



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 14, 2021 Government Records Council Meeting

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

Complaint No. 2018-79

v.

Old Bridge Township (Middlesex)
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council ("Council") considered the December 8, 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 14th Day of December 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: December 16, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Prevailing Party Attorney's Fees*
Supplemental Findings and Recommendations of the Executive Director
December 14, 2021 Council Meeting**

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

GRC Complaint No. 2018-79

v.

**Old Bridge Township (Middlesex)²
Custodial Agency**

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

1. Complaints prepared by the Old Bridge Township Police Department ("OBPD") relating to Drug Recognition Expert ("DRE") Rolling Logs.
2. DRE Reports prepared by the OBPD DRE Officer(s) from January 2016 through present.
3. Driving While Intoxicated/Driving Under the Influence ("DWI/DUI") complaints that were prepared by the OBPD from January 2016 through present.
4. Drug possession complaints that were prepared and filed by the OBPD from January 2016 through present.
5. OBPD's "Arrest Listings" from January 2016 through present.

Custodian of Record: Nicole Czerula

Request Received by Custodian: April 10, 2018

Response Made by Custodian: April 19, 2018; April 30, 2018

GRC Complaint Received: May 7, 2018

Background

November 9, 2021 Council Meeting:

At its November 9, 2021 public meeting, the Council considered the October 26, 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 December 15, 2020 Interim Order because she responded in the prescribed time frame certifying that the Complainant took no

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

² Represented by Kenneth W. Lozier, Esq., of Roselli, Griegel, Lozier & Lazzaro, PC (Hamilton, NJ).

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

action regarding the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

2. The Custodian unlawfully denied access to the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council's December 15, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's December 15, 2020 Interim Orders 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 either produce the responsive records or assess a special service charge for production. 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. 423, 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 November 10, 2021, the Council distributed its Interim Order to all parties. On November 29, 2021, the Complainant notified the GRC that the parties have resolved the issue of counsel fees. That same day, the GRC inquired as to whether the Township of Old Bridge ("Township") needed to formally approve the settlement between the parties. On November 30, 2021, Custodian's Counsel responded to the GRC stating that formal approval of the settlement was not required.

Analysis

Compliance

At its November 9, 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 November 10, 2021, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on December 10, 2021. On November 29, 2021, the Complainant notified the GRC that the parties resolved the issue of counsel fees. That same day, the GRC inquired as to whether the settlement needed formal approval from the Township. On November 30, 2021, Custodian's Counsel responded to the GRC stating that formal approval was unnecessary.

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 the Council find 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

December 8, 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

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2018-79

v.

Old Bridge Township (Middlesex)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 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 December 15, 2020 Interim Order because she responded in the prescribed time frame certifying that the Complainant took no action regarding the special service charge. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 3. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council’s December 15, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s December 15, 2020 Interim Orders 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 either produce the responsive records or assess a special service charge for production. 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. 423, 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 9th Day of November 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: November 10, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

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

GRC Complaint No. 2018-79

v.

**Old Bridge Township (Middlesex)²
Custodial Agency**

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

1. Complaints prepared by the Old Bridge Township Police Department (“OBPD”) relating to Drug Recognition Expert (“DRE”) Rolling Logs.
2. DRE Reports prepared by the OBPD DRE Officer(s) from January 2016 through present.
3. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared by the OBPD from January 2016 through present.
4. Drug possession complaints that were prepared and filed by the OBPD from January 2016 through present.
5. OBPD’s “Arrest Listings” from January 2016 through present.

Custodian of Record: Nicole Czerula

Request Received by Custodian: April 10, 2018

Response Made by Custodian: April 19, 2018; April 30, 2018

GRC Complaint Received: May 7, 2018

Background

December 15, 2020 Council Meeting:

At its December 15, 2020 public meeting, the Council considered the December 8, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council’s September 29, 2020 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge for the Complainant’s OPRA request item Nos. 2, 4, and 5.

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

² Represented by Kenneth W. Lozier, Esq., of Roselli, Griegel, Lozier & Lazzaro, PC (Hamilton, NJ).

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

Specifically, although the Custodian informed the GRC of the Complainant's proposed charge rejection within the allotted period, she did not submit her certification until four (4) business days after the response deadline had expired. Notwithstanding, the GRC need not address this issue any further because the Complainant declined to pay the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose records responsive to item Nos. 2, 4, and 5.

2. The Custodian has borne her burden of proof that the proposed special service charge of \$1,148.50 comprising fifty (50) hours at a rate of \$22.97 to locate, retrieve, and copy records responsive to the Complainant's OPRA request item No. 3 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of fifty (50) hours, the Custodian should adjust the special service charge accordingly and notify the Complainant.
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁴ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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."

