



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

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2018-80

Complainant

v.

Township of Washington (Gloucester)
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 the Council should 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 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 15, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

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

GRC Complaint No. 2018-80

v.

**Township of Washington (Gloucester)²
Custodial Agency**

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

1. Complaints prepared by the Washington Police Department (“WPD”) relating to the Drug Recognition Expert (“DRE”) Rolling Logs.
2. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the WPD from January 2016 through present.
3. Drug possession complaints prepared and filed by the WPD from January 2016 through present.

Custodian of Record: Leo Selb⁴

Request Received by Custodian: April 13, 2018

Response Made by Custodian: April 16, 2018; April 17, 2018; April 20, 2018; April 28, 2018;
May 4, 2018

GRC Complaint Received: May 7, 2018

Background

August 24, 2021 Council Meeting:

At its August 24, 2021 public meeting, the Council considered the August 17, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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

² Represented by Stuart A. Platt, Esq., Washington Township Solicitor (Sewell, N.J.).

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

⁴ The current Custodian of Record is Christine Ciallella.

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

Procedural History:

On August 25, 2021, the Council distributed its Interim Order to all parties. On September 13, 2021, the Complainant e-mailed the Government Records Council ("GRC") advising that the parties have settled the issue of counsel fees subject to formal approval by the Township of Washington ("Township"). The Complainant also stated that the meeting for approval was scheduled for September 22, 2021. On September 23, 2021, the Complainant e-mailed the GRC requesting to dismiss the matter due to the Township's approval of the settlement via Resolution R257-2021.

Analysis

Prevailing Party Attorney's Fees

At its August 24, 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 August 25, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant’s response was due by close of business on September 23, 2021. On September 13, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval by the Township on September 22, 2021. On September 23, 2021, the Complainant notified the GRC that the Township approved the settlement between the parties.

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

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council should 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

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

August 24, 2021 Government Records Council Meeting

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

Complaint No. 2018-80

v.

Township of Washington (Gloucester)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian failed to comply with the Council’s May 19, 2020 Interim Order. Specifically, the current Custodian failed to provide the GRC with a certification pertaining to the Complainant’s willingness or refusal to pay the special service charge. Notwithstanding, the GRC need not address this issue any further because the evidence of record indicates that the Complainant provided payment for the requested records and the Custodian provided same on July 8, 2020.
2. Although the current Custodian failed to comply with the Council’s May 19, 2020 Interim Order, she demonstrated that she provided the Complainant with the requested records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s May 19, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees**

to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

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

GRC Complaint No. 2018-80

v.

**Township of Washington (Gloucester)²
Custodial Agency**

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

1. Complaints prepared by the Washington Police Department (“WPD”) relating to the Drug Recognition Expert (“DRE”) Rolling Logs.
2. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the WPD from January 2016 through present.
3. Drug possession complaints prepared and filed by the WPD from January 2016 through present.

Custodian of Record: Leo Selb⁴

Request Received by Custodian: April 13, 2018

Response Made by Custodian: April 16, 2018; April 17, 2018; April 20, 2018; April 28, 2018; May 4, 2018

GRC Complaint Received: May 7, 2018

Background

May 19, 2020 Council Meeting:

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

1. The Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Additionally, the second component estimating 37.25 hours to “review and redact” the records was reasonable given the

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

² Represented by Stuart A. Platt, Esq., Washington Township Solicitor (Sewell, N.J.).

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

⁴ The current Custodian of Record is Christine Ciallella.

number of potentially responsive records and the number of redactions needed for each. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). However, the first and third components estimating 29.7 hours to “retrieve and print” and “scan and e-mail” the records was unreasonable as the evidence of record does not support the estimated time and effort to conduct those tasks. Furthermore, while the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost,” the Custodian may charge the actual cost of computer disc used to deliver the records. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). Therefore, the total recalculated special service charge is \$929.76 plus the actual cost of the disc, and the Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Custodian shall comply with conclusion No. 1 above by making the amended special service charge 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). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director⁷ within ten (10) business days following receipt of said payment. 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 as described above.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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

Procedural History:

On May 20, 2020, the Council distributed its Interim Order to all parties. On June 4, 2020, the Complainant requested confirmation from the current Custodian that the special service charge payment was received. The current Custodian responded that same day confirming receipt of payment.

