



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

August 24, 2021 Government Records Council Meeting

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

Complaint No. 2018-63

v.

South Brunswick Township (Middlesex)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 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 24th Day of August 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: August 25, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

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

GRC Complaint No. 2018-63

v.

**South Brunswick Township (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:³

1. Copies of complaints that were prepared by the South Brunswick Township Police Department (“SBPD”) relating to Drug Recognition Expert (“DRE”) Rolling Logs.
2. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the SBPD from January of 2016 to the present.
3. Copies of drug possession complaints that were prepared and filed by the SBPD from January of 2016 to the present.

Custodian of Record: Barbara Nyitrai

Request Received by Custodian: March 1, 2018

Response Made by Custodian: March 12, 2018; March 14, 2018; April 4, 2018

GRC Complaint Received: April 10, 2018

Background

July 27, 2021 Council Meeting:

At its July 27, 2021 public meeting, the 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, found that:

1. The Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.

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

² Represented by Donald J. Sears, Director of Law (Monmouth Junction, NJ).

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

2. The Custodian provided an insufficient response in violation of N.J.S.A. 47:1A-5(g) and failed to provide the responsive records in the medium requested pursuant to N.J.S.A. 47:1A-5(d). The Custodian also imposed an unwarranted special service charge. N.J.S.A. 47:1A-5(c). However, the Custodian provided responsive records to the Complainant and fully complied with the Council's February 26, 2020 Interim Order by timely refunding the assessed special service charge. 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 February 26, 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 refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. 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 July 29, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval on August 10, 2021, by the Township of South Brunswick ("Township").

On August 12, 2021, the GRC e-mailed the parties to request an update and confirmation that the settlement has been approved by the Township. That same day, the Complainant e-mailed the GRC, advising that the Township approved the settlement between the parties.

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 July 29, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval on August 10, 2021, by the Township. On August 12, 2021, the Complainant confirmed via e-mail that the Township approved the settlement between the parties.

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

August 17, 2021



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

July 27, 2021 Government Records Council Meeting

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

Complaint No. 2018-63

v.

South Brunswick Township (Middlesex)
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 Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian provided an insufficient response in violation of N.J.S.A. 47:1A-5(g) and failed to provide the responsive records in the medium requested pursuant to N.J.S.A. 47:1A-5(d). The Custodian also imposed an unwarranted special service charge. N.J.S.A. 47:1A-5(c). However, the Custodian provided responsive records to the Complainant and fully complied with the Council’s February 26, 2020 Interim Order by timely refunding the assessed special service charge. 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 February 26, 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 refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. 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**

**Rotimi Owoh, Esq., (On Behalf of
African American Data and Research Institute)¹
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GRC Complaint No. 2018-63

v.

**South Brunswick Township (Middlesex)²
Custodial Agency**

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2. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the SBPD from January of 2016 to the present.
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Custodian of Record: Barbara Nyitrai

Request Received by Custodian: March 1, 2018

Response Made by Custodian: March 12, 2018; March 14, 2018; April 4, 2018

GRC Complaint Received: April 10, 2018

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the February 19, 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’s March 23, 2018 response was insufficient because she failed to address the Complainant’s preferred method of delivery. N.J.S.A. 47:1A-5(g). Specifically, the Custodian notified the Complainant that the records were available for pick-up and did not address the Complainant’s request for electronic delivery via e-

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

² Represented by Donald J. Sears, Director of Law (Monmouth Junction, NJ).

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

mail. See Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).

2. The Custodian's failure to provide the responsive records to the Complainant in the medium requested (electronic) resulted in a violation of OPRA. Specifically, the evidence of record indicates that the Custodian had the ability to provide the records through other forms of electronic media and failed to do so. N.J.S.A. 47:1A-5(d). See also Scheeler v. N.J. Dep't of Educ., GRC Complaint No. 2014-172 (Interim Order dated September 30, 2014). However, the Council should decline to order disclosure of the records in the requested method of delivery because the Complainant offered and acquiesced to receiving the records by regular mail via the U.S. Postal Service, and the Custodian mailed same on April 3, 2018.
3. The Custodian failed to demonstrate that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that the charged fee represents the actual time and effort required to prepare and disclose the records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199, 204 (Law Div. 2002). Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the "actual cost." Thus, the Custodian must refund the total amount of the charge (\$295.84) to the Complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
5. 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.
6. 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 February 28, 2020, the Council distributed its Interim Order to all parties. On March 2,

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."