Procedural History:

On December 16, 2020, the Council distributed its Interim Order to all parties. On December 31, 2020, the Custodian responded to the Council's Interim Order, submitting a certification. The Custodian certified that to date Old Bridge Township ("Township") has not received a response from the Complainant as to accepting or rejecting the special service charge.

Analysis

Compliance

At its December 15, 2020 meeting, the Council ordered the Complainant to remit payment of the special service charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the current Custodian ten (10) business days from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4. On December 16, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on December 23, 2020. Further, the current Custodian's response was due by close of business on January 4, 2021, accounting for the Christmas and New Year's Day holidays.

On December 31, 2020, the ninth (9th) business day after receipt of the Council's Order, the Custodian responded to the Council's Order submitting a certification. The Custodian certified that as of that date the Complainant had not submitted a response either accepting or rejecting the special service charge.

Therefore, the Custodian complied with the Council's December 15, 2020 Interim Order because she responded in the prescribed time frame certifying that the Complainant took no action regarding the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following

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

In the matter before the Council, the Custodian unlawfully denied access to the Complainant’s OPRA request item No. 3. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council’s December 15, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the 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), cert. 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 tickets, complaints and summonses prepared by the Township’s police department pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Complainant also sought arrest listings prepared by the Township’s police department. The Custodian initially denied access to item No. 3, asserting that they were court records. The Complainant thereafter filed the instant complaint, asserting that he was unlawfully

denied access. The Custodian ultimately located responsive records for item No. 3 and imposed a special service charge to process the request.

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 December 15, 2020 Interim Order, the Custodian assessed a warranted and reasonable special service charge to provide the responsive records to the Complainant. Notwithstanding whether the Complainant accepted or reject the charge, the imposition was a reversal of the Custodian's initial denial of access. 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.⁶

Therefore, pursuant to the Council's December 15, 2020 Interim Orders the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to either produce the responsive records or assess a special service charge for production. 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 December 15, 2020 Interim Order because she responded in the prescribed time frame certifying that the Complainant took no action regarding the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.
2. The Custodian unlawfully denied access to the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council's December 15, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was

⁶ 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).

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 December 15, 2020 Interim Orders 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 either produce the responsive records or assess a special service charge for production. 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. 423, 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

October 26, 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

December 15, 2020 Government Records Council Meeting

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

Complaint No. 2018-79

Complainant

v.

Old Bridge Township (Middlesex)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council ("Council") considered the December 8, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council's September 29, 2020 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge for the Complainant's OPRA request item Nos. 2, 4, and 5. Specifically, although the Custodian informed the GRC of the Complainant's proposed charge rejection within the allotted period, she did not submit her certification until four (4) business days after the response deadline had expired. Notwithstanding, the GRC need not address this issue any further because the Complainant declined to pay the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose records responsive to item Nos. 2, 4, and 5.
2. The Custodian has borne her burden of proof that the proposed special service charge of \$1,148.50 comprising fifty (50) hours at a rate of \$22.97 to locate, retrieve, and copy records responsive to the Complainant's OPRA request item No. 3 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of fifty (50) hours, the Custodian should adjust the special service charge accordingly and notify the Complainant.
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer**

be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver¹ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.²

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

Interim Order Rendered by the
Government Records Council
On The 15th Day of December 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 16, 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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2018-79

v.

**Old Bridge Township (Middlesex)²
Custodial Agency**

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

1. Complaints prepared by the Old Bridge Township Police Department (“OBPD”) relating to Drug Recognition Expert (“DRE”) Rolling Logs.
2. DRE Reports prepared by the OBPD DRE Officer(s) from January 2016 through present.
3. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared by the OBPD from January 2016 through present.
4. Drug possession complaints that were prepared and filed by the OBPD from January 2016 through present.
5. OBPD’s “Arrest Listings” from January 2016 through present.

Custodian of Record: Nicole Czerula

Request Received by Custodian: April 10, 2018

Response Made by Custodian: April 19, 2018; April 30, 2018

GRC Complaint Received: May 7, 2018

Background

September 29, 2020 Council Meeting:

At its September 29, 2020 public meeting, the Council considered the September 22, 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 may have unlawfully denied access to the Complainant’s OPRA request Item No. 3 seeking DWI/DUI complaints and summonses from 2016 to the present. N.J.S.A. 47:1A-6; Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).

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

² Represented by Kenneth W. Lozier, Esq., of Roselli, Griegel, Lozier & Lazzaro, PC (Hamilton, NJ).

