



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

July 25, 2023 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o
Baffi Simmons)
Complainant

Complaint No. 2020-157

v.

Glassboro Police Department (Gloucester)
Custodian of Record

At the July 25, 2023 public meeting, the Government Records Council (“Council”) considered the July 18, 2023 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. Complainant’s Counsel complied with the Council’s September 29, 2022 Interim Order because he responded in the prescribed time frame providing an Amended Application and Amended Time Log and provided certified conformation of compliance to the Executive Director.
2. The Council finds that Complainant Counsel’s fee application confirms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and with the table, the Council finds that the time expended was not reasonable. The Council finds that 6.7 hours at \$300 per hour is reasonable for the work performed by Complainant’s Counsel instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Executive Director recommends that the Council award fees to the Complainant, representing AADARI, for the amount of \$2,010.00, representing 6.7 hours of service at \$300 per hour.**
3. As was the case with the Council’s initial adjudication on fees, no enhancement should be awarded.

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 25th Day of July 2023

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 27, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
July 25, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-157

v.

**Glassboro Police Department (Gloucester)²
Custodial Agency**

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

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

Custodian of Record: Samantha Bellebuono
Request Received by Custodian: May 6, 2020
Response Made by Custodian: July 27, 2020
GRC Complaint Received: August 13, 2020

Background

September 29, 2022 Council Meeting:

At its September 29, 2022 public meeting, the Council considered the September 22, 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, found that:

1. Because the parties failed to reach a fee agreement, and because the Complainant’s

¹ The Complainant represents Baffi Simmons.

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ). Also represented by Gary M. Marek, Esq., of the Law Offices of Gary M. Marek (Mount Laurel, NJ).

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

Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.

2. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided bill for services fails to log each entry in increments of tenths of an hour. Therefore, the bill for services must be amended so that the Council is able to determine the reasonableness of the hours expended. See Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013). **Accordingly, because the Council does not award fees to Complainant's Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Procedural History:

On October 4, 2022, the Council distributed its Interim Order to all parties. On October 11, 2022, Complainant's Counsel ("Complainant's Counsel") responded to the Order filing a supplemental fee certification ("Supplemental Certification") in support of his amended application ("Amended Application") for fees. In his Supplemental Certification, Complainant's Counsel provided an amended time log ("Amended Time Log") with increments in tenths of an hour. Complainant's Counsel certified that he has now expended 25.7 hours on this matter, which therefore increased his fee request from \$5,250.00 at 17.5 hours to \$7,710.00. Complainant's Counsel included within the Amended Application the time he expended complying with the Council's September 29, 2022 Interim Order.

On October 18, 2022, the Custodian's Counsel, Timothy D. Scaffidi, Esq., and Co-Counsel, Gary M. Marek, Esq. ("Custodian's Co-Counsel"), filed an opposition to Complainant Counsel's Amended Application ("Opposition"). Custodian's Co-Counsel maintained that the revised time log still included charges for work never performed in the instant matter as noted in the original objection ("Original Opposition") to Complainant Counsel's fee application. Custodian's Co-Counsel also contended that Counsel included additional charges for filing an unnecessary reply to the Original Opposition. Custodian's Co-Counsel argued that Complainant Counsel's Amended Application did nothing to change the arguments in their Original Opposition and objected to the new charges.

Custodian's Co-Counsel contended that the Borough should not have to pay for Complainant Counsel's failure to comply with N.J.A.C. 1:105-2.13(b)(5). Custodian's Co-

Counsel next contended that in the Amended Application, Complainant’s Counsel included a charge of 0.8 hours for “Research[] the regulations and cases cited in the Interim order in order to properly Comply with the Interim Order.” Custodian’s Co-Counsel asserted that this exact entry, including the typographical errors, appears in Complainant Counsel’s October 7, 2022 revised fee application in Owoh, Esq. (O.B.O. Baffi Simmons) v. Hopatcong Police Dep’t (Sussex), GRC Complaint No. 2020-162, where he was also ordered by the Council to resubmit his application. See Owoh, Esq. (O.B.O. Baffi Simmons) v. Hopatcong Police Dep’t (Sussex), GRC Complaint No. 2020-162 (Interim Order dated September 29, 2022). Custodian’s Co-Counsel argued that the entry was excessive on its face but was also improper to submit the same fee in two separate matters for the same task.

Custodian’s Co-Counsel further argued that Complainant’s Counsel sought an upward adjustment of the lodestar amount of his fee application without providing any basis. Custodian’s Co-Counsel contended that the lodestar should either be rejected outright or lowered since the success Complainant’s Counsel obtained in the action was limited compared to the relief requested.

On October 20, 2022, Complainant’s Counsel submitted a reply to Custodian Co-Counsel’s Opposition to the Amended Application. Complainant’s Counsel noted again that Custodian’s Co-Counsel have collected more than \$1.3 million from the Borough for services since 2020. Complainant’s Counsel also questioned how a firm who lost made more money than the firm who won. Complainant’s Counsel asserted that he stands by his assessed charges as well as his request for a lodestar adjustment.

Analysis

Compliance

At its September 29, 2022 meeting, the Council permitted the “Complainant or his attorney . . . to submit an amended time log to the Council in support of Counsel’s application for fee award.” In addition, the Council ordered that “[t]he Custodian [may] object to the amended time logs[] N.J.A.C. 5:105-2.13(d).” On October 4, 2022, the Council distributed its Interim Order to all parties, providing the Complainant five (5) business days to comply with the terms of said Order. Thus, the Complainant’s Amended Application was due by close of business on October 12, 2022, accounting for the Columbus Day holiday.