⁶ 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.

2020, the Custodian responded to the Council's Interim Order. The Custodian provided a copy of a check in the amount of \$295.89 for the assessed special service charge, as well as a certified confirmation of compliance to the Executive Director. The Custodian certified that the check was mailed to the Complainant that same day.

Analysis

Compliance

At its February 26, 2020 meeting, the Council ordered the Custodian to refund the total amount assessed to the Complainant as a special service charge. 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 February 28, 2020 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 March 6, 2020.

On March 2, 2020, the third (3rd) business day after receipt of the Council's Order, the Custodian responded in writing, providing a certified confirmation of compliance to the Executive Director, and a scanned copy of the check issued to the Complainant in the amount of \$295.89. Furthermore, the Custodian certified that the check was mailed to the Complainant on March 2, 2020.

Therefore, the Custodian complied with the Council's February 26, 2020 Interim Order because she responded in the prescribed time frame providing a refund 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)).

The Custodian provided an insufficient response in violation of N.J.S.A. 47:1A-5(g) and failed to provide the responsive records in the medium requested pursuant to N.J.S.A. 47:1A-5(d). The Custodian also imposed an unwarranted special service charge. N.J.S.A. 47:1A-5(c). However, the Custodian provided responsive records to the Complainant and fully complied with the Council's February 26, 2020 Interim Order by timely refunding the assessed special service charge. 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 SBPD based upon DRE rolling logs, as well as complaints pertaining to drug possession or DUI/DWI offenses. The Custodian assessed a special service charge to process the request. Although the Complainant paid the assessed charge, he filed the instant complaint asserting that the special service charge was unwarranted.

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 February 26, 2020 Interim Order, the Custodian was required to refund the assessed 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.⁷

Therefore, pursuant to the Council's February 26, 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 refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 26, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian provided an insufficient response in violation of N.J.S.A. 47:1A-5(g) and failed to provide the responsive records in the medium requested pursuant to N.J.S.A. 47:1A-5(d). The Custodian also imposed an unwarranted special service charge. N.J.S.A. 47:1A-5(c). However, the Custodian provided responsive records to the Complainant and fully complied with the Council's February 26, 2020 Interim Order by timely refunding the assessed special service charge. 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 February 26, 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

⁷ 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).

(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 refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. 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



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

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 26, 2020 Government Records Council Meeting

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

Complaint No. 2018-63

Complainant

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South Brunswick Township (Middlesex)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s March 23, 2018 response was insufficient because she failed to address the Complainant’s preferred method of delivery. N.J.S.A. 47:1A-5(g). Specifically, the Custodian notified the Complainant that the records were available for pick-up and did not address the Complainant’s request for electronic delivery via e-mail. See Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Custodian’s failure to provide the responsive records to the Complainant in the medium requested (electronic) resulted in a violation of OPRA. Specifically, the evidence of record indicates that the Custodian had the ability to provide the records through other forms of electronic media and failed to do so. N.J.S.A. 47:1A-5(d). See also Scheeler v. N.J. Dep’t of Educ., GRC Complaint No. 2014-172 (Interim Order dated September 30, 2014). However, the Council should decline to order disclosure of the records in the requested method of delivery because the Complainant offered and acquiesced to receiving the records by regular mail via the U.S. Postal Service, and the Custodian mailed same on April 3, 2018.
3. The Custodian failed to demonstrate that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that the charged fee represents the actual time and effort required to prepare and disclose the records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199, 204 (Law Div. 2002). Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost.” Thus, the Custodian must refund the total amount of the charge (\$295.84) to the Complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
5. 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.
6. 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 26th Day of February 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: February 28, 2020

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 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
February 26, 2020 Council Meeting**

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

GRC Complaint No. 2018-63

v.

**South Brunswick Township (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:³

1. Copies of complaints that were prepared by the South Brunswick Township Police Department (“SBPD”) relating to Drug Recognition Expert (“DRE”) Rolling Logs.
2. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the SBPD from January of 2016 to the present.
3. Copies of drug possession complaints that were prepared and filed by the SBPD from January of 2016 to the present.