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

Thus, the Custodian must perform a search for responsive records kept and maintained the Township. Should the Custodian not locate and responsive records, she must certify to this fact. Additionally, should the Custodian determine that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.**⁵
3. **In the event the Custodian determines that a special service charge is applicable regarding conclusion No. 1 above, the Custodian shall complete the GRC's 14-point analysis⁶ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. The Custodian has borne her burden of proof that the proposed special service charge of \$1,451.10 comprising seventy (70) hours at a rate of \$20.17 to locate, retrieve, and copy records responsive to the Complainant's OPRA request Item Nos. 2, 4, and 5 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where

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

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁶ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

5. **The Complainant shall comply with conclusion No. 4 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁷ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁸**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 30, 2020, the Council distributed its Interim Order to all parties. On October 5, 2020, the Custodian e-mailed the Complainant stating that a special service charge was necessary to process the Complainant's request for "DWI/DUI complaints and summonses from 2016 to present." In accordance with the Interim Order's conclusion No. 3, the Custodian provided the following responses to the 14-point analysis:

1. What records are requested?

Response: DWI/DUI complaints from January 2016 through present.

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

Response: These are records of Driving While Intoxicated, also known as Driving Under the Influence. There are an estimated 200 records.

⁷ 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.

⁸ "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. What is the period of time over which the records extend?

Response: The records are from 2016 to present.

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

Response: The records are from 2016 to present.

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

Response: The police department/agency has a total of 102 sworn officers, and twenty-two (22) civilian employees.

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

Response: There is one (1) employee available.

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

Response: Redactions must include Driver's license number, SBI – State Bureau of Investigation #, Social Security number, booking photo, and any other applicable redactions necessary.

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

Response: The lowest paid records clerk is paid \$22.91 hourly and it is estimated to take fifty (50) hours to locate, retrieve, and assemble the records.

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: N/A

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: N/A

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 the lowest paid employee in the department capable of performing this task.

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: Linda Krupski, Records Clerk @ 22.97 an hour will perform this task.

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

Response: There are copy machines available and other technological ways to process and relay information in the Township.

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

Response: It will take an estimated fifty (50) hours to locate, sort, copy, redact, and process an estimated two hundred (200) documents responsive to this request. This totals \$1,148.50 and must be approved and paid for before we begin processing this request.

That same day on October 5, 2020, the Complainant responded to the Custodian. The Complainant requested a breakdown of how many records were responsive for the years 2016, 2017, and from January 1, 2018 through April 19, 2018. The Complainant also stated that he was rejecting the special service charge for records responsive to item Nos. 2, 4, and 5.

On October 7, 2020, the Custodian responded to the Complainant, first stating that no responsive records exist for the 2016 year as they were destroyed prior to the date of the OPRA request. The Custodian then stated that for the years 2017 and 2018, the DWI/DUI documents were loosely strewn in one (1) banker's box. The Custodian stated that she estimated there were 17,000 summonses in that box and would need to be reviewed, sorted, copied, redacted and processed, and was therefore the basis for the special service charge. The Custodian stated that it was not possible to determine how many records exist for 2017 and 2018. That same day, the Complainant responded to the Custodian, stating that he believed the estimated charge was excessive and requested the GRC determine the reasonableness of the amount.

On October 21, 2020, the Custodian provided certifications in response to the Council's Interim Order. Therein, the Custodian certified that the Complainant rejected the special service charge for records responsive to item Nos. 2, 4, and 5. The Custodian also certified that the Complainant disputed the reasonableness for the estimated charge for records responsive to item No. 3.

Analysis

Compliance

At its September 29, 2020 meeting, the Council ordered the Complainant to remit payment of the special service charge for item Nos. 2, 4, and 5, or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the

Complainant's willingness or refusal to pay the special service charge, allotting ten (10) business days from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4.

Additionally, the Council ordered the Custodian to provide responsive records for item No. 3, or if applicable, provide and estimated special service charge along with a 14-point analysis within five (5) business days. The Council also ordered the Complainant to remit payment of the special service charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's refusal to pay the special service charge in accordance with R. 1:4-4 and provide same to the Executive Director within twenty (20) business days of receipt.

On September 30, 2020, the Council distributed its Interim Order to all parties, providing the Custodian and Complainant five (5) business days to comply with the terms of said Order. Thus, the initial responses were due by close of business on October 7, 2020. Furthermore, the Custodian's certification as to the Complainant's desire to purchase item Nos. 2, 4, and 5 was due by close of business on October 15, 2020, and October 29, 2020 for item No. 3.

On October 5, 2020, the Custodian submitted to the Complainant a 14-point analysis and estimated special service charge for OPRA request item No. 3. That same day, the Complainant responded to the Custodian, requesting the total number of responsive records broken down by year. The Complainant also rejected the special service charge for OPRA request item Nos. 2, 4, and 5.

On October 7, 2020, the Custodian responded to the Complainant's request, stating that the number of responsive records for item No. 3 could not be broken down by year. The Complainant replied that same day, stating that he believed the estimated charge was excessive and requested the GRC determine its reasonableness.