On June 15, 2020, the GRC sent an e-mail to the current Custodian, requesting a status update on the Township of Washington's ("Township") compliance with the Interim Order, as no correspondence had been received from either party. That same day, Custodian's Counsel replied to the GRC stating that the Custodian sent a response and received payment from the Complainant for the special service charge. Counsel also stated that the Township requested a two (2) week extension to provide the responsive records due to the size of the request. The Complainant also replied stating that he submitted payment and consented to the extension. On June 17, 2020, the current Custodian provided an e-mail chain indicating that the Complainant provided payment for the requested records.

On July 8, 2020, the current Custodian mailed the Complainant a DVD containing the responsive records. The letter accompanying the DVD also stated that some of the records contained redactions for personally identifying information.

On November 25, 2020, the GRC sent an e-mail to the current Custodian requesting an update on the Township's compliance with the Interim Order, as the parties have not provided correspondence since June 17, 2020. No response was received by the parties.

On July 13, 2021, the GRC requested another status update on the Township's compliance from all parties. The Complainant replied that same day, stating that he submitted payment on May 20, 2020. On July 15, 2021, the current Custodian responded to the GRC stating that a DVD containing the responsive records was mailed to the Complainant on July 8, 2020 and provided a copy of the cover letter. That same day, the Complainant responded to confirm that he received the DVD containing the responsive records.

Analysis

Compliance

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

On May 20, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on May 28, 2020. Further, the Custodian's response was due by close of business on June 4, 2020. Both deadlines accounted for the Memorial Day holiday.⁸

On May 20, 2020, the date of receipt of the Council's Order, the Complainant submitted payment to the Township for the special service charge. On June 4, 2020, the current Custodian confirmed receipt of the payment. However, the current Custodian did not provide the GRC with a certification indicating that the Complainant accepted the charge. The current Custodian did not provide the GRC with any correspondence pertaining to the matter until June 15, 2020.

Additionally, although the evidence of record indicates that the Custodian provided the Complainant with the responsive records on July 8, 2020, neither certification nor notice was provided to the GRC. It was not until after the GRC requested another status update on July 15, 2021, that the current Custodian notified the GRC that the responsive records were provided to the Complainant. Based on the foregoing, the Custodian did not comply with the Interim Order.

Therefore, the current Custodian failed to comply with the Council's May 19, 2020 Interim Order. Specifically, the current Custodian failed to provide the GRC with a certification pertaining to the Complainant's willingness or refusal to pay the special service charge. Notwithstanding, the GRC need not address this issue any further because the evidence of record indicates that the Complainant provided payment for the requested records and the Custodian provided same on July 8, 2020.

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.

⁸ Memorial Day was observed on May 25, 2020.

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)).

Although the current Custodian failed to comply with the Council's May 19, 2020 Interim Order, she demonstrated that she provided the Complainant with the requested records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." Id. at 603 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant sought complaints and summonses prepared by WPD based upon DRE rolling logs, as well as complaints pertaining to drug possession or DUI/DWI offenses. The Custodian assessed a special service charge to process the request. The Complainant filed this instant matter asserting that the special service charge was unwarranted.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's May 19, 2020 Interim Order, although the imposition of the special service charge was warranted, the assessed amount was unreasonable. 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.⁹

⁹ 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 Rotimi Owoh, Esq. (on behalf of African American Data and Research Institute) v. Township of Washington (Gloucester), 2018-80 – 6 Supplemental Findings and Recommendations of the Executive Director

Therefore, pursuant to the Council's May 19, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 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 revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian failed to comply with the Council's May 19, 2020 Interim Order. Specifically, the current Custodian failed to provide the GRC with a certification pertaining to the Complainant's willingness or refusal to pay the special service charge. Notwithstanding, the GRC need not address this issue any further because the evidence of record indicates that the Complainant provided payment for the requested records and the Custodian provided same on July 8, 2020.
2. Although the current Custodian failed to comply with the Council's May 19, 2020 Interim Order, she demonstrated that she provided the Complainant with the requested records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's May 19, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the

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).

Rotimi Owoh, Esq. (on behalf of African American Data and Research Institute) v. Township of Washington (Gloucester), 2018-80 – 7
Supplemental Findings and Recommendations of the Executive Director

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

Prepared By: Samuel A. Rosado
Staff Attorney

August 17, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 19, 2020 Government Records Council Meeting

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

Complaint No. 2018-80

v.

