



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

September 28, 2021 Government Records Council Meeting

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

Complaint No. 2018-190

v.

Egg Harbor City Police Department (Atlantic)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 28th Day of September 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 30, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

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

GRC Complaint No. 2018-190

v.

**Egg Harbor City Police Department (Atlantic)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 Egg Harbor City Police Department (“EHCPD”) from January 2016 through present.
2. Drug possession complaints prepared and filed by the EHCPD from January 2016 through present.
3. Drug paraphernalia complaints and summonses prepared by the EHCPD from January 2016 through present.

Custodian of Record: Kathy Cori⁴

Request Received by Custodian: July 30, 2018

Response Made by Custodian: August 13, 2018; August 14, 2018

GRC Complaint Received: August 20, 2018

Background

July 27, 2021 Council Meeting:

At its July 27, 2021 public meeting, the Council considered the July 20, 2021 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 Complainant represents the African American Data and Research Institute.

² Represented by Angela Maione Costigan, Esq., of Costigan and Costigan, LLC (Hammonon, N.J.). Previously represented by James Carroll, Esq., of the James Carroll Law Firm (Galloway, N.J.).

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

⁴ The current Custodian of Record is Meg Steeb.

1. The current Custodian complied with the Council’s June 30, 2020 Interim Order because she responded in the prescribed time frame providing responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian imposed an unwarranted special service charge, the current Custodian fully complied with the Council’s June 30, 2020 Interim Order by providing the responsive records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s June 30, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records without imposing a special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On July 28, 2021, the Council distributed its Interim Order to all parties. On August 13, 2021, the Complainant e-mailed the GRC, advising an intent to withdraw the matter due to amicable settlement. The Complainant also stated that the resolution for settlement needed to be approved by Egg Harbor City (“City”). That same day, the Complainant stating that he was informed that the meeting for approval was slated for August 26, 2021.

On August 26, 2021, the GRC notified that parties that the deadline to advise of a settlement expired on August 25, 2021 but acknowledged the Complainant’s notification of a pending settlement on August 13, 2021. The GRC then formally inquired whether an extension was necessary to allow the City to approve the settlement. That same day, Custodian’s Counsel responded in writing, requesting fifteen (15) days to approve the settlement. The GRC replied by approving a twenty (20) business day extension, providing a new deadline of September 23, 2021.

On September 2, 2021, the Complainant e-mailed the GRC, stating that he received a check from the City for payment of counsel fees, and therefore the fee issue has been resolved.

Analysis

Prevailing Party Attorney's Fees

At its July 27, 2021 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On July 28, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant's response was due by close of business on August 17, 2021. On August 13, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval on August 26, 2021, by the City. On August 26, 2021, the GRC granted an extension of twenty (20) business days for the City to approve the settlement. On September 2, 2021, the Complainant notified the GRC that he received payment from the City for counsel fees.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

September 21, 2021



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 27, 2021 Government Records Council Meeting

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

Complaint No. 2018-190

v.

Egg Harbor City Police Department (Atlantic)
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 2021 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 current Custodian complied with the Council’s June 30, 2020 Interim Order because she responded in the prescribed time frame providing responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian imposed an unwarranted special service charge, the current Custodian fully complied with the Council’s June 30, 2020 Interim Order by providing the responsive records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s June 30, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records without imposing a special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on**



the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 27th Day of July 2021

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 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 27, 2021 Council Meeting**

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2. Drug possession complaints prepared and filed by the EHCPD from January 2016 through present.
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Custodian of Record: Kathy Cori⁴

Request Received by Custodian: July 30, 2018

Response Made by Custodian: August 13, 2018; August 14, 2018

GRC Complaint Received: August 20, 2018

Background

June 30, 2020 Council Meeting:

At its June 30, 2020 public meeting, the Council considered the June 23, 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 Complainant represents the African American Data and Research Institute.

² Represented by Angela Maione Costigan, Esq., of Costigan and Costigan, LLC (Hammonton, N.J.). Previously represented by James Carroll, Esq., of the James Carroll Law Firm (Galloway, N.J.).