On October 21, 2020, the fourteenth (14th) business day after receipt of the Council's Order, the Custodian provided certifications to the Executive Director stating that the Complainant declined to purchase records responsive to item Nos. 2, 4, and 5. The Custodian also certified that the Complainant believed the estimated special service charge to process records responsive to item No. 3 was excessive. Thus, although the Complainant timely submitted a certification regarding item No. 3, her certification regarding item Nos. 2, 4, 5 was submitted after the response deadline. Therefore, the Custodian did not fully comply with the Council's Order due to a timeliness issue.

Accordingly, the Custodian did not fully comply with the Council's September 29, 2020 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge for the Complainant's OPRA request item Nos. 2, 4, and 5. Specifically, although the Custodian informed the GRC of the Complainant's proposed charge rejection within the allotted period, she did not submit her certification until four (4) business days after the response deadline had expired. Notwithstanding, the GRC need not address this issue any further because

the Complainant declined to pay the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose records responsive to item Nos. 2, 4, and 5.

Special Service Charge

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

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

[Id. (emphasis added).]

The determination of what constitutes an "extraordinary expenditure of time and effort" under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the "extraordinary burden" placed upon the school district in responding to the request. Id.

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

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

Here, the Custodian provided a 14-point analysis reflecting the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the proposed charge of \$1,148.50 comprised 50 hours of labor. The Custodian asserted that one (1) employee, Ms. Krupski, would be assigned to process the request at a rate of \$22.97, which was the lowest hourly rate. The Custodian asserted that there were an estimated 200 responsive documents within a banker's box containing 17,000 pages of complaints. The Custodian asserted that each document required review and redaction of personal information, and the estimated time included all aspects of the production process from locating to review and redaction.

A review of the forgoing finds that the Township's estimated expenditure of fifty (50) hours represents an "extraordinary time and effort" to produce responsive records given the scope of the search and the disruption to the employee's regular duties. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Specifically, although the Custodian asserted that the estimated 200 responsive records had to be located and processed, she had informed the Complainant in her October 7, 2020 correspondence that the records were contained in a banker's box that also stored approximately 17,000 other complaints. Although the estimated number of complaints differs, the Custodian's assertion is consistent with the Custodian's and Captain Fritz, Jr.'s respective certifications stating that the responsive complaints were haphazardly mixed in with 17,000 other complaints filed in a banker's box. See Owoh, Esq. (O.B.O. AADARI) v. Old Bridge Twp. (Middlesex), GRC Complaint No. 2018-79 (Interim Order dated September 29, 2020). Given that none of the records are electronically stored, it is reasonable to estimate that just the search for responsive records within the banker's box would be a time-consuming task. The GRC is further persuaded by Capt. Fritz's prior certification that assigning Ms. Krupski to the task would substantially disrupt her normal duties of researching, acquiring, and copying records for discovery, court, and law enforcement. Id. Thus, the evidence of record adequately supports that a special service charge for fifty (50) hours is warranted here.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$1,148.50 comprising fifty (50) hours at a rate of \$22.97 to locate, retrieve, and copy records responsive to the Complainant's OPRA request item No. 3 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-311. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of fifty (50) hours, the Custodian should adjust the special service charge accordingly and notify the Complainant.

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 did not fully comply with the Council's September 29, 2020 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge for the Complainant's OPRA request item Nos. 2, 4, and 5. Specifically, although the Custodian informed the GRC of the Complainant's proposed charge rejection within the allotted period, she did not submit her certification until four (4) business days after the response deadline had expired. Notwithstanding, the GRC need not address this issue any further because the Complainant declined to pay the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose records responsive to item Nos. 2, 4, and 5.
2. The Custodian has borne her burden of proof that the proposed special service charge of \$1,148.50 comprising fifty (50) hours at a rate of \$22.97 to locate, retrieve, and copy records responsive to the Complainant's OPRA request item No. 3 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of fifty (50) hours, the Custodian should adjust the special service charge accordingly and notify the Complainant.
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁹ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's**

⁹ 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.

response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.¹⁰

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

Prepared By: Samuel A. Rosado
Staff Attorney

December 8, 2020

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Old Bridge Township (Middlesex), 2018-79 – 10
Supplemental Findings and Recommendations of the Executive Director



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 29, 2020 Government Records Council Meeting

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

Complaint No. 2018-79

Complainant

v.

