



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

December 15, 2020 Government Records Council Meeting

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

Complaint No. 2018-174

v.

Township of Holmdel (Monmouth)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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 complied with the Council’s November 10, 2020 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge by submitting her certification to the Executive Director within the extended period. Additionally, the Council need not address this issue further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is no required 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 15th Day of December 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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

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

GRC Complaint No. 2018-174

v.

**Township of Holmdel (Monmouth)²
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUP”) complaints prepared and filed by the Police Department from January 2016 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.
3. Copies of the Police Department’s “Arrest Listings” from January 2016 to present.
4. Copies of drug paraphernalia complaints, summonses, and tickets prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Wendy Patrovich
Request Received by Custodian: July 16, 2018
Response Made by Custodian: July 25, 2018
GRC Complaint Received: August 9, 2018

Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 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 \$1,400.00 comprising seventy (70) hours at a rate of \$20.00 per hour to locate, retrieve, assemble, review, and redact 250 pages of records is warranted and reasonable

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

² Represented by Michael L. Collins, Esq., of Archer & Greiner, P.C. (Red Bank, NJ).

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

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 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 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.
4. 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 November 12, 2020, the Council distributed its Interim Order to all parties. On November 25, 2020, the Government Records Council ("GRC") sent an e-mail to the Custodian, requesting an update on her compliance with the Council's Interim Order. That same day, Custodian's Counsel responded to the GRC, requesting an extension of time provide a certification from the Custodian. The GRC granted an extension to November 30, 2020.

On November 30, 2020, the Custodian's Counsel responded to the Council's Interim Order, providing a certification from the Custodian. The Custodian certified that she has not received a response from the Complainant regarding payment or rejection of the special service charge.

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."

Analysis

Compliance

At its November 10, 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 allotted 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 November 12, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant's response to the Custodian was due by close of business on November 19, 2020. Further, the Custodian's response was due by close of business on November 27, 2020, accounting for the Thanksgiving holiday.⁶

On November 25, 2020, the ninth (9th) business day after receipt of the Interim Order, the GRC requested an update on the Custodian's compliance. That same day, Counsel e-mailed the GRC requesting an extension of time to submit a response. The GRC granted the request and extended the deadline to November 30, 2020. On November 30, 2020, Counsel provided a certification from the Custodian. Therein, the Custodian certified that the Complainant failed to provide payment or make known his refusal to pay the special service charge.

Therefore, the Custodian complied with the Council's November 10, 2020 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge by submitting her certification to the Executive Director within the extended period. Additionally, the Council 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.

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.]

⁶ Thanksgiving Day was observed on November 26, 2020.

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 complied with the Council’s November 10, 2020 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge by submitting her certification to the Executive Director within the extended period. Additionally, the Council 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

December 8, 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

November 10, 2020 Government Records Council Meeting

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

Complaint No. 2018-174

v.

Township of Holmdel (Monmouth)
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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, finds that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$1,400.00 comprising seventy (70) hours at a rate of \$20.00 per hour 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 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.
4. 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 10th Day of November 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: November 12, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

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

GRC Complaint No. 2018-174

v.

**Township of Holmdel (Monmouth)²
Custodial Agency**

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

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

Custodian of Record: Wendy Patrovich
Request Received by Custodian: July 16, 2018
Response Made by Custodian: July 25, 2018
GRC Complaint Received: August 9, 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. On July 25, 2018, the Custodian responded in writing advising that an extension of the seven (7) business days was required due to the voluminous nature of the OPRA request. The Custodian thus extended the response time frame through August 17, 2018. On the same day, the Complainant confirmed the extension and asked

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

² Represented by Michael L. Collins, Esq., of Archer & Greiner, P.C. (Red Bank, 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. Township of Holmdel (Monmouth), 2018-174 – Findings and Recommendations of the Executive Director

whether the Custodian would be “complying with all” request items. The Custodian responded stating that the Police Department was reviewing the request and that she was not sure which items they would be able to address.

On August 8, 2018, the Custodian responded in writing advising the Complainant that the Township of Holmdel (“Township”) was assessing a special service charge of \$1,400.00 for seventy (70) hours of work to review and produce “520 cases.” On the same day, the Complainant e-mailed the Custodian contending that the assessed charge was “excessive.” The Complainant further narrowed the applicable time frame “from January 2018 to the present” in order to “reduce the cost.” The Complainant noted that he reserved the right to challenge the initial assessed fee.