Township of Washington (Gloucester)
Custodian of Record

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

1. The Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Additionally, the second component estimating 37.25 hours to “review and redact” the records was reasonable given the number of potentially responsive records and the number of redactions needed for each. Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). However, the first and third components estimating 29.7 hours to “retrieve and print” and “scan and e-mail” the records was unreasonable as the evidence of record does not support the estimated time and effort to conduct those tasks. Furthermore, while the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost,” the Custodian may charge the actual cost of computer disc used to deliver the records. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). Therefore, the total recalculated special service charge is \$929.76 plus the actual cost of the disc, and the Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Custodian shall comply with conclusion No. 1 above by making the amended special service charge 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). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director³ within ten (10) business days following receipt of said payment. 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 as described above.

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

Interim Order Rendered by the
Government Records Council
On The 19th Day of May 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 20, 2020

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

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

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2018-80

v.

**Township of Washington (Gloucester)²
Custodial Agency**

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

1. Complaints prepared by the Washington Police Department (“WPD”) relating to the Drug Recognition Expert (“DRE”) Rolling Logs.
2. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the WPD from January 2016 through present.
3. Drug possession complaints prepared and filed by the WPD from January 2016 through present.

Custodian of Record: Leo Selb

Request Received by Custodian: April 13, 2018

Response Made by Custodian: April 16, 2018; April 17, 2018; April 20, 2018; April 28, 2018; May 4, 2018

GRC Complaint Received: May 7, 2018

Background⁴

Request and Response:

On April 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 16, 2018, Lieutenant William Lee of the WPD responded to the Complainant seeking clarification of the request. The Complainant responded that same day, asking Lt. Lee to specify what clarifications he needed regarding the request.

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

² Represented by Stuart A. Platt, Esq., Washington Township Solicitor (Sewell, N.J.).

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. Township of Washington (Gloucester), 2018-80 – Findings and Recommendations of the Executive Director

On April 17, 2018, Lt. Lee responded to the Complainant with clarifying questions. For Item No. 1, Lt. Lee asked whether the Complainant was seeking citizen or criminal complaints. Regarding Item Nos. 2 and 3, Lt. Lee asked whether the Complainant was seeking criminal, citizen or anonymous complaints.

On April 18, 2018, the Complainant responded to Lt. Lee, stating that he attached samples of the requested complaints to aid with Lt. Lee's clarification request.

On April 20, 2018, the Custodian responded to the Complainant, stating that it would take ninety (90) calendar days to fulfill the request. The Custodian also stated that a special service charge would be imposed due to the volume of the records, and an estimate would be provided later. The Custodian also stated that the documents would be placed on a compact disc due to the number of records and limitations of what could be sent via e-mail. The Custodian asked the Complainant whether he would accept the extension request, and if so, stated that the new return date would be July 23, 2018.

On April 21, 2018, the Complainant responded to the Custodian consenting to the extension request.

On April 28, 2018, the Custodian responded to the Complainant in writing stating that based on the Complainant's clarifications his request involved thousands of documents requiring review and redactions for personal identifiers. The Custodian stated that a special service charge would be imposed, and if accepted the review process would take ninety (90) calendar days to complete. The Custodian stated that the estimate was based on processing the entirety of the Complainant's OPRA request, with a labor cost of \$4,467.84 at \$24.96 per hour for 179 hours. The Custodian stated that an additional \$99.25 would be imposed for copying costs, for a total charge of \$4,567.09.

On April 28, 2018, the Complainant responded to the Custodian stating that the special service charge was excessive considering OPRA's statutory rate and when compared to other police departments. The Complainant stated that the cost of \$4,467.84 for 1,985 pages of records amounted to \$2.30 per page. The Complainant stated that the Spotswood Township ("Spotswood") Police Department and Monroe Township ("Monroe") Police Department charged \$60.00 for 1,200 pages and \$73 for 1,460 pages, respectively. The Complainant stated that due to the excessive charge he revised his OPRA request to seek only the above-mentioned items and requested an estimated cost to process them.

On May 4, 2018, the Custodian responded to the Complainant providing an updated special service charge estimate based on the Complainant's April 28, 2018 correspondence:

1. What records are requested?

Response:

- a. Complaints prepared by the WPD relating to the DRE Rolling Logs.
- b. DWI/DUI complaints that were prepared and filed by the WPD from January 2016 through present.

- c. Drug possession complaints that were prepared and filed by the WPD from January 2016 through present.

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

Response: Approximately 745.

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

Response: January 1, 2016 to April 5, 2018.