Old Bridge Township (Middlesex)
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council ("Council") considered the September 22, 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. Item No. 3 seeking DWI/DUI complaints and summonses from 2016 to the present. N.J.S.A. 47:1A-6; Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). Thus, the Custodian must perform a search for responsive records kept and maintained the Township. Should the Custodian not locate and responsive records, she must certify to this fact. Additionally, should the Custodian determine that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Executive Director.²**
3. **In the event the Custodian determines that a special service charge is applicable regarding conclusion No. 1 above, the Custodian shall complete the GRC's 14-point analysis³ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

³ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

- (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.
4. The Custodian has borne her burden of proof that the proposed special service charge of \$1,451.10 comprising seventy (70) hours at a rate of \$20.17 to locate, retrieve, and copy records responsive to the Complainant's OPRA request Item Nos. 2, 4, and 5 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
 5. The Complainant shall comply with conclusion No. 4 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁴ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁵
 6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
 7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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."

Interim Order Rendered by the
Government Records Council
On The 29th Day of September 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: September 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

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

GRC Complaint No. 2018-79

v.

**Old Bridge Township (Middlesex)²
Custodial Agency**

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

1. Complaints prepared by the Old Bridge Township Police Department (“OBPD”) relating to Drug Recognition Expert (“DRE”) Rolling Logs.
2. DRE Reports prepared by the OBPD DRE Officer(s) from January 2016 through present.
3. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared by the OBPD from January 2016 through present.
4. Drug possession complaints that were prepared and filed by the OBPD from January 2016 through present.
5. OBPD’s “Arrest Listings” from January 2016 through present.

Custodian of Record: Nicole Czerula

Request Received by Custodian: April 10, 2018

Response Made by Custodian: April 19, 2018; April 30, 2018

GRC Complaint Received: May 7, 2018

Background⁴

Request and Response:

On April 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 19, 2018, the Custodian responded in writing stating that an extension until April 30, 2018 was needed due to the potential redactions needed to process the request. The Complainant responded that same day consenting to the extension request.

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

² Represented by Kenneth W. Lozier, Esq., of Roselli, Griegel, Lozier & Lazzaro, PC (Hamilton, 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. Old Bridge Township (Middlesex), 2018-79 – Findings and Recommendations of the Executive Director

On April 30, 2018, the Custodian responded in writing stating that for Item No. 1, redactions would be needed prior to disclosure. The Custodian then stated that a special service charge would be imposed for Item Nos. 2, 4, and 5 due to the redactions needed to process the records. The Custodian stated that each request item would cost \$1,015.77, comprising seven (7) business days, at seven (7) hours each day, at an hourly rate of \$20.73. The Custodian stated that a two (2) week extension would cover the time needed to review and redact the records. The Custodian stated that payment was needed first before the clock began on the extension. For Item No. 3, the Custodian stated that the requested records were court documents, unless the Complainant specified the type of document.

On May 3, 2018, the Custodian e-mailed the Complainant asking whether he would agree to the estimated charge.

Denial of Access Complaint:

On May 7, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the fees and charges assessed were excessive and above OPRA’s set rates. The Complainant also disputed the contention that each item would cost the same amount to process. The Complainant argued that other municipalities have produced the same records for substantially less than Old Bridge Township (“Township”).

Additional Correspondence:

On May 23, 2018, the Custodian e-mailed the Complainant stating that upon reviewing the request, she determined that fulfilling Item Nos. 2, 4, and 5 may only take up to one (1) week at a maximum cost of \$1,015.77. The Custodian also stated that payment was required prior to processing.

On May 24, 2018, the Custodian e-mailed the Complainant providing responsive records for Item No. 1. In a subsequent e-mail, the Custodian stated that the estimated special service charge to fulfill Item Nos. 2, 4, and 5 had been revised to take up to ten (10) business days at a total cost of \$1,451.10.

Later that same day, the Custodian e-mailed the Complainant stating that the estimated fee had been revised again. The Custodian stated that processing the request would take seven (7) business days and cost a maximum of \$1,015.77 to fulfill Item Nos. 2, 4, and 5.

Statement of Information:

On May 24, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 10, 2018. The Custodian certified that she responded in writing on April 19, 2018 seeking an extension of time to respond. The Custodian certified that she responded on April 30, 2018, stating that Item No. 1 needed redactions, and that Item No. 3 sought court documents. The Custodian also stated that fulfilling the remaining items required a special service charge of \$1,015.77 each for a total of \$3,047.31.

The Custodian also included the correspondence dated May 23, 2018 and May 24, 2018, wherein she informed the Complainant that the estimated charge had been revised. The Custodian asserted that the total cost was initially reduced to \$1,015.77, then \$1,451.10, then back to \$1,015.77 to process Item Nos. 2, 4, and 5.