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

⁴ The current Custodian of Record is Meg Steeb.

1. The Custodian has not borne her burden of proof that a special service charge is warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 8.3 or ten (10) hours represents an “extraordinary amount of time and effort” to prepare and disclose 100 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). However, the current Custodian may charge the actual cost of the CD used to deliver the records. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). Thus, the current Custodian shall grant access to the requested records, with redactions where applicable, once the Complainant remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The current Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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 current Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 1, 2020, the Council distributed its Interim Order to all parties. On July 9, 2020, the current Custodian e-mailed the Complainant, stating that the request records were available. The current Custodian stated that because the file size was too large, the records were placed on a disc with a cost of \$5.00. Later that day, the current Custodian submitted a certified confirmation of compliance to the Executive Director. The current Custodian certified that she mailed the disc to the Complainant, who agreed to pay the \$5.00 charge.

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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

At its June 30, 2020 meeting, the Council ordered the Custodian to provide access to the requested records. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On July 1, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 9, 2020, accounting for the Independence Day holiday.

On July 9, 2020, the fifth (5th) business day after receipt of the Council's Order, the current Custodian responded in writing, providing a certified confirmation of compliance to the Executive Director. The current Custodian certified that the requested records were mailed to the Complainant that same day via disc.

Therefore, the current Custodian complied with the Council's June 30, 2020 Interim Order because she responded in the prescribed time frame providing responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the current matter, although the Custodian imposed an unwarranted special service charge, the current Custodian fully complied with the Council's June 30, 2020 Interim Order by

providing the responsive records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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, 432 (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.]

Here, the Complainant sought complaints prepared by EHCPD complaints pertaining to drug paraphernalia, drug possession, or DUI/DWI offenses. The Custodian assessed a special service charge to process the request. The Complainant then filed the instant complaint asserting that the special service charge excessive.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council’s June 30, 2020 Interim Order, the Custodian was ordered to produce the responsive records without imposing a special service charge, which was the Complainant’s desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁸

⁸ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Therefore, pursuant to the Council's June 30, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to produce the responsive records without imposing a special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's June 30, 2020 Interim Order because she responded in the prescribed time frame providing responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian imposed an unwarranted special service charge, the current Custodian fully complied with the Council's June 30, 2020 Interim Order by providing the responsive records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's June 30, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records without imposing a special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on**

the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Prepared By: Samuel A. Rosado
Staff Attorney

July 20, 2021



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June 30, 2020 Government Records Council Meeting

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At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 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 not borne her burden of proof that a special service charge is warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 8.3 or ten (10) hours represents an “extraordinary amount of time and effort” to prepare and disclose 100 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). However, the current Custodian may charge the actual cost of the CD used to deliver the records. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). Thus, the current Custodian shall grant access to the requested records, with redactions where applicable, once the Complainant remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The current Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

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

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

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

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Interim Order 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 1, 2020

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2018-190

v.

**Egg Harbor City Police Department (Atlantic)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 Egg Harbor City Police Department (“EHCPD”) from January 2016 through present.
2. Drug possession complaints prepared and filed by the EHCPD from January 2016 through present.
3. Drug paraphernalia complaints and summonses prepared by the EHCPD from January 2016 through present.

Custodian of Record: Kathy Cori⁴

Request Received by Custodian: July 30, 2018

Response Made by Custodian: August 13, 2018; August 14, 2018

GRC Complaint Received: August 20, 2018

Background⁵

Request and Response:

On July 29, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 13, 2018, the Custodian responded to the Complainant in writing stating that a special service charge was calculated based on the amount of time needed to gather the records, redact, scan and convert them to CD. The Custodian stated that sending the records via e-mail was not possible. The Custodian also stated

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

² Represented by Angela Maione Costigan, Esq., of Costigan and Costigan, LLC (Hammonton, N.J.). Previously represented by James Carroll, Esq., of the James Carroll Law Firm (Galloway, N.J.).

