



**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**

**January 25, 2022 Government Records Council Meeting**

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

Complaint No. 2020-11

v.

Town of Westfield (Union)  
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the extended deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

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 25<sup>th</sup> Day of January 2022

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: January 27, 2022**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
January 25, 2022 Council Meeting**

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

**GRC Complaint No. 2020-11**

**v.**

**Town of Westfield (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs.
2. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.

**Custodian of Record:** Tara Rowley

**Request Received by Custodian:** December 26, 2019

**Response Made by Custodian:** January 7, 2020; January 17, 2020

**GRC Complaint Received:** January 21, 2020

**Background**

**September 28, 2021 Council Meeting:**

At its September 28, 2021 public meeting, the Council considered the September 21, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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<sup>1</sup> The Complainant represents the African American Research & Data Institute.

<sup>2</sup> Represented by Thomas C. Jardim, Esq., of Jardim, Meisner & Susser, P.C. (Florham Park, NJ).

<sup>3</sup> The Complainant sought additional records not at issue in this complaint.

1. The Custodian did not fully comply with the Council's May 18, 2021 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until sixteen (16) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.
2. The Custodian imposed a warranted but unreasonable special service charge to process the Complainant's OPRA request. N.J.S.A. 47:1A-5(c). Further, the Custodian failed to fully comply with the Council's May 18, 2021 Interim Order. However, the Custodian presented the revised charge to the Complainant with the opportunity to accept or reject. Further, 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 18, 2021 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.**

#### Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties. On November 3, 2021, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application. On November 5, 2021, the Complainant's Counsel responded to the GRC requesting an additional thirty (30) days to file for counsel fees. The GRC responded to the Complainant's Counsel granting an additional twenty (20) business days to submit a fee application. The Complainant's Counsel did not submit a fee application within the extended period.

## Analysis

### Compliance

At its September 28, 2021 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On September 29, 2021, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by October 28, 2021.

On November 3, 2021, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days, or until November 30, 2021 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On November 5, 2021, Complainant’s Counsel requested an additional thirty (30) days to submit a fee application. The GRC granted Complainant’s Counsel an additional twenty (20) business days, or until December 29, 2021, to submit a fee application. As of December 29, 2021, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from Complainant’s Counsel.

Therefore, Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the extended deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the extended deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

Prepared By: Samuel A. Rosado  
Staff Attorney

January 18, 2022



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 28, 2021 Government Records Council Meeting**

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

Complaint No. 2020-11

v.

Town of Westfield (Union)  
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council’s May 18, 2021 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until sixteen (16) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. The Custodian imposed a warranted but unreasonable special service charge to process the Complainant’s OPRA request. N.J.S.A. 47:1A-5(c). Further, the Custodian failed to fully comply with the Council’s May 18, 2021 Interim Order. However, the Custodian presented the revised charge to the Complainant with the opportunity to accept or reject. Further, 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 18, 2021 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 28<sup>th</sup> Day of September 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 29, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 28, 2021 Council Meeting**

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

**GRC Complaint No. 2020-11**

v.

**Town of Westfield (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs.
2. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.

**Custodian of Record:** Tara Rowley

**Request Received by Custodian:** December 26, 2019

**Response Made by Custodian:** January 7, 2020; January 17, 2020

**GRC Complaint Received:** January 21, 2020

**Background**

May 18, 2021 Council Meeting:

At its May 18, 2021 public meeting, the Council considered the May 11, 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:

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<sup>1</sup> The Complainant represents the African American Research & Data Institute.

<sup>2</sup> Represented by Thomas C. Jardim, Esq., of Jardim, Meisner & Susser, P.C. (Florham Park, NJ).

<sup>3</sup> The Complainant sought additional records not at issue in this complaint.

1. The Custodian lawfully denied access to the Complainant's December 26, 2019 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Westfield Police Department does not possess or maintain the requested complaints and summonses. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the fifty-six (56) hour charge for the part-time clerk to retrieve and copy the responsive complaints accurately reflects the necessary time needed, and therefore been revised to 24.5 hours. Furthermore, the evidence does not support that the nineteen (19) hour charge for Sgt. Walsh to retrieve and print the responsive summonses accurately reflects the necessary time needed and has also been revised to 7.35 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Thus, the total recalculated special service charge is \$826.33, 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).
3. **The Custodian shall comply with conclusion No. 2 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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director<sup>6</sup> 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.**

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<sup>4</sup> 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.

<sup>5</sup> "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."

<sup>6</sup> 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 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.