Custodian of Record: Barbara Nyitrai

Request Received by Custodian: March 1, 2018

Response Made by Custodian: March 12, 2018; March 14, 2018; April 4, 2018

GRC Complaint Received: April 10, 2018

Background⁴

Request and Response:

On March 1, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 12, 2018, the Custodian responded in writing stating that a special service charge would be imposed to fulfill the request, adding that an extensive number of hours would be required of staff to retrieve and redact the records.

On March 13, 2018, the Complainant responded to the Custodian, asking how much the

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

² Represented by Donald J. Sears, Director of Law (Monmouth Junction, 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 and Research Institute) v. South Brunswick Township (Middlesex), 2018-63 – Findings and Recommendations of the Executive Director

special service charge would be to complete the above-mentioned items. The Complainant stated he would like to have those items completed right away, and would address the remaining items at another time.

On March 14, 2018, the Custodian responded to the Complainant, and broke down the cost of labor to complete Item Nos. 1 and 2 as follows:

- 1 staff member 4 hr @ \$20.67 = \$82.68
- 1 staff member 4 hr @ \$17.84 = \$71.36
- 1 staff member 2 hr @ \$37.47 = \$74.94

The Custodian stated that the total estimated labor cost would be \$228.98, with an additional \$5.90 for copying costs, for a total cost of \$234.88.

Regarding Item No. 3, the Custodian broke down the cost of labor as follows:

- 1 staff member 1.5 hr @ \$20.67 = \$31.00
- 1 staff member 1.5 hr @ \$17.84 = \$26.76

The Custodian stated that the total estimated labor cost would be \$57.76, with an additional \$3.20, for copying costs, for a total cost of \$60.96.

The Custodian stated that the combined total was \$295.84, and requested the Complainant submit a deposit check for \$150. The Custodian also stated that the SBPD have records responsive to Item No. 3 for 2016, but records for 2017 and 2018 were filed through the municipal court, and therefore SBPD no longer maintained those records.

On March 17, 2018, the Complainant e-mailed the Custodian, attaching a copy of a money order for the deposit. The Complainant also stated that he expected receipt of copies of complaints (Item No. 3) from 2016-2018 as requested, and not just for 2016.

On March 19, 2018, the Custodian e-mailed the Complainant, stating that she would notify the Complainant when the records would be ready for pick-up. The Custodian also stated that complaints for 2017 and 2018 must be requested from the municipal court, and that they should have their own form for requesting records.

On March 23, 2018, the Custodian e-mailed to the Complainant, stating that the requested records were ready for pickup. The Custodian also stated there was an outstanding balance of \$145.84. The Complainant responded that same day, stating that he would mail the remaining balance, but also noted that the OPRA request asked for e-mail delivery.

On March 26, 2018, the Custodian replied to the Complainant stating that the files were too big to send through e-mail. The Complainant responded that same day, stating that the Custodian could send the records via the U.S. Postal Service.

On March 27, 2018, the Custodian e-mailed the Complainant stating that postage would cost an additional \$7.25.

On March 30, 2018, the Complainant submitted a money order to the Custodian for \$153.34, comprising the remaining balance of \$145.84 and \$7.25 for postage.

On April 4, 2018, the Custodian mailed the responsive records to the Complainant. The Custodian stated that there were 118 pages of records responsive for Item Nos. 1 and 2, with redactions made to dates of birth pursuant to OPRA's privacy exemption. N.J.S.A. 47:1A-1.1. The Custodian then stated that there were sixty-four (64) pages of responsive records for Item No. 3, with redactions made to driver's license numbers, dates of birth, social security numbers, SBI numbers, telephone numbers, and home addresses under OPRA's privacy exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On April 10, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted imposing a special service charge on his request was unreasonable and excessive, and therefore in violation of OPRA.

The Complainant also contended that any records responsive to his OPRA request should have been sent electronically via e-mail as requested. The Complainant asserted that the Custodian stated in her March 23, 2018 response that the records were ready to be picked up, without mention of his preferred method of delivery. Thus, the Complainant contended that the Custodian's imposition of the postage fee was improper, as she should have sent the responsive records via e-mail.