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

Response: These records are stored in both a computer records management system and paper file system.

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

Response: Record Clerk: three (3) employees.

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

Response: One (1) clerk from the WPD's records unit.

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

Response: All records must be reviewed for personal identifiers and then redacted accordingly.

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: Clerk 1 at \$24.96 per hour for 66.95 hours.

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

Response: Clerk 1 – 745 records x 5 minutes = 66.95 hours. \$24.96 x 66.95 hours = \$1,671.07.

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: Included in Item 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: Lowest paid employee is Clerk 1 and all other Clerks including the one to be assigned have other duties to meet.

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: Cindy Seagrave, Clerk 1 rate \$24.96.

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

Response: Each record must be individually retrieved, copied, redacted and then recopied. Scanned and e-mailed.

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

Response:

- a. Record retrieval and print – 2 minutes – 24.8 hours.
- b. Produce (Actual Inspection, Redactions, Recopying, Return) – 3 minutes – 37.25 hours.
- c. Digital Download: 14.9 times to the scanner for 50 documents. Afterwards documents to e-mail. Clerk must open e-mail and transfer documents to CD. 20 minutes per 50 documents = 4.9 hours.
- d. Total hours = 66.95.

Cost for special service charge: \$1,671.07.

Cost per record page at \$0.05 = \$37.25

Total cost to be paid prior to fulfilling OPRA: \$1,708.32

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 Township of Washington’s (“Township”) imposed charge of \$4,467.84 for 1,985 pages of records was excessive. The Complainant asserted that other police departments such as Spotswood and Monroe made similar records available for much less than the Township. The Complainant included copies of responses from the aforementioned municipalities, indicating that Spotswood charged \$60 for 1,200 pages and Monroe charged \$73 for 1,460 pages of records. The Complainant did not reference the special service estimate provided by the Custodian on May 4, 2018.

Statement of Information:

On May 24, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian

certified that he received the Complainant's OPRA request on April 13, 2018. The Custodian certified that he and WPD's Records Custodian searched through the Township's and WPD's files for responsive records. The Custodian certified that upon receiving the Complainant's clarifications, he responded in writing on April 28, 2018, detailing the special service charge needed to redact the located records for personal identifiers. The Custodian certified that the Complainant responded that same day, objecting to the estimated charge as excessive and specifically withdrew three (3) of the six (6) OPRA request items, requesting an estimated charge to fulfill the remainder. The Custodian certified that on May 4, 2018, he provided the Complainant with an updated special service charge estimate based on the Complainant's request. The Custodian certified that the Complainant filed the instant complaint without responding to the updated estimate.

The Custodian first argued that the Complainant was never denied access to his OPRA request, since he did not dispute the revised special service charge. The Custodian noted that under OPRA, "N.J.S.A. 47:1A-5(g) permits consideration of demands on agency operations imposed by the document request at issue." N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 183 (App. Div.), certif. denied, 190 N.J. 394 (2007). Citing Grieco v. Borough of Haddon Heights, 449 N.J. Super. 513, 520 (Law Div. 2015), the Custodian argued that despite OPRA's encouragement of cooperation between requestors and government agencies, the Complainant failed to address the revised charge and simply refused to reach an amicable solution with the Township.

The Custodian next argued that the OPRA request initially sought six (6) categories of records pertaining to DWI and drug incidents from January 2016 through the present, and his search located 1,985 pages of records. The Custodian asserted that the above-mentioned items involved 745 pages of records. The Custodian asserted that the records contained multiple personal identifiers, including those of juvenile subjects. The Custodian asserted that due to the number of pages requiring review, the special service charge was justified. The Custodian argued that in Burnett v. Cnty. of Bergen, 198 N.J. 408, 423 (2009), the New Jersey Supreme Court held in favor of the government agency's special service charge assessment when it had to expend an extraordinary time and effort to process the request.

Regarding the Complainant's references to other police departments, the Custodian argued that the Council did not have the ability to assess what another agency would charge since the factors considered would be unique to each agency. The Custodian asserted that other police departments may not have been aware they could have imposed a special service charge for fulfilling the OPRA request, or actively decided against it. The Custodian argued that the decisions made by other police departments were inapposite to the answers the Township provided in its 14-point analysis.

The Custodian asserted that the Township provided a complete and proper 14-point analysis in accordance with OPRA. The Custodian asserted that the Complainant failed to challenge any specific aspect of the analysis and refused to reach an amiable resolution with the Township. Thus, the Custodian requested that the Council dismiss the matter.