#### Procedural History:

On May 19, 2021, the Council distributed its Interim Order to all parties. On May 24, 2021, the Custodian submitted a certification to the Complainant presenting the revised special service charge.

On June 11, 2021, the Custodian responded to the Council's Interim Order, providing a certification to the Executive Director. The Custodian certified that the Town of Westfield ("Town") sent the certification containing the amended special service charge via e-mail on May 24, 2021. The Custodian also certified that the certification was sent to the Complainant via certified and regular mail on May 25, 2021. The Custodian further certified that as of June 11, 2021, no response has been received from the Complainant expressing his willingness to pay the amended special service charge.

On June 17, 2021, the Complainant informally requested reconsideration of the Interim Order in light of the New Jersey Supreme Court's decision in Simmons v. Mercado, 247 N.J. 24 (2021). On June 21, 2021, the GRC responded to the Complainant stating that the ten (10) business day period to request reconsideration of the Order had expired, and therefore rejected the request.

On June 22, 2021, the Complainant filed a Notice of Appeal of the Interim Order with the Appellate Division. That same day, Custodian's Counsel requested the Complainant withdraw the appeal, stating that it was without merit. On June 24, 2021, the Complainant filed an amended Notice of Appeal. On July 6, 2021, Counsel filed a Notice of Cross Appeal of the Interim Order.

On July 23, 2021, the Honorable Garry S. Rothstadt, J.A.D. issued an order granting the Town's motion to dismiss the Complainant's appeal. Judge Rothstadt further stated, "[t]he May 18, 2021 and June 21, 2021 decisions from the GRC are interim determinations, not appealable as of right. Leave to appeal must be sought or the issues raised by appellant must await a final determination by the GRC."

### Analysis

#### Compliance

At its May 18, 2021 meeting, the Council ordered the Custodian to present the amended special service charge to the Complainant and for the Complainant to remit payment of the 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 of receiving the charge 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 19, 2021, the Council distributed its Interim Order to all parties. Thus, the Custodian was required to provide the Complainant the amended special service charge by the close of business on May 26, 2021. The Complainant's response was due by close of business five (5) business days thereafter. Further, the Custodian was required to provide certified confirmation of compliance by June 3, 2021 accounting for the Memorial Day holiday.<sup>7</sup>

On May 24, 2021, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, the Custodian provided the Complainant with the amended special service charge. On June 11, 2021, the sixteenth (16<sup>th</sup>) business day after receipt of the Order, the Custodian submitted her certification to the GRC. Therein, the Custodian certified that as of that date, the Complainant has failed to provide payment or make known his refusal to pay the special service charge. Based on the foregoing, the Custodian did not fully comply with the Order due to a timeliness issue.

Therefore, the Custodian did not fully comply with the Council's May 18, 2021 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until sixteen (16) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

### **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.

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<sup>7</sup> Memorial Day was observed on May 31, 2021.

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 instant matter, the Custodian imposed a warranted but unreasonable special service charge to process the Complainant's OPRA request. N.J.S.A. 47:1A-5(c). Further, the Custodian failed to fully comply with the Council's May 18, 2021 Interim Order. However, the Custodian presented the revised charge to the Complainant with the opportunity to accept or reject. Further, 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 (7<sup>th</sup> 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 the Town based upon DRE rolling logs, as well as complaints pertaining to drug possession, drug paraphernalia, and 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 18, 2021 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.<sup>8</sup>

Therefore, pursuant to the Council's May 18, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 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 Custodian did not fully comply with the Council's May 18, 2021 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until sixteen (16) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.
2. The Custodian imposed a warranted but unreasonable special service charge to process the Complainant's OPRA request. N.J.S.A. 47:1A-5(c). Further, the Custodian failed to full comply with the Council's May 18, 2021 Interim Order. However, the Custodian presented the revised charge to the Complainant with the opportunity to accept or reject. Further, 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.

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<sup>8</sup> 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).

3. Pursuant to the Council’s May 18, 2021 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.**

Prepared By: Samuel A. Rosado  
Staff Attorney

September 21, 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 18, 2021 Government Records Council Meeting**

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

Complaint No. 2020-11

v.