Statement of Information:

On May 9, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on March 1, 2018. The Custodian certified that the request was forwarded to the SBPD on the day of receipt for their review and response. The Custodian certified that upon review, she estimated that substantial time was needed to retrieve, review, and redact responsive records prior to production. The Custodian certified that after discussion with legal counsel, she provided the Complainant with details of the special service charge on March 14, 2018.

The Custodian certified that she responded in writing on March 23, 2018, stating that records were ready for pickup. The Custodian certified that while the request was for e-mail delivery, the size of the file was too large. The Custodian certified that the Complainant accepted receipt via regular mail on March 26, 2018 and mailed the records to the Complainant on April 3, 2018.

Additional Submissions:

On May 13, 2018, the Complainant responded to the Complainant's SOI. The Complainant asserted that the special service charge of \$295.84 for reviewing and redacting responsive records was unreasonable and excessive. The Complainant asserted that redacting 252 total pages of records did not require an extraordinary expenditure of time and effort on the part of the Township.

The Complainant asserted that nineteen (19) other municipalities either did not charge at all or charged far less than the Township to provide records in response to the same OPRA request. The Complainant asserted that when making a comparative market analysis, it was clear the Township charged far more than was reasonable.

Additionally, the Complainant maintained that he made it clear that he requested e-mail delivery, and the Township violated OPRA by requiring him to either pick up the records or have them physically mailed to him and incur postage costs. The Complainant contended that the Township should be compelled to refund the payment made for such costs.

On December 18, 2019, the GRC requested a 14-point special service charge analysis from the Custodian. On December 26, 2019, the Custodian provided the following responses to the 14-point analysis:

1. What records are requested?

Response:

1. Copies of complaints that were prepared by the SBPD relating to DRE Rolling Logs.
2. Copies of DWI/DUI complaints that were prepared and filed by the SBPD from January of 2016 to the present.
3. Copies of drug possession complaints that were prepared and filed by the SBPD from January of 2016 to the present.

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

Response: They include complaints mentioned in the DRE Rolling Log from January 2016 to current, copies of DRE reports from January 2016 to current and drug possession complaints from 2016 to current.

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

Response: January 2016 to date of request signed 2/27/2018.

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: 290 full-time.

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

Response: There were four (4) people in the records bureau department.

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

Response: Every page is 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: Records bureau clerical staff member @ \$20.67 per hour for 5.5 hours; Records bureau clerical staff member @ \$17.84 per hour for 5.5 hours; Records bureau clerical staff member @ \$37.47 per hour for 2 hours.

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: None.

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: This cost is included with the cost to retrieve, copy, redact, and assemble cost.

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

Response: They are current employees.

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: Sandra Villano, Data Processing Clerk II @ \$20.76/hour; Parame Kannan, Records Clerk II @ 17.84/hour; Nancy Pyne, Information Management Supervisor @ \$37.47/hour.

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

Response: We have a copier machine and information technology available.

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

Response: The employees were required to run queries, isolate case numbers, retrieve documents, copy documents, review, redact and return documents to files.

Request Item Nos. 1 and 2:

- 1 staff member 4 hr @ \$20.67 = \$82.68
- 1 staff member 4 hr @ \$17.84 = \$71.36
- 1 staff member 2 hr @ \$37.47 = \$74.94

The Custodian stated that the total estimated labor cost was \$228.98.

Request Item No. 3:

- 1 staff member 1.5 hr @ \$20.67 = \$31.00
- 1 staff member 1.5 hr @ \$17.84 = \$26.76

The Custodian stated that the total estimated labor cost was \$57.76.

On January 28, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. At the time of the request, did the Township have the means to provide the responsive records on a CD, USB thumb drive, cloud storage, or other electronic medium?

On January 29, 2019 Custodian responded to the GRC. The Custodian certified that the time of the OPRA request, the Township had the means to provide the records via CD, but the Complainant did not indicate that he would accept the CD as a means of delivery. The Custodian certified that due to current computers no longer having CD drives, it would have been unreasonable to provide the records in that format without the Complainant indicating that it would have been acceptable. The Custodian then certified that the Township did not utilize cloud storage at the time of the request nor did the Township have a USB thumb drive to deliver the records. The Custodian certified that the Township would have been able to provide the records via USB thumb drive if the Complainant provided one.