The Custodian also included a certification from OBPD Captain Donald Fritz, Jr. Therein, Capt. Fritz certified that fulfilling the request would require removing a staff member from their normal duties and reassigning them to the task. Capt. Fritz also certified that the complaints were not searchable within OBPD's reporting system, and the staffer would need to read each arrest report within the requested period to identify whether they were responsive. Capt. Fritz certified that the estimated time to review each arrest report, collect those applicable to the request, and produce them to the Complainant would be seven (7) working days. Capt. Fritz certified that the lowest hourly rate for staff at OBPD's records bureau was \$20.73. Capt. Fritz certified that at seven (7) hours per day for seven (7) working days, the total cost would be \$1,015.77.

Additional Submissions:

On May 27, 2018, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant first argued that he was a prevailing party as result of the Township's revisions to the estimated special service charge, as well as the production of records responsive to Item No. 1. The Complainant noted after the Custodian provided the initial estimate of \$3,047.31, he filed the instant complaint on May 7, 2018. The Complainant asserted that the Custodian offered revisions on May 23, 2018 and May 24, 2018 respectively. The Complainant also asserted that the Custodian provided records responsive to Item No. 1 on May 24, 2018 without cost. The Complainant asserted that the complaint was thus the catalyst which caused the Township to revise its estimated special service charge and produce responsive records.

The Complainant also asserted that the Township failed to produce records responsive to Item No. 3. The Complainant asserted that the State's retention schedules required OBPD to retain complaints and summonses for at least sixty (60) days after disposition. The Complainant also asserted that the State's retention schedules required the Township to retain copies of the records for at least fifteen (15) years. The Complainant therefore argued that the Township had no basis to withhold responsive records since the request sought records from just two (2) years prior.

The Complainant also argued that even at the revised estimate, the special service charge was excessive. The Complainant noted that other municipalities have complied with similar requests without imposing any charge or charged the copying rates set by OPRA.⁵ The Complainant asserted that the Township charged far more than was reasonable when making a comparative market analysis with the other municipalities. The Complainant also asserted that the Custodian's downward revisions were evidence that the initial estimate was excessive at the time of filing.

⁵ The Complainant identified seven (7) municipalities that complied with similar requests submitted by the Complainant on behalf of AADARI.
Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Old Bridge Township (Middlesex), 2018-79 – Findings and Recommendations of the Executive Director

On January 22, 2020, the GRC requested a 14-point special service charge analysis from the Custodian. On January 28, 2020, the Custodian provided the following responses to the 14-point analysis:

1. What records are requested?

Response:

2. DRE Reports prepared by the OBPD's DRE Officer(s) from January 2016 through present.
4. Drug possession complaints that were prepared and filed by the OBPD from January 2016 through present.
5. OBPD's "Arrest Listings" from January 2016 through present.

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

Response: The request seeks police records including drug complaints, DWI complaints, and arrest reports (the Complainant requested arrest listings which is not a document and does not exist, so I requested the reports which would provide the information being sought in the request). The total number of pages is 103.

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

Response: The period of time was from January 2016 through April 2018 covering twenty-four (24) months.

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

Response: None of the requested documents were placed in off-site storage or archives as of the date of the requested but they had to be located in the current case filing system.

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

Response: The total number of employees for the Township is 245 which includes Administration, Public Works, Recreation, Police Department Animal Shelter, Code Enforcement, Engineering, Finance, Planning, Tax Assessors, Library and Clerk's office. There are several other departments which really have no impact on this issue. The Township does have four (4) clerks in the Municipal Clerk's office, one of which is designated to handle OPRA requests. Police records has four (4) clerks, OBPD designated Capt. Fritz to oversee all OPRA requests of police documents given the privacy and investigative concerns involved with police records and the Assistant Township Attorney reviews all requests for redaction and approval for release.

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

Response: See No. 5 above.

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

Response: Due to the sensitive nature of all of the requests made, each document had to be located, read, and reviewed by Capt. Fritz for medical/HIPPA information, personal identifiers and photographs which needed to 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: This work required one police records clerk at \$20.73 an hour (the lowest hourly rate in the records clerk office). It should be noted that the Township did not bill the time required of Capt. Fritz to review and redact, the Custodian's time, or the Township Assistant Attorney's time.

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: This does not apply as this was not a request to view or review documents but to produce same. As indicated previously these documents were in-house so there was no extraordinary time to return the documents to storage.

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

Response: See No. 9 above.

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

Response: The most competent, lowest paid employee in the Police Records Department was utilized to process this request but is tasked with other daily responsibilities including but not limited to researching, acquiring, and copying records on a daily basis for discovery, court and law enforcement.

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: Linda Krupski, the Police Records Clerk employee earning \$20.73 an hour in 2018, and Nicole Czerula, Council Stenographer and Township Clerk employee earning \$21.96 an hour also in 2018.

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

Response: The Township has the technology to search, copy, print, scan and copy all documents and records.