Town of Westfield (Union)  
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian lawfully denied access to the Complainant’s December 26, 2019 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Westfield Police Department does not possess or maintain the requested complaints and summonses. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the fifty-six (56) hour charge for the part-time clerk to retrieve and copy the responsive complaints accurately reflects the necessary time needed, and therefore been revised to 24.5 hours. Furthermore, the evidence does not support that the nineteen (19) hour charge for Sgt. Walsh to retrieve and print the responsive summonses accurately reflects the necessary time needed and has also been revised to 7.35 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). Thus, the total recalculated special service charge is \$826.33, 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).
3. **The Custodian shall comply with conclusion No. 2 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 deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director<sup>3</sup> 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.**

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 18<sup>th</sup> Day of May 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: May 19, 2021**

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<sup>1</sup> 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.

<sup>2</sup> "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."

<sup>3</sup> 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 18, 2021 Council Meeting**

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

**GRC Complaint No. 2020-11**

v.

**Town of Westfield (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs.
2. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.

**Custodian of Record:** Tara Rowley

**Request Received by Custodian:** December 26, 2019

**Response Made by Custodian:** January 7, 2020; January 17, 2020

**GRC Complaint Received:** January 21, 2020

**Background<sup>4</sup>**

**Request and Response:**

On December 26, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 7, 2020, the Maureen Lawshe responded in writing on the Custodian’s behalf stating that the Complainant sought records maintained by the Westfield Municipal Court (“Court”), and therefore needed to submit a request to the Court Administrator. Ms. Lawshe included a copy of the New Jersey

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<sup>1</sup> The Complainant represents the African American Research & Data Institute.

<sup>2</sup> Represented by Thomas C. Jardim, Esq., of Jardim, Meisner & Susser, P.C. (Florham Park, NJ).

<sup>3</sup> The Complainant sought additional records not at issue in this complaint.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Town of Westfield (Union), 2020-11 – Findings and Recommendations of the Executive Director

Judiciary Records Request form. That same day, the Complainant replied to the Custodian, requesting reconsideration stating that he submitted his request to the Executive branch and not the Judiciary.

On January 17, 2020, the Custodian responded to the Complainant stating that for request item No. 1, no responsive records exist. The Custodian then stated that for the remaining items, upon review from the Town Attorney, members from the Westfield Police Department (“WPD”) could fulfill the request, but with a special service charge being assessed due to the extraordinary expenditure of time and effort needed to process the request. The Custodian stated that such charges were permitted under OPRA via N.J.S.A. 47:1A-5(c).

The Custodian indicated that there were 147 case files pertaining to DUI/DWI, drug possession and drug paraphernalia arrests, with each file needing to be retrieved and reviewed for responsive records. The Custodian stated that the records would then need to be reviewed for any potential redactions, photocopied, and refiled. The Custodian stated that WPD estimated it would take seventy-five (75) hours to fulfill the request, at a total estimated cost of \$2,024.86. The Custodian stated that the estimate was based upon the hourly rate of the lowest paid employees capable of processing the request. The Custodian asserted that the Police Sergeant within WPD’s Records Division was the lowest paid employee authorized to access the E-Ticket system and was paid at an hourly rate of \$61.86. The Custodian next stated that the part-time records clerk would fulfill the remainder of the request at an hourly rate of \$15.17, by physically removing the files and reviewing the records for potential redactions. The Custodian stated that the Police Sergeant would expend nineteen (19) hours and the clerk would expend fifty-six (56) hours.

#### Denial of Access Complaint:

On January 21, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian initially directed the Complainant to obtain the records from the Court. The Complainant asserted that he requested the Custodian reconsider the denial, as other police departments have provided the requested records. The Complainant contended that on January 17, 2020, he received correspondence from the Custodian stating that WPD would provide the requested records but imposed a special service charge of \$2,024.86.

The Complainant argued that the special service charge was excessive because the requested records were stored electronically, and most other police departments did not impose a fee for production. The Complainant therefore requested that the GRC declare the special service charge as excessive and unlawful under OPRA.

#### Statement of Information:

On February 10, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 26, 2019. The Custodian certified that after receiving the Complainant’s January 7, 2020 request for reconsideration, the request was submitted to the Town Attorney for review. The Custodian certified that the request was later reviewed by Sgt. Michael Walsh, who identified 147 case files

containing responsive records. The Custodian certified that on January 17, 2020, she responded to the Complainant in writing, stating that a special service charge would be imposed to fulfill item Nos. 2-4, and that no responsive records exist for item No. 1.

The Custodian included a certification from Sgt. Walsh. Sgt. Walsh certified that while arrest records were maintained electronically through LawSoft, the only way to obtain the corresponding complaints and summonses was to pull the physical case files, which would have a copy of the report and complaint. Sgt. Walsh certified that after locating the summonses, he would have to log on to the E-Ticket system and search the summonses by either summons number or plate number. Sgt. Walsh certified that he would then print out each summons individually, at two (2) pages per summons.