The Custodian certified that if there were any other means of providing the records electronically, the Township would have done so. The Custodian certified that the Complainant did not request that the Township provide the records on any other electronic medium other than e-mail. The Custodian certified that instead of requesting delivery via another electronic medium, the Complainant agreed to accept delivery of the records via regular mail, and the Township proceeded accordingly.

Analysis

Insufficient Response

The GRC has previously adjudicated complaints in which a custodian did not address the complainant's preferred method of delivery. In Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), the complainant identified his preferred method of delivery as "electronic copies on compact disc or USB drive." The custodian timely responded but did not address the complainant's preferred method of delivery. The Council, relying on its past decision in O'Shea v. Twp of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008) (stating "[a]ccording to [the] language of N.J.S.A. 47:1A-5(g), the [c]ustodian was given two ways to comply and should have, therefore, responded

Rotimi Owoh, Esq. (on behalf of African American Data and Research Institute) v. South Brunswick Township (Middlesex), 2018-63 – Findings and Recommendations of the Executive Director

acknowledging the [c]omplainant's preferences with a sufficient response for each.”), held that the custodian's response was insufficient. See also Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) (although the custodian timely responded granting access to the requested record, the custodian's response was insufficient because she failed to address the preferred method of delivery); Wolosky v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2009-194 (Interim Order dated August 24, 2010) (the custodian's response was insufficient because he did not address the complainant's preferred method of delivery).

In the instant complaint, the Complainant sought access to the responsive records via e-mail. However, when the Custodian responded to the OPRA request on March 23, 2018, she notified the Complainant that the records were ready for pick-up. At no point in her initial response does she address the Complainant's preferred method of delivery. Consistent with the Council's decision in Delbury, GRC 2013-240, the Custodian's initial response was insufficient.

Therefore, the Custodian's March 23, 2018 response was insufficient because she failed to address the Complainant's preferred method of delivery. N.J.S.A. 47:1A-5(g). Specifically, the Custodian notified the Complainant that the records were available for pick-up and did not address the Complainant's request for electronic delivery via e-mail. See Delbury, GRC 2013-240.

Conversion of Medium

OPRA provides that:

A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be

- \$ 0.05 per letter size page or smaller, and
- \$ 0.07 per legal size page or larger . . .

Access to electronic records and non-printed materials 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) (emphasis added).]

Further, OPRA provides that:

A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:

- in a medium not routinely used by the agency;

- not routinely developed or maintained by an agency; or
- requiring a substantial amount of manipulation or programming of information technology,

the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

[N.J.S.A. 47:1A-5(d).]

In Scheeler v. N.J. Dep't of Educ., GRC Complaint No. 2014-172 (Interim Order dated September 30, 2014), the complainant sought e-mails sent to him in electronic format via e-mail. The custodian responded stating that he could not e-mail the records due to a size limitation, but that he could provide them on a compact disc for \$2.49. The Council compared the facts in Scheeler to those in McBride v. Twp. of Bordentown (Burlington), GRC Complaint No. 2007-217 (August 2009) and held that the custodian violated N.J.S.A. 47:1A-5(d). The Council reasoned that custodians were required to provide records in the medium requested. The Council held that, as in McBride, the custodian had the ability to e-mail the records to the complainant but failed to do so.

Here, the Complainant sought disclosure of the records via e-mail. The Custodian stated that the records were too big to be sent by e-mail. Thereafter, the Custodian later certified that the Township had the means to provide the records electronically via CD at the time of the request, or via thumb drive if the Complainant provided one for use.

OPRA specifically requires a custodian to make attempts to provide a record in the medium requested. N.J.S.A. 47:1A-5(d). In the instance that a custodian cannot, they are required to provide the record in a medium meaningful to the requestor. Id. Here, the Custodian asserted that the records were too large to be sent electronically via e-mail. However, the Custodian failed to offer the ability to provide the records electronically via CD or thumb drive: which is her legal obligation under N.J.S.A. 47:1A-5(d) if she so had the ability. See Scheeler, 2014-172.