Additional Submissions:

On May 28, 2018, the Complainant filed a brief in response to the Custodian's SOI. The Complainant first argued that the special service charge of \$4,467.84 for 1,985 records comprising the identified request items was excessive compared to what other police departments charged for records of the same type. The Complainant included exhibits containing the responses of twenty-two (22) other municipalities, wherein they either did not charge for the records or charged less than the Township. The Complainant argued that when making a comparative market analysis, the Township was charging far more than other similarly situated municipalities.

The Complainant also reiterated his request that the Council find that the Township's special service charge was unwarranted and unreasonable, and to award counsel fees.

On May 31, 2018, the Custodian responded to the Complainant's response brief. The Custodian first disputed the Complainant's assertion that the estimated charge of \$4,467.84 was for the request items at issue. The Custodian contended that the revised special service charge estimate for the above-mentioned request items was \$1,708.32 for 745 pages of records and was submitted to the Complainant on May 4, 2018. The Custodian asserted that based upon the Complainant's submissions, the other requested items were withdrawn and are not at issue in the current matter. The Custodian also asserted that the Complainant failed to directly challenge the revised 14-point analysis, and therefore did not oppose the Township's responses.

The Custodian argued that the Complainant's use of a comparative market analysis was without merit and had no basis in law or under GRC precedent. The Custodian argued that the Council previously held that determining the validity of a special service charge was made on a case-by-case basis, citing Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). The Custodian asserted that the Council specifically rejected the notion of a comparative service charge analysis in Rivera. The Custodian argued that the 745 records needed to be reviewed since they contained personal identifiers, and some pertained to juveniles. The Custodian argued that the total charge of \$1,708.32 for Item Nos. 1-3 was not an income or revenue generating mechanism for the Township, but instead a recoupment of the request's actual processing cost.

The Custodian asserted that the Complainant's complaint and reply brief were lacking in any factual challenge to the actual special service charge. The Custodian asserted that what other municipalities charged was irrelevant and contrary to prior GRC decisions, and therefore the Council should dismiss the complaint.

Analysis

Special Service Charge

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

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

[Id. (emphasis added).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case-by-case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 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.

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

may be subject to the imposition of actual costs for duplication of records. N.J.S.A. 47:1A-5(b)-(c).

Initially, the GRC notes that prior to the complaint filing, the Complainant and Custodian exchanged correspondence regarding the initial 14-point analysis based upon processing the Complainant's original OPRA request. On April 28, 2018, the Complainant requested an estimated charge to process the request items at issue and stated he would not seek the remaining request items. On May 4, 2018, the Custodian provided the revised estimate as requested, but the Complainant filed the instant complaint on May 7, 2018 instead of responding to the revised to charge.

In his complaint, while the Complainant stated that he filed to dispute the initial special service charge estimate of \$4,467.84 for 1,985 pages of records, he also stated he was challenging the excessive charge imposed to process the request items at issue. Furthermore, the Complainant's reply brief explicitly identified above-mentioned items as the records at issue, yet still referenced the initial estimate of \$4,467.84. However, the GRC will address the special service charge issue using the Custodian's revised estimate of \$1,671.07 for 745 pages because said charge formed the basis of the Complainant's Denial of Access Complaint.

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 \$1,671.07 comprised 66.95 hours to process the request. The Custodian certified that one (1) out of the three (3) employees of the Township's Clerk Office has the expertise to comply with request; a clerk with the Township's Police Records Unit at \$24.96 per hour. The Complainant's OPRA request sought several categories of complaints spanning over two (2) years. The Custodian certified that all the located records required review for personal identifiers and that each page would take five (5) minutes to fully process.

A review of the forgoing supports the finding that a special service charge was warranted based upon the similarities between the facts here and those in Rivera, GRC 2009-285. There, the custodian's 14-point analysis identified one (1) employee capable of performing the task, which was to review and redact 411 pages of police records containing personal identifiers. In the instant matter, the Custodian identified one (1) employee capable of performing the task to review and redact 745 pages of records. Additional factors supporting this determination was the Custodian's per-minute time estimate by which he based the clerk's overall time expenditure, and his certification that all 745 pages required review for personal identifiers.