Sgt. Walsh certified that in order to determine which arrest would apply to a responsive complaint or summons, he could run a search on LawSoft. However, Sgt. Walsh certified that it was WPD practice to code the arrest within LawSoft based upon the most substantial criminal charge. Sgt. Walsh certified that as an example, if an incident involved a motor vehicle theft, but the subject also possessed narcotics or was intoxicated, the case would be coded in LawSoft as a motor vehicle theft. Sgt. Walsh therefore certified that in order ensure that the Complainant received all responsive records, he needed to review each arrest file within the requested period.

Sgt. Walsh certified there were an estimated 147 case files containing responsive information and would take thirty (30) minutes to process each file, for a total of seventy-five (75) hours. Sgt. Walsh certified that he was the lowest paid employee with access to the E-Ticket system at an hourly rate of \$61.86, but that his involvement would take approximately nineteen (19) hours. Sgt. Walsh certified that the part-time records clerk could fulfill the bulk of the process, which would be the physical retrieval of each file, copying the records, reviewing same for potential redactions. Sgt. Walsh certified that of the allotted thirty (30) minutes, ten (10) would be expended by himself, and the remainder by the part-time records clerk. Sgt. Walsh certified that he was unaware of any other process utilized by police departments that could simplify the task.

The Custodian's Counsel initially argued that the records were required to be disclosed under OPRA as they were court records. Counsel asserted that the Town of Westfield ("Town") was voluntarily choosing to produce the records given the Complainant's litigation history. Counsel asserted that a search revealed twenty-six (26) lawsuits filed against public agencies over the last two (2) years, along with twenty-five (25) GRC complaints filed over the last seven (7). The Custodian also asserted that an Internet search for the "African American Data and Research Institute" returned no website, physical office, or publications by anyone working for AADARI.

Counsel argued that at no point did the Complainant object to the Town's special service charge estimate or explain why he believed it was too high. Counsel asserted that instead the Complainant chose to file directly with the GRC. Counsel asserted that the request was reasonable based upon Sgt. Walsh's certification. Counsel asserted that because of the way arrests were coded in LawSoft, and that the complaints and summonses were maintained in their physical jackets, Sgt. Walsh and the part-time clerk needed to allocate a substantial amount of time to process the request. Counsel therefore argued that the estimated seventy-five (75) hours of labor was reasonable.

Additional Submissions:

On February 13, 2020, the Complainant filed a letter brief in response to the SOI. Therein, the Complainant asserted that the estimated charge of \$2,024.86 was “grossly” excessive for records that could be retrieved via eCDR and delivered electronically. The Complainant noted that other municipalities have complied with similar requests without imposing any charge or charging the copying rates set by OPRA.<sup>5</sup> The Complainant asserted that the Town charged far more than was reasonable when making a comparative market analysis with the other municipalities. Lastly, the Custodian asserted that modern technology allows for the electronic redaction of records and municipalities should be encouraged to enable its use.

On February 18, 2020, Counsel submitted a reply to the GRC. Counsel argued that the Town was not attempting to deny access to the records by imposing the special service charge. Counsel asserted that Sgt. Walsh’s certification provided sufficient detail regarding how the estimated time would be utilized and noted that the Complainant was not being charged copying costs or attorney’s fees for the records.

Counsel also asserted that the Complainant’s assertion that the records could be retrieved via eCDR was incorrect. Counsel initially argued that eCDR was a system maintained by the Judiciary, and not the Town. Counsel asserted that even if the Town were required to access the records through eCDR, the time needed would not be shortened based upon the supplemental certification from Sgt. Walsh.

Sgt. Walsh certified that based upon speaking with officers in his department, using the court’s eCDR system would not shorten the estimated time to process the Complainant’s request. Sgt. Walsh certified that the only way to identify the responsive complaints and summonses was by identification number. Sgt. Walsh certified that an authorized user would have to input each of the 147 case files into eCDR, then either print and redact, or save electronically and redact. Sgt. Walsh also certified that eCDR could not be used to retrieve motor vehicle summonses.

Counsel next asserted that the GRC generally does not permit a special service charge when the request takes less than ten-to-twenty hours to fulfill, citing Diamond v. Twp. of Old Bridge, GRC Complaint No. 2003-15 (February 2014), Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281, *et seq.* (October 2014), Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-105, *et seq.* (Interim Order dated January 31, 2012). Counsel argued that in the current matter, the Town estimates that retrieving the request records would take approximately seventy-five (75) hours.