On October 11, 2022, the fourth (4th) business day after receipt of the Council’s Order, Complainant’s Counsel filed an Amended Application. On October 18, 2022, the fifth (5th) business day after receipt of Complainant Counsel’s Amended Application, Custodian’s Co-Counsel filed Opposition.

Therefore, Complainant’s Counsel complied with the Council’s September 29, 2022 Interim Order because he responded in the prescribed time frame providing an Amended Application and Amended Time Log and provided certified conformation of compliance to the Executive Director.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Further, the Council found 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 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney’s fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties’ ability to reach an agreement, the Council provided the Complainant’s Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley, 461 U.S. at 434). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div.

2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm't, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a).)]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who

require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Complainant’s Counsel is seeking a fee award of \$7,710.00, representing 25.7 hours at \$300.00 per hour. In support of this hourly rate, Complainant’s Counsel submits exhibits containing orders awarding him prevailing parties fees at the requested hourly rate in litigation representing the same client pertaining to the same or similar issues.

Although the GRC is not required to adhere to court determinations on a practitioner’s experience, it is persuasive when combined with prior GRC decisions which permitted awards of \$300.00 per hour. See Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Paff v. Cnty. Of Salem, GRC Complaint No. 2015-342 (June 2017). It should be noted that although Custodian’s Co-Counsel filed objections to the fee application, same did not dispute the requested hourly rate.

Based on the foregoing, the rate of \$300.00 per hour is reasonable for a practitioner with Complainant Counsel’s experience and skill level.

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The New Jersey District Court, in PIRG v. Powell Duffryn Terminals, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff’s trial preparation fee request by 50%. The PIRG court, noting that plaintiff’s counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

In support of his original request for a fee award, Complainant’s Counsel submitted a certification (“Original Certification”). Therein, Complainant’s Counsel attached a five (5) page list itemizing his hours and expenses (“Original Time Log”). The Original Time Log contained time entries for the period from July 28, 2020, through July 27, 2022 (“Fee Period”). Complainant’s Counsel billed a total of 17.5 hours for a fee of \$5,250.00 for services during the Fee Period. Time entry descriptions included: reviewing the complaint; researching OPRA provisions other relevant law; reviewing and filing a letter brief; preparing correspondence and filing other documents with the GRC; and submitting an OPRA request for billing statements of opposing counsel related to the instant matter.

In response to the Council’s September 29, 2022 Interim Order, Complainant’s Counsel submitted a Supplemental Certification and Amended Time Log to the GRC. However, Complainant’s Counsel did not directly explain the additional charges or the basis for an upward

lodestar adjustment. Including the fees assessed to comply with the Council's Order, Complainant's Counsel billed an additional 8.2 hours.

Initially, the GRC notes that Complainant's Counsel billed 2.7 hours (dated from September 30, 2020 to October 22, 2020) for a fee of \$810.00 for "research[ing] issues" raised in the Custodian's Statement of Information ("SOI"), as well as drafting and submitting a reply to same. However, in this matter the GRC never received a reply to the SOI from the Complainant. Thus, these expenditures shall be stricken.

Next, the Council finds that the 2.5 hours (dated from June 4, 2022 to June 15, 2022) for a fee of \$750.00 expended on submitting an OPRA request to the Borough for Custodian's Counsel and Co-Counsel's billing statements pertaining to the instant matter to be unnecessary. At no point in his Amended Application does Complainant's Counsel justify why those billing statements would be relevant to his fee application. Thus, the costs associated with submitting this OPRA request should not be charged to the Custodian.

Complainant's Counsel next billed approximately 3.6 hours (dated from August 10, 2022 to September 16, 2022) for a fee of \$1,080.00 in connection with reviewing and responding to the Custodian's Original Opposition. Approximately 1.4 hours were billed for reviewing e-mail correspondence between the GRC and Custodian's Counsel and Co-Counsel, and reviewing the Original Opposition submitted on August 26, 2022. The remaining 2.2 hours were expended on researching caselaw, statutes, and regulations along with drafting and submitting the response. However, Complainant Counsel's reply failed to remedy the issues which necessitated a resubmission of his fee application and failed to provide a benefit to the Complainant. Owoh, Esq., GRC 2020-157 (September 29, 2022). Notwithstanding, GRC regulations do not have provisions permitting Complainant's Counsel to file a reply in the first instance. Therefore, Complainant's Counsel is not entitled to the 3.6 hours or \$1,080.00 expenditure on the reply.

In addition, Complainant's Counsel billed 2.9 hours (dated from October 4, 2022 to October 8, 2022) for a fee of \$870.00 to prepare and file his Amended Application. The Council, via its September 29, 2022 Interim Order, permitted Complainant's Counsel to resubmit his time log in order to comply with N.J.A.C. 5:105-2.13(b)(5) and the Council's April 26, 2022 Interim Order, which awarded fees. The Council finds that the filing of the Amended Application was necessitated by Complainant Counsel's failure to comply with the standards for a filing fee application and to provide the Council with sufficient information to make a determination of a proper award. Accordingly, the GRC finds that the costs associated with Complainant Counsel's resubmission of his deficient application must be borne by Counsel. See Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-262 (March 2014).

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. Although the GRC finds that Complainant Counsel's Amended Application and Amended Time Log conforms to the requirements of N.J.A.C. 1:105-2.13(b)(5), the total time is excessive. Each entry was reviewed and considered, and evaluated in light of the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a).

The GRC conducted a review of the Amended Time Log and Amended Application. The recommendations of the Executive Director following that review are set forth in the following table. However, the GRC notes that the table does not include expenditures already determined above as improper:

Date of time entry	Description of Service	Time Expended (in tenths of an hour)/ and Amount Billed at \$300/hour in dollars		Findings from Fee Application Review	Adjusted Entry: