide advance notice to secure a substitute when asked to step away. Ms. Ferris certified that on rare occasions, the FHPD would have both of its clerks working on the same shift to accommodate the workload/department needs.

The Custodian asserted that the 14-point analysis demonstrated the extraordinary hardship and the amount of time and effort required to process the responsive records. The Custodian also asserted that the Borough's estimate of ten (10) hours was subject to additional time needed to process the request.

Regarding the extension of time, the Custodian asserted that OPRA allows custodians to seek an extension of time to respond to request if a specific return date is provided. N.J.S.A. 47:1A-5(i). The Custodian noted that in Starkey v. N.J. Dep't of Transp., GRC Complaint Nos. 2007-315, 2007-216, and 2007-317 (February 2009), the Council held that because the custodian timely requested an extension of time and provided a date certain, the custodian properly requested said extension. See also Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010).

The Custodian asserted that in the current matter, she timely responded to the Complainant's OPRA request. The Custodian also asserted that based on the 14-point analysis, the clerk would need to specifically schedule time to allocate, assemble, copy, and redact the records, while the Borough must accommodate the clerk's regular schedule, workload, and other FHPD needs. Therefore, the Custodian asserted that the extension was both reasonable and necessary for the Borough.

The Custodian requested that the Council find that the Custodian's special service charge and extension was reasonable and warranted, and that the supporting evidence indicates that the Custodian's actions did not rise to a knowing and willful violation of OPRA.

Additional Submissions:

On August 8, 2018, the Complainant filed a brief in response to the Custodian's SOI. The Complainant contended that based upon complaints and summonses received by other police departments, each traffic ticket required only three (3) minor redactions and each criminal complaint required only five (5) redactions. The Complainant asserted that based upon the total number of pages and minor redactions necessary, a special service charge was not appropriate.

The Complainant also argued that the Custodian was not acting in good faith in this matter by conditioning a waiver of the charge in exchange for allowing a sixty (60) business day extension of time to process the request. The Complainant asserted that he was given a choice to either pay an excessive charge or wait approximately three (3) months to obtain responsive records. The Complainant argued that requiring sixty-seven (67) business days to complete a task estimated to take only ten (10) hours to perform was unreasonable, noting that OPRA called for prompt access to public records.

The Complainant also provided evidence from twenty-three (23) other police department or municipalities, asserting that they either did not charge at all for copies of the requested records, or only charged a copying fee. The Complainant asserted that when making a comparative market analysis, it was clear that the Borough was charging far more than was reasonable.

Additionally, the Complainant noted that he requested electronic delivery of records. The Complainant contended that other police departments such as the Marlboro Police Department used electronic redaction programs to redact sensitive records. The Complainant asserted that the Borough and other municipalities should also adopt similar redaction programs.

Lastly, the Complainant requested that the Council find that the Borough violated OPRA, and to award counsel fees.

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.

In Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012), the complainant sought in part motor vehicle recording (“MVR”) footage from the Rutgers University Police Department (“RUPD”). The custodian certified that there was one (1) out of the seventy-five (75) employees qualified to fulfill the complainant’s OPRA request. The employee certified that he expended approximately twelve (12) hours fulfilling the entire request, but RUPD charged only for the two (2) hours spent locating and copying the requested MVR footage on his work computer. The employee also certified that while creating a copy of the footage, he was unable to perform any other work on his computer. The Council held that the disruption to the employee’s regular duties, as well as the fact that RUPD did not charge the entire time expended to fulfill the request, warranted the special service charge.

In the instant matter, the Complainant disputed the assessed special service charge of \$155.00 (\$15.50 per hour x 10 hours) for 250 pages of records. The Complainant asserted that the charge was unwarranted due to the number of pages involved and the estimated number of hours needed to fulfill the request. Conversely, the Custodian argued that the charge was warranted because of the hardship placed on the Borough to process the request due to the records’ need for redactions, the size of the agency, and the scope of the clerk’s regular duties beyond responding to OPRA requests. The Custodian’s 14-point analysis confirms that some of the records were available electronically, while others were in storage requiring the need to schedule time for the clerk to locate, retrieve, and assemble those records. The Custodian also noted that the Police Chief and Lieutenant would expend an estimated two (2) and three (3) hours respectively to assist in reviewing the records for redactions. However, the Borough did not charge for this time as a courtesy to the Complainant.

A review of the forgoing supports that the Borough’s estimated expenditure of ten (10) hours represents an extraordinary time and effort to produce responsive records given the size of the agency and the disruption to Ms. Ferris’s regular duties. See Rivera, GRC 2009-311. In particular, the Custodian’s 14-point analysis and Ms. Ferris’s certification detailed the scope of her daily tasks as the clerk for the FHPD. As was the case in Rivera, the evidence of record demonstrates that Ms. Ferris’s responsibilities while being physically present at the FHPD’s front desk would be wholly disrupted each time she must step away to locate, retrieve, assemble, copy, review, and redact the requested records. The GRC is further persuaded by the fact that the agency’s size of nineteen (19) employees is a fraction of the RUPD in Rivera, thereby increasing the “extraordinary” effort incurred in processing the request. See Courier Post, 360 N.J. Super. at

202. Thus, the evidence of record adequately supports that a special service charge for ten (10) hours of time is warranted here.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$155.00 comprised of ten (10) hours at a rate of \$15.50 to locate, retrieve, assemble, review, and redact 250 pages of records is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-311. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Additionally, the GRC briefly addresses the Complainant's assertion that the Custodian's offer to waive the special service charge in exchange of granting a sixty (60) business day extension of time to process the request was made "in bad faith." The New Jersey courts have held that OPRA envisions collaboration between the parties to find a reasonable accommodation that benefits the interests of both. See N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181 (App. Div. 2007); Grieco v. Borough of Haddon Heights, 449 N.J. Super. 513, 520 (Law Div. 2015). Specifically, N.J.S.A. 47:1A-5(g) states in part: "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record *after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.*" (emphasis added). In Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009), the Council held that a custodian's request for an extension of time was a "reasonable solution" under N.J.S.A. 47:1A-5(g) when fulfilling the request within the seven (7) business day time frame would have substantially disrupted his agency's operations. See also Aviles v. Perth Amboy Bd. of Educ. (Middlesex), GRC Complaint No. 2008-191 (November 2009).

Here, the Custodian asserted that reviewing and redacting the responsive records within the allotted time frame would substantially disrupt agency operations, and thus required the imposition of a special service charge under N.J.S.A. 47:1A-5(c). However, as was the case in Rivera, GRC 2008-112, the Custodian requested an extension of time to sixty (60) business days to offset the request's disruptive impact and provided the Complainant the option to avoid paying a special service charge. Rather than an example of "bad faith," the Custodian's offer reflects an attempt to balance the agency's interest in maintaining regular operations with the Complainant's interest in avoiding the potential costs to access records.

Therefore, the Custodian's offer of an extension of time in exchange for waiving the special service charge falls within the meaning of "a reasonable solution" that attempts to accommodate the interests of both parties. N.J.S.A. 47:1A-5(g); N.J. Builders Ass'n., 390 N.J. Super. at 181; Rivera, GRC 2008-112; Avila, GRC 2008-191.

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 borne her burden of proof that the proposed special service charge of \$155.00 comprised of ten (10) hours at a rate of \$15.50 to locate, retrieve, assemble, review, and redact 250 pages of records is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁵ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁶**
3. The Custodian's offer of an extension of time in exchange for waiving the special service charge falls within the meaning of "a reasonable solution" that attempts to accommodate the interests of both parties. N.J.S.A. 47:1A-5(g); N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181 (App. Div. 2007); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009); Aviles v. Perth Amboy Bd. of Educ. (Middlesex), GRC Complaint No. 2008-191 (November 2009).

⁵ 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.

⁶ "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."

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of Fair Haven (Monmouth), 2018-146 – Findings and Recommendations of the Executive Director

4. 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.
5. 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: Samuel A. Rosado
Staff Attorney

May 12, 2020