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

Response: The cost was initially determined to be an estimated fee of \$1,015.77, representing seven (7) business days and seventy (70) business hours, with an hourly rate of the lowest paid qualified police records clerk, earning \$20.73 an hour for each item.

The cost for the time spent for review and redaction by Capt. Fritz and the Assistant Township Attorney were not billed or used in the estimate for the cost associated with the request.

The Custodian certified that after receiving the complaint filing, the Township Assistant Attorney questioned the initial amount given to the Complainant. The Custodian also certified that upon speaking with Cpt. Fritz, she realized that the initial amount of \$1,015.77 was the total estimated charge and not per request item. The Custodian certified that she was also told that the estimated processing time was ten (10) business days rather than seven (7). The Custodian certified that she notified the Complainant on May 23, 2018 of her misunderstanding and informed that the cost would be \$1,451.10 total. The Custodian did not mention the additional revision back to \$1,015.7 dated May 24, 2018.

On July 7, 2020, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked:

1. Do OBPD's police officers keep or maintain copies of complaints responsive to Item No. [3] upon submission to the municipal court?
2. Does the Township keep or maintain copies of complaints responsive to Item No. [3] in archives or storage?

On July 13, 2020, the Custodian responded to the GRC's request for additional information. The Custodian certified that OBPD officers did not keep or maintain copies of the complaints, but OBPD itself did. Regarding the second question, the Custodian certified that the complaints were stored, unorganized, in the Township's basement. The Custodian certified that someone would need to physically look through each box to locate any responsive DUI/DWI complaints. The Custodian certified that the Township receives approximately 8,500 summonses a year, and the requested period would include over 16,000 documents.

On July 14, 2020, the Complainant e-mailed the GRC in response to the Custodian. The Complainant stated that the Custodian failed to provide any responsive summonses and complaints maintained by OBPD or stored in the Township's basement. The Complainant therefore asserted that the Custodian violated OPRA by not providing the Complainant with responsive records available at the time of the request.

On July 29, 2020, the GRC submitted an additional request for information to the Custodian. Specifically, the GRC asked:

1. What is the actual requested special service charge and total number of hours estimated to process the request?
2. Which requested Items does the special service charge encompass?
3. Has a search, retrieval, review, and redaction of responsive records already occurred, in whole or in part, regarding request Items identified in Question No. 2 above? If so, please provide a detailed description as well as a breakdown of the number of hours already expended by whom and for which task. Please include those hours expended but not billed, such as Capt. Fritz's time spent reviewing and redacting records. Please do not include time spent locating and processing request Items that were not billed (i.e., Item Nos. 1 and 2).
4. Please provide a breakdown as to how many of the 103 pages of records identified in the 14-point analysis pertains to each request Item (for example: 20 pages pertain to Item No. [2], 40 pages pertain to Item No. [3], No responsive records located for Item No. [4]).
5. If a portion of the 103 pages of records pertain to Item No. [3], did the search for those records stem from complaints stored in the Township's basement as mentioned in your certification dated July 13, 2020?

On August 11, 2020, the Custodian responded to the GRC's request for additional information. The Custodian certified that the estimated charge was \$1,451.10 for seventy (70) hours of labor to fulfill Item Nos. 2, 4, and 5. Regarding question no. 3, the Custodian referred to Capt. Fritz's certification that he only recently discovered the documents in July 2020. Capt. Fritz also certified that there has been no review or redactions of criminal or motor vehicle complaints.

Regarding question nos. 4 and 5, the Custodian certified that seventeen (17) pages pertained to Item No. 1, and eighty-six (86) pages pertained to Item No. 2, with none of the documents pertaining to Item No. 3.

Regarding request Item No. 3, Capt. Fritz certified that during a records purge, banker's boxes were located and secured which contained motor vehicle complaints for the years 2017-2018, and no complaints for the 2016 year. Capt. Fritz also certified that motor vehicle complaints are stored both electronically and manually depending on how they are issued. The Custodian certified that DWI/DUI complaints may be located within the boxes, but the cost of processing Item No. 3 has not been calculated. The Custodian certified that it may take approximately sixteen (16) hours to sort through approximately 12,000 complaints to determine which are DWI/DUI.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Furthermore, the Council has previously held that criminal complaints and summonses are subject to disclosure. Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). See also Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (January 2016). The Council has also held that judicial or court records still meet the definition of a government if received or kept on file by an agency subject to OPRA. See Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014).

Item No. 3

In the instant matter, the Complainant request Item No. 3 sought DWI/DUI complaints and summonses held by OBPD from 2016 to the present. The Custodian responded stating that the requested summonses and complaints were court records. The Complainant asserted that the Township was required to keep and maintain copies of the requested records for a set period in accordance with the State’s retention schedules.