Accordingly, the Custodian's failure to provide the responsive records to the Complainant in the medium requested (electronic) resulted in a violation of OPRA. Specifically, the evidence of record indicates that the Custodian had the ability to provide the records through other forms of electronic media and failed to do so. N.J.S.A. 47:1A-5(d). See also Scheeler, GRC 2014-172. However, the Council should decline to order disclosure of the records in the requested method of delivery because the Complainant was amenable to receiving the records by regular mail via the U.S. Postal Service, and the Custodian mailed same on April 3, 2018.

Special Service Charge

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant

to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .*

[Id. (emphasis added).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post, 360 N.J. Super. at 199. There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Additionally, in complaints where the complainant paid an assessed fee and the Council subsequently determined that the fee was unwarranted or unreasonable, the Council has ordered the public agency to refund monies to complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009) (citing Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008)) (holding that the assessed special service charge was unreasonable and ordering the Custodian to refund the

difference between the \$5.00 fee and the actual cost of \$0.96 (or \$4.04)). See also White v. Monmouth Reg'l High Sch., GRC Complaint No. 2012-218 (Interim Order dated July 23, 2013).

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

Here, the Complainant disputed the assessed special service charge of \$295.84 for 252 pages of complaints and summonses. The Complainant argued that the fee was unwarranted given that several other municipalities provided the same records either without charge, or for a lesser charge than the Township. The Complainant added that other municipalities provided over 1,000 pages of redacted complaints and summonses but charged only for the copying costs incurred.

Conversely, the Custodian argued in the SOI that the fee was warranted and reasonable, as the requested records required a substantial amount of time to respond to retrieve, review, and redact. The Custodian certified that the process took three (3) employees thirteen (13) hours total. The Custodian certified as to the hourly rates for each of the employees and calculated the total based upon the hours each employee spent processing the request.

Upon review of the evidence the GRC is not satisfied that a special service charge was warranted. 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. Here, the Custodian asserted that it took three (3) employees thirteen (13) hours to redact similar information from 252 pages. Moreover, the Custodian did not elaborate as to the specific tasks interfered with or were beyond the scope of the employees' regular job duties.

Moreover, the Custodian provided no evidence to justify the charges for copying complaints and summonses. As mentioned above, the Custodian failed to address the Complainant's preferred method of delivery – e-mail, and instead made paper copies of the records available for pick-up. Additionally, there is no evidence in the record that the Custodian could not redact the records electronically. For these reasons, the associated copy cost of \$9.10 is not supported by the record here.

Accordingly, the Custodian failed to demonstrate that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that the charged fee represents the actual time and effort required to prepare and disclose the records. See N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. 191. Further, the Custodian failed to prove

that the copy cost associated with providing the records electronically was the “actual cost.” Thus, the Custodian must refund the total amount of the charge (\$295.84) to the Complainant. See Coulter, GRC 2008-220.

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’s March 23, 2018 response was insufficient because she failed to address the Complainant’s preferred method of delivery. N.J.S.A. 47:1A-5(g). Specifically, the Custodian notified the Complainant that the records were available for pick-up and did not address the Complainant’s request for electronic delivery via e-mail. See Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Custodian’s failure to provide the responsive records to the Complainant in the medium requested (electronic) resulted in a violation of OPRA. Specifically, the evidence of record indicates that the Custodian had the ability to provide the records through other forms of electronic media and failed to do so. N.J.S.A. 47:1A-5(d). See also Scheeler v. N.J. Dep’t of Educ., GRC Complaint No. 2014-172 (Interim Order dated September 30, 2014). However, the Council should decline to order disclosure of the records in the requested method of delivery because the Complainant offered and acquiesced to receiving the records by regular mail via the U.S. Postal Service, and the Custodian mailed same on April 3, 2018.
3. The Custodian failed to demonstrate that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that the charged fee represents the actual time and effort required to prepare and disclose the records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199, 204 (Law Div. 2002). Further, the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost.” Thus, the Custodian must refund the total amount of the charge (\$295.84) to the Complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. 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**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

February 19, 2020

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.

Rotimi Owoh, Esq. (on behalf of African American Data and Research Institute) v. South Brunswick Township (Middlesex), 2018-63 – Findings and Recommendations of the Executive Director