On February 18, 2020, the Complainant submitted a response to the GRC. The Complainant argued that based on Sgt. Walsh’s certification that only 147 summonses and complaints were at issue, the estimated total of \$2,024.86 was excessive. The Complainant argued that traffic summonses were available to all departments electronically through the ACS/ATS database.

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<sup>5</sup> The Complainant identified twenty-one (21) municipalities that complied with similar requests submitted by the Complainant on behalf of AADARI. Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Town of Westfield (Union), 2020-11 – Findings and Recommendations of the Executive Director

On April 21, 2021, the GRC requested a 14-point special service charge analysis from the Custodian. On April 28, 2021, the current Custodian provided the following responses to the request:

**1. What records are requested?**

**Response:**

- a. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs.
- b. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
- c. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
- d. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.

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

**Response:** Generally, the Complainant is seeking certain police and municipal court records.

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

**Response:** The Complainant by the terms of his request seeks records for the period of January 1, 2019, to December 24, 2019.

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

**Response:** Physical records are located in the WPD Records Storage Room, which is on site. Electronic records are believed to be stored within the Municipal Court.

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

**Response:** The Town has 261 municipal employees and 71 Pool employees. The Town Clerk’s Office has three (3) full time employees (myself included). The WPD Records Bureau has four (4) full time employees and one (1) part time employee.

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

**Response:** Two (2) WPD employees and one (1) Town Clerk’s office employee.

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

**Response:** Unknown at this time. Records were to be gathered and reviewed for possible redactions if special service charge was accepted.

**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 information was previously provided to the requestor on January 16, 2020 and in the Sgt. Walsh Certification.

- Sergeant Michael Walsh, Westfield Police Department Records Bureau Hourly Rate: \$61.86.
- Andrea Reider, Part Time Records Clerk, Westfield Police Department Hourly Rate: \$15.17.
- The Police Department has indicated it would take 75 hours to locate, retrieve, and assemble the records for copying.

**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:** Not applicable. On-site inspection/examination was not requested.

**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:** The number of hours to return records to their original storage place was not considered and was not included in the service charge. Only the hours needed to retrieve the physical arrest jackets, search WPD's E-Ticket system, and photocopy physical records were included.

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

**Response:** Sgt. Walsh of the WPD Records Bureau as he is the lowest paid employee with access to the E-Ticket System, and Andrea Rieder, Part Time Police Department Records Clerk, is the lowest paid employee within the WPD Records Bureau, which is where the physical records are stored and located.

**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:**

- Sergeant Michael Walsh, Westfield Police Department Records Bureau Hourly Rate: \$61.86.
- Andrea Reider, Part Time Records Clerk, Westfield Police Department Hourly Rate: \$15.17.

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

**Response:** Please see the attached SOI's of the Custodian and Maureen Lawshe, Sgt. Walsh's certification, and the Town Attorney's Letter Brief dated February 10, 2020.

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

**Response:** The Custodian asserted that this information was previously provided to the GRC and the Complainant through the SOI and additional submissions.

## **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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the instant matter, upon receiving the Complainant's request for reconsideration, the Custodian responded to the Complainant on January 17, 2020, stating that because WPD did not have a DRE in-house, no responsive records exist for item No. 1. The Custodian also certified to same in the SOI. Additionally, the Complainant did not specifically address the Custodian's response to this portion of the request in either his complaint or additional submissions.

Accordingly, the Custodian lawfully denied access to the Complainant's December 26, 2019 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that WPD does not possess or maintain the requested complaints and summonses. See Pusterhofer, GRC 2005-49.

### **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.

In the Denial of Access Complaint at issue here, the Complainant disputed the estimated special service charge of \$2,024.86 for seventy-five (75) hours of time to process 147 responsive summonses and complaints. The Complainant asserted that the fee was excessive give the number of potentially responsive records, and on the basis that the records could be obtained electronically through eCDR.

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 requested complaints and summonses were not held electronically by WPD, and that trying to access the records via eCDR would be no less time-consuming and that copying costs were not being assessed against the Complainant. The Custodian also argued that Sgt. Walsh’s hourly rate of \$61.86 was assessed in part as he was the lowest paid employee with access to WPD’s E-Ticketing system. The Custodian also certified that the part-



time clerk required twenty (20) minutes to physically remove the files, copy the requested records, and review for potential redactions at an hourly rate of \$15.17.

A review of the foregoing supports that a special service charge is warranted here based upon the contention that the responsive complaints are in paper format and needed to be physically retrieved for copying. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Specifically, Sgt. Walsh certified that the only way to locate the summons was to pull the physical case files containing the corresponding arrest report and complaint. Additionally, he certified that because of the way the records were classified, all individual case files for the requested period needed to be reviewed to ensure that all responsive records were located. Furthermore, Sgt. Walsh certified that trying to obtain the records through eCDR would not reduce the estimated time needed to process the request, and that he was being assisted by a part-time records clerk.

Now that the GRC has determined that a special service charge is warranted here, it must now determine whether the proposed fee of \$2,024.86 was reasonable. The Custodian asserted that it would take an estimated thirty (30) minutes to process each of the 147 case files. Sgt. Walsh then certified that the period broke down the charge into two (2) components. The first component reflects the 20 minutes taken by the part-time records clerk, accounting for the physical retrieval of the responsive complaints. The second component reflects ten (10) minutes taken by Sgt. Walsh to access the E-Ticketing system to locate the responsive summons corresponding with the case file. Sgt. Walsh certified that the estimated time did not include the time taken to return the records to their location. Although decided during the pendency of this complaint, the GRC looks to Owoh, Esq. (O.B.O. AADARI) v. Twp. of Washington (Gloucester), GRC Complaint No. 2018-80 (May 2020) for reference. In that matter, the Council found that the custodian's estimate of three (3) minutes needed to review and redact each page of the requested complaints and summonses was reasonable given the amount and type of sensitive information contained therein. Furthermore, in Rivera, GRC 2009-285, the BPD estimated just seven (7) hours to review and redact 411 pages containing the same or similar information as the records at issue.

Regarding the first component, the GRC does not find that the estimated time of fifty-six (56) hours to retrieve and copying 147 complaints summons is reasonable. The Custodian certified that the records were not archived or in storage, and the total number of responsive records have been identified. Furthermore, the estimate did not include any time taken for potential redactions. However, because the Custodian certified that the case files need to be physically removed and the task is being conducted by a part-time clerk, time should be allotted for retrieval and copying. Therefore, the estimated time should be reduced to ten (10) minutes per case file, or 24.5 hours. Therefore, the total allowable charge should be reduced to \$371.66 based upon the lowest hourly rate.

Regarding the second component. Then GRC does not find that the estimated nineteen (19) hours to retrieve and print the responsive summons via WPD's E-Ticket system to be reasonable. It is unclear in the record how each summons requires ten (10) minutes to locate and print from the system, once their case numbers have been identified, notwithstanding Sgt. Walsh's certification that the summonses had to be accessed individually. It should also be noted that Sgt. Walsh's estimate also does not account for potential redactions as well. Therefore, the estimated

time should be reduced to three (3) minutes per case file, or 7.35 hours, to allow Sgt. Walsh time to locate and retrieve the responsive summons. Thus, the total allowable charge for this component is \$454.67.

Therefore, although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the fifty-six (56) hour charge for the part-time clerk to retrieve and copy the responsive complaints accurately reflects the necessary time needed, and therefore been revised to 24.5 hours. Furthermore, the evidence does not support that the nineteen (19) hour charge for Sgt. Walsh to retrieve and print the responsive summonses accurately reflects the necessary time needed and has also been revised to 7.35 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199; Rivera, GRC 2009-285. Thus, the total recalculated special service charge is \$826.33, 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 lawfully denied access to the Complainant's December 26, 2019 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Westfield Police Department does not possess or maintain the requested complaints and summonses. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the fifty-six (56) hour charge for the part-time clerk to retrieve and copy the responsive complaints accurately reflects the necessary time needed, and therefore been revised to 24.5 hours. Furthermore, the evidence does not support that the nineteen (19) hour charge for Sgt. Walsh to retrieve and print the responsive summonses accurately reflects the necessary time needed and has also been revised to 7.35 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC

Complaint No. 2009-285 (Interim Order dated May 24, 2011). Thus, the total recalculated special service charge is \$826.33, 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).

3. **The Custodian shall comply with conclusion No. 2 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 deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director<sup>8</sup> 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.**
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

May 11, 2021

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<sup>6</sup> 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.

<sup>7</sup> "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."

<sup>8</sup> 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 & Research Institute) v. Town of Westfield (Union), 2020-11 – Findings and Recommendations of the Executive Director