Upon review, the GRC is persuaded that the Custodian may have unlawfully denied access. While the Custodian asserted that the requested complaints and summonses were court records, the Custodian later certified that the Township possessed and maintained physical copies of motor vehicle complaints in its basement. Since such records are subject to disclosure under Merino, GRC 2003-110, the Custodian should have conducted a search for responsive records possessed by the Township. Additionally, that the responsive records are considered court records does not absolve the Township’s obligation to produce those government records it in fact keeps and maintains. Pitts, GRC 2013-299; N.J.S.A. 47:1A-1.1.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s OPRA request Item No. 3 seeking DWI/DUI complaints and summonses from 2016 to the present. N.J.S.A. 47:1A-6; Merino, GRC 2003-110. Thus, the Custodian must perform a search for responsive records kept and maintained the Township. Should the Custodian not locate and responsive records, she must certify to this fact. Additionally, should the Custodian determine that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

Special Service Charge

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

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public

agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .*

[Id. (emphasis added).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

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

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

Item Nos. 2, 4, and 5

Initially, the GRC notes that the Custodian’s initial estimated charge was \$1,015.77 for Item Nos. 2, 4, and 5 each, for a total of \$3,047.31. The Custodian certified that it was not until after the complaint filing that she realized her mistake and the \$1,015.77 estimate was the total to process all three (3) items. Additionally, the Custodian notified the Complainant of the error on May 23, 2018, and then informed the Complainant that the estimated charge had been revised to \$1,451.10 on May 24, 2018. However, while the Custodian noted the \$1,451.10 revision in response to the GRC’s 14-point analysis, the Custodian did not mention the subsequent revision back to \$1,015.77 sent to the Complainant later that day. Notwithstanding the above, based upon the Custodian’s certification in response to the GRC’s request for a 14-point analysis and subsequent request for additional information, the GRC will address the special service charge issue based upon the revised estimate of \$1,451.10 to process Item Nos. 2, 4, and 5.

Here, the Custodian provided a 14-point analysis reflecting the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the proposed charge of \$1,451.10 comprised 70 hours or ten (10) business days. The Custodian certified that one (1) out of the four (4) OBPD clerks would be assigned to process the request at \$20.17 per hour, which was the lowest hourly rate. The Custodian certified that the Complainant's OPRA request sought several categories of complaints and arrest listings spanning over two (2) years, with each document requiring review and redaction of personal information. However, the Custodian certified that the estimated time was only for Ms. Krupski to locate, produce, and copy the records after the review and redaction procedures were completed. The Custodian certified that the time spent by the herself, Capt. Fritz, and the Township Attorney to review and redact the records was not part of the estimate.

A review of the forgoing supports the Township's estimated expenditure of seventy (70) hours represents an "extraordinary time and effort" to produce responsive records given the number of potential records and the disruption to the employee's regular duties. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). In particular, Capt. Fritz certified that the requested complaints were not searchable, and therefore Ms. Krupski would need to locate responsive records by reviewing each arrest report filed during the requested period and determine whether they were responsive. Capt. Fritz also certified that once applicable arrests were located, their respective investigation reports could be produced. Given the Custodian and Capt. Fritz's estimation of the annual number of summonses issued by OBPD, a substantial amount of time would be needed to read through each arrest report and locate responsive records. The GRC is further persuaded by Capt. Fritz's certification that assigning Ms. Krupski to the task would disrupt her normal duties of researching, acquiring, and copying records for discovery, court, and law enforcement. Thus, the evidence of record adequately supports that a special service charge for seventy (70) hours is warranted here.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$1,451.10 comprising seventy (70) hours at a rate of \$20.17 to locate, retrieve, and copy records responsive to the Complainant's OPRA request Item Nos. 2, 4, and 5 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-311. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the Complainant's OPRA request Item No. 3 seeking DWI/DUI complaints and summonses from 2016 to the present. N.J.S.A. 47:1A-6; Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). Thus, the Custodian must perform a search for responsive records kept and maintained the Township. Should the Custodian not locate and responsive records, she must certify to this fact. Additionally, should the Custodian determine that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
3. **In the event the Custodian determines that a special service charge is applicable regarding conclusion No. 1 above, the Custodian shall complete the GRC's 14-point analysis⁸ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

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.

⁸ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Old Bridge Township (Middlesex), 2018-79 – Findings and Recommendations of the Executive Director

4. The Custodian has borne her burden of proof that the proposed special service charge of \$1,451.10 comprising seventy (70) hours at a rate of \$20.17 to locate, retrieve, and copy records responsive to the Complainant's OPRA request Item Nos. 2, 4, and 5 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
5. **The Complainant shall comply with conclusion No. 4 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁹ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.¹⁰**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

September 22, 2020

⁹ 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.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Old Bridge Township (Middlesex), 2018-79 – Findings and Recommendations of the Executive Director