On August 9, 2018, the Custodian responded advising that 100 arrest records fall within the reduced time period. The Custodian stated that each arrest will have to be removed, reviewed, photocopied, redacted, and scanned. The Custodian thus stated that the Complainant shall pay an applicable special service charge of \$200.00 prior to the Township beginning the review process.

Denial of Access Complaint:

On August 9, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Township assessed an excessive special service charge of \$1,400.00 for records responsive to the subject OPRA request. The Complainant also argued that the Township improperly continued to assess an estimated “\$2.00 per page” after he shortened the OPRA request time frame. The Complainant noted that other police departments disclosed records in response to similar OPRA requests without charging a fee.

The Complainant thus requested that the GRC determine that the assessed special service charges violated OPRA. The Complainant further requested that the GRC find that he is a prevailing party entitled to an award of attorney’s fees.

Statement of Information:

On August 30, 2018, the Custodian filed a Statement of Information (“SOF”) attaching a certification from Lieutenant Jeffrey Ackerson. The Custodian certified that she received the Complainant’s OPRA request on July 16, 2018. The Custodian certified that the Police Department reviewed its electronic database to identify potentially responsive records. Ackerson Cert. ¶ 5. The Custodian certified that she responded in writing on July 25, 2018 extending the response time frame through August 17, 2018. The Custodian certified that she responded again on August 8, 2018 assessing a special service charge of \$1,400.00 for “520 cases.” The Custodian affirmed that she reduced the special service charge to \$200.00 in response to the Complainant’s amended time frame.

The Custodian argued that the Township lawfully imposed a special service charge in this instance. N.J.S.A. 47:1A-5(d). The Custodian certified that the original OPRA request required 70 hours of labor at a rate of \$20.00 per hour, which was less than the actual hourly rate of the Township Records Clerk (\$21.74). Ackerson Cert. ¶ 6-7. See Fisher v. Div. of Law, 400 N.J.

Super. 61 (App. Div. 2008). The Custodian argued that in order to respond to the subject OPRA request, the Township was required to: 1) remove files from storage; 2) review each file; 3) locate responsive complaints/summonses; 4) photocopy those records; 5) redact any exempt information; and 6) scan the redacted records for disclosure. The Custodian also noted that Lt. Ackerman did not charge his rate of \$76.28 over the several hours needed to estimate the special service charge. Ackerman Cert. ¶ 12. The Custodian thus contended that the assessed charge was lawful under OPRA.

The Custodian further contended that the Complainant conflated OPRA's copying cost provision with the special service charge when arguing that the lesser charge amounted to "\$2.00 per page and way above the statutory rate." The Custodian stated that N.J.S.A. 47:1A-5(d) allowed an agency to charge fees "in addition to the actual cost of duplication." Id. The Custodian thus asserted that the Complainant's claim was without merit because the assessed charge did not include duplication. The Custodian also noted that there were 100 cases responsive to the amended OPRA request; thus, it is possible that multiple responsive records could exist within each case file.

Finally, the Custodian argued that whether other responding police departments charged a fee is of no moment here. The Custodian contended that other police departments' conduct had no bearing on the Township's ability to assess a special service charge. The Custodian asserted that there could be multiple reason why those agencies disclosed records without a charge, including technological advantages or via agency discretion. The Custodian thus reiterated that the actions of other agencies had no bearing on the Township's actions in this complaint.

Additional Submissions:

On September 1, 2018, the Complainant filed a letter brief refuting the Custodian's SOI. Therein, the Complainant argued that the Custodian failed to provide him and the GRC a 14-point analysis. The Complainant further argued that the lesser fee of \$200.00 was excessive when compared to responses from thirty-five (35) other police departments. The Complainant noted that he received multiple records from twelve (12) other municipalities at drastically less cost. The Complainant noted that twenty-three (23) of the municipalities disclosed records free of charge. The Complainant thus contended that a "comparative market analysis shows" that the Borough's special service charge was excessive. The Complainant contended that OPRA was not intended to become a municipal revenue generator.

The Complainant argued that special service charges are only appropriate where a request would cause a substantial disruption of agency operations. The Complainant contended that unlike the facts in Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002), the Township intended to charge \$200.00 for 100 responsive pages of records. The Complainant questioned that such a disclosure represented a substantial disruption.