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

⁴ The current Custodian of Record is Tanya Hancock.

⁵ 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.

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that the process would take ten (10) hours at the Custodian's hourly rate of \$26.23 for a cost of \$262.00, subtracting \$0.30. The Custodian stated that the cost of the CD was \$5.00, for a total cost of \$267.00. The Custodian then requested a 50% deposit of \$133.50 before beginning the process. That same day, the Complainant responded to the Custodian requesting the number of pages being provided for each request item.

On August 14, 2018, the Custodian responded to the Complainant stating that the total number of pages was between 98-100. The Custodian stated that it would take her five (5) minutes to pull each page from the file, redact, scan, and then create the CD. The Custodian stated that the total time was 500 minutes, or 8.3 hours. The Custodian stated that she added 1.7 hours for the time taken to gather the records, for a total of ten (10) hours.

Denial of Access Complaint:

On August 20, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that it was improper to impose a special service charge for just 98-100 records. The Complainant asserted that because the statutory rate for 100 pages was about \$5.00, the estimated charge was excessive and in violation of OPRA. The Complainant asserted that other police departments have either provided the same records without cost or charged the statutory rate.

Statement of Information:

On October 17, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 30, 2018. The Custodian certified that on August 1, 2018, she e-mailed the Complainant requesting an extension of time to gather information on the request items.⁶ The Custodian certified that she told the Complainant that she worked alone and would have to search for the responsive records by hand, and therefore a special service charge would be imposed. The Custodian certified that she responded to the Complainant on August 13, 2018, providing the special service charge estimate and assessing a \$5 fee for the CD.

The Custodian included correspondence from Meg Steeb⁷ as part of the SOI. Ms. Steeb asserted that the last contact the Custodian received from the Complainant was the August 13, 2018 e-mail requesting an itemized breakdown of the estimated charge. Ms. Steeb asserted that the Custodian provided the breakdown on August 14, 2018. Ms. Steeb also contended that the Custodian tried to contact the Complainant through other means but was unsuccessful.

Additional Submissions:

On October 21, 2018, the Complainant e-mailed Ms. Steeb seeking clarification of the SOI. The Complainant asked whether the City sought only the \$5.00 fee for the CD, rather than the combined estimate of \$267.00 for the CD and the special service charge.

⁶ Neither the Complainant nor the Custodian included a copy of this correspondence in their submissions.

⁷ Meg Steeb is the Custodian of Record for Egg Harbor City, N.J. ("City"). The Custodian retired from her position on or around October 2018.

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On October 23, 2018, Ms. Steeb responded to the Complainant confirming that the estimated special service charge included the \$262.00 in addition to the \$5.00 fee for the CD.

On October 27, 2018, the Complainant filed a brief in response to the Custodian's SOI. The Complainant asserted that charging \$267.00 for only 98-100 pages was excessive when compared with other police departments. The Complainant provided evidence from twenty-eight (28) other police departments or municipalities asserting they either charged the statutory copying fee or provided the requested records without cost. The Complainant also asserted that when making a comparative market analysis, it was clear that the City's estimated charge was unreasonable.

The Complainant also asserted that modern technology allows for the electronic storage and redaction of records, and the GRC should not reward "inefficient municipalities". The Complainant contended that a special service charge was proper when the request may cause a "substantial disruption" of agency operations. See Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 202 (Law Div. 2002). The Complainant asserted that making minor redactions to 98-100 pages of complaints and summonses would not "substantially disrupt" the City's operations.

The Complainant requested the Council find that the Custodian violated OPRA. The Complainant also asserted that the Council should award him counsel fees as a prevailing party. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

On May 1, 2020, the GRC requested a 14-point special service charge analysis from the current Custodian. On May 6, 2020, the current Custodian provided the following responses to the 14-point analysis:

1. What records are requested?

Response:

- a. Driving While Intoxicated/Driving Under the Influence ("DWI/DUI") complaints prepared and filed by the Egg Harbor City Police Department ("EHCPD") from January 2016 through present.
- b. Drug possession complaints prepared and filed by the EHCPD from January 2016 through present.
- c. Drug paraphernalia complaints and summonses prepared by the EHCPD from January 2016 through present.

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

Response: Approximately 98-100 pages.

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

Response: Eighteen (18) months at the time of request.

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

Response: No.

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

Response: EHCPD has fourteen (14) employees.

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

Response: One (1) Records Clerk available to accommodate the request.

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

Response: The social security numbers, driver's license numbers, unlisted phone numbers and dates of birth on the complaints, summonses, and tickets must be redacted.

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: One (1) Records Clerk employed at \$29.00 an hour for 7.3 hours is required.

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: One (1) Sergeant employed at \$76.57 an hour for 8.3 hours is required.

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: One (1) Records Clerk employed at \$29.00 an hour for 1 hour is required.

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

Response: Due to the size of the EHCPD, there is only one (1) Records Clerk employed who will accommodate the request during off hours.

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: EHCPD Records Clerk, Tanya M. Hancock's hourly rate is \$29.00.

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

Response: Information technology and copying 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:

- a. Providing approximately 100 pages.
- b. Five (5) minutes to identify, copy, or prepare for inspection, produce and return each page.
- c. 100 pages x 5 minutes – 500 minutes/8.3 hours.

The current Custodian did not explicitly provide an estimated total. However, based upon the 14-point analysis the total estimated charge was \$240.70, which was lower than the Custodian’s initial estimate of \$262.00 plus \$5.00 for the CD.

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.

Moreover, OPRA provides that providing access to records electronically “shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.” N.J.S.A. 47:1A-5(b); see also McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). However, it should be noted that the cost imposed must be actual cost of an individual CD, even if purchased as part of a bundle. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).

Initially, the GRC notes that while the Custodian provided an estimated charge of \$262 for ten (10) hours of work, the current Custodian’s 14-point analysis proposed a revised estimate of \$240.70 for 8.3 hours of work. The current Custodian certified that one (1) out of the fourteen (14) EHCPD employees has the expertise to comply with request, and that all located records required review for personal identifiers. The current Custodian also certified that each page would take five (5) minutes to fully process.

Upon review of the evidence, the GRC is not satisfied that an expenditure of 8.3 or ten (10) hours represents an “extraordinary amount of time and effort” for one (1) employee to review and redact 100 pages of records. Courier Post, 360 N.J. Super. at 199. In Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011), the agency estimated just seven (7) hours of work to review and redact 411 pages of records for personal information, utilizing three (3) employees. In contrast, the current Custodian estimated that it would take over eight (8) hours to redact 100 pages of records. Additionally, the current Custodian’s 14-point analysis did not elaborate as to what daily functions would be disrupted or were beyond the scope of her regular duties.

Additionally, while the Complainant did not explicitly dispute the \$5.00 cost for the CD, the GRC notes that since the Custodian asserted that the records could not be delivered via e-mail due to technical limitations, the current Custodian may charge the actual cost of the CD in accordance with McBride, GRC 2009-138.

Accordingly, the Custodian has not borne her burden of proof that a special service charge is warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 8.3 or ten (10) hours represents an “extraordinary amount of time and effort” to prepare and disclose 100 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199; Rivera, GRC 2009-285. However, the current Custodian may charge the actual cost of the CD used to deliver the records. See McBride, GRC 2009-138. Thus, the current Custodian shall grant access to the requested records, with redactions where applicable, once the Complainant remitted payment of same. 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 current 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 current Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne her burden of proof that a special service charge is warranted. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 8.3 or ten (10) hours represents an “extraordinary amount of time and effort” to prepare and disclose 100 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). However, the current Custodian may charge the actual cost of the CD used to deliver the records. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). Thus, the current Custodian shall grant access to the requested records, with redactions where applicable, once the Complainant remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The current Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁸**

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

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰

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

Prepared By: Samuel A. Rosado
Staff Attorney

June 23, 2020

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

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

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