Now that the GRC has determined that a special service charge was warranted here, it must now determine whether the proposed fee of \$1,671.07 was reasonable. The Custodian broke down the charge into three (3) components. The first component reflects 24.8 hours taken by the clerk to "retrieve and print" 745 pages of records at two (2) minutes per page. The second component reflects 37.25 hours to "review and redact" the 745 pages of records at three (3) minutes per page. The third component reflects 4.9 hours to "scan and e-mail" the records to the clerk's e-mail account, and then transfer from her account to disc. The Custodian certified that the clerk can scan up to fifty (50) documents at a time and would take 20 minutes per instance.

Regarding the first component, the GRC concludes that the 24.8-hour charge to “retrieve and print” the 745 pages of records was unreasonable. The Custodian does not provide a sufficient basis to assert that each page takes two (2) minutes to retrieve and print when the Custodian did not adequately describe the Township’s copying capabilities or lack thereof. Further, the total number of potentially responsive records has been identified, questioning the amount of time needed to retrieve the records for printing. Therefore, the GRC does not find that the Custodian justified the first component of the special service charge.

Regarding the second component, the GRC concludes that the 37.25-hour charge to “review and redact” the 745 pages of records was reasonable. Based upon the samples of complaints provided by the Complainant, each complaint would contain personal identifiers requiring redactions, including social security numbers and driver’s license numbers. Additionally, the Custodian also certified that many of the located records pertained to juvenile subjects, further emphasizing the need for careful review to ensure the nondisclosure of personal identifiers. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Thus, the Custodian’s assessment of taking three (3) minutes per page is warranted, and the total allowable charge for this component is \$929.76.

As to the third component, the GRC concludes that the 4.9 hour charge to “scan and e-mail” the records was unreasonable. While the Custodian indicated in his April 20, 2018 correspondence that the responsive records would need to be delivered via disc due to limitations with the Township’s e-mail, he did not elaborate further in his 14-point analyses or in the SOI. The Custodian did not adequately explain why the clerk was limited to fifty (50) pages per scanning session, or why each session would take twenty (20) minutes to complete. Thus, the GRC does not find that the Custodian justified the third component of the special service charge.

Additionally, the Custodian provided no evidence to support that the complaints and summonses required copying costs, as was the case in Paff, GRC 2010-09. While the GRC understands the need to protect original records, the Custodian acknowledged that the records existed in both paper and electronic format. Additionally, there is no evidence in the record that the Custodian could not redact the records electronically. Therefore, the estimated copying cost of \$37.25 is not supported by the evidence. However, because the Custodian asserted that the records could not be delivered via e-mail due to technical limitations, the Custodian may charge the actual cost of the disc being used in accordance with McBride, GRC 2009-138.

Accordingly, the Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Additionally, the second component estimating 37.25 hours to “review and redact” the records was reasonable given the number of potentially responsive records and the number of redactions needed for each. Courier Post, 360 N.J. Super. at 199; Rutgers, GRC 2009-311. However, the first and third components estimating 29.7 hours to “retrieve and print” and “scan and e-mail” the records was unreasonable as the evidence of record does not support the estimated time and effort to conduct those tasks. Furthermore, while the Custodian failed to prove that the copy cost associated with providing the records electronically was the “actual cost,” the Custodian may charge the actual cost of computer disc used to deliver the records. See McBride, GRC 2009-138. Therefore, the total recalculated special service charge is \$929.76 plus the actual cost of the disc, and the Custodian shall grant

access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that a special service charge is warranted here. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c). Additionally, the second component estimating 37.25 hours to "review and redact" the records was reasonable given the number of potentially responsive records and the number of redactions needed for each. Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). However, the first and third components estimating 29.7 hours to "retrieve and print" and "scan and e-mail" the records was unreasonable as the evidence of record does not support the estimated time and effort to conduct those tasks. Furthermore, while the Custodian failed to prove that the copy cost associated with providing the records electronically was the "actual cost," the Custodian may charge the actual cost of computer disc used to deliver the records. See McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). Therefore, the total recalculated special service charge is \$929.76 plus the actual cost of the disc, and the Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Custodian shall comply with conclusion No. 1 above by making the amended special service charge 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). Should the**

Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director⁷ within ten (10) business days following receipt of said payment. 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 as described above.

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

Prepared By: Samuel A. Rosado
Staff Attorney

May 12, 2020

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Rotimi Owoh, Esq. (on behalf of African American Data and Research Institute) v. Township of Washington (Gloucester), 2018-80 – Findings and Recommendations of the Executive Director