The Complainant also contended that the GRC "should not reward inefficient municipalities" by upholding their special service charge. The Complainant argued that the Township could have purchased software allowing for electronic redactions at multiple retailers or online.

The Complainant thus requested that the Council: 1) determine the Borough violated OPRA; and 2) determine that he is a prevailing party entitled to attorney fees.

On September 25, 2020 the GRC requested a 14-point special service charge analysis from the Custodian. On September 28, 2020, the Custodian's Counsel provided the following responses to the request:

1. What records are requested?

Response:

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

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

Response: Specific complaints and summonses that were prepared and filed by the Township's police department.

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

Response: The request was submitted on July 16, 2018, so it sought records for over a 2½ year period.

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

Response: Yes. The [Custodian] specifically advised that "files will have to be recovered from storage."

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

Response: Holmdel has 109 employees.

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

Response: The Holmdel Township Clerk's office is comprised of a Township Clerk and a Deputy Township Clerk. The Holmdel Police Department has a lieutenant assigned to assist with records issues along with a Records Clerk I.

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

Response: Each individual complaint and summons is subject to redaction of personal identifiers.

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 Township would utilize the labor of a Records Clerk I for these tasks. The hourly rate (excluding fringe) for the Records Clerk I was \$21.74, with the special services charged assessed at an hourly rate of \$20.00 (at the time of Holmdel responding to this complaint).

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: See response 8.

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: See response 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 Records Clerk I is the lowest-level position that is capable of carrying out the required tasks to complete a response to the OPRA request.

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: Anastasia Merken, Records Clerk I, Hourly Rate of \$21.74 (at the time of Holmdel responding to this complaint).

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

Response: In this case, the files were not electronically maintained. As the records custodian originally advised the requester, the relevant files needed to be “removed from storage, reviewed on a case by case [basis, and] then the summonses/complaints . . . removed from each case, photocopied, redacted and scanned.”

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

Response: The original OPRA request contained 520 responsive records. The Township estimated that it would take approximately 70 hours to complete the required work, which involves needing to have the relevant files “removed from storage, reviewed on a case by case [basis, and] then the summonses/complaints . . . removed from each case, photocopied, redacted and scanned.”

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 v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002). 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.

Initially, the GRC notes that prior to the complaint filing, the Complainant and Custodian exchanged correspondence regarding the initial special service charge totaling \$1,400.00 for 520 cases. On August 8, 2018, the Complainant revised the OPRA request to seek records from 2018 to present rather than 2016. The Custodian provided a revised estimate of \$200.00 for 100 pages of records on August 9, 2018, to which the Complainant also objected. However, the GRC will address the special service charge issue using the initial estimate because said charge formed the basis of the Complainant’s Denial of Access Complaint.

Here, the Custodian’s Counsel provided a 14-point analysis reflecting the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. Counsel argued that processing the 520 arrest records would take approximately seventy 70 hours at an hourly rate of \$20.00, for a total of \$1,400.00. Counsel certified that the Township would employ a Records Clerk I, whose hourly rate was \$21.74. Counsel certified that the Complainant’s OPRA request sought records that were not electronically maintained and needed to be located from storage. Counsel certified that the records needed to be manually removed from each case file, photocopied, redacted, and scanned.

A review of the forgoing supports the Township’s estimated expenditure of seventy (70) hours represents an “extraordinary time and effort” to produce responsive records given the number of potential records and the disruption to the employee’s regular duties. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Specifically, Lt. Ackerson certified that the requested complaints were not searchable, and therefore the designated employee would need to locate responsive records by manually reviewing each arrest record filed during the requested period and determine whether they were responsive. Lt. Ackerson certified that a substantial amount of time would be needed to read through each arrest record, and thereafter scan, redact, and return same to its location, with the 2016 and 2017 records located in storage. The GRC is further persuaded by Lt. Ackerson’s certification that he did not include his own labor as part of the cost, and the assessed hourly rate of \$20.00 is lower than the rate of the assigned employee.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$1,400.00 comprising seventy (70) hours at a rate of \$20.00 per hour to locate, retrieve, and copy records responsive to the Complainant’s OPRA request 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).

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 \$1,400.00 comprising seventy (70) hours at a rate of \$20.00 per hour 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 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 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. Township of Holmdel (Monmouth), 2018-174 – Findings and Recommendations of the Executive Director

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

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October 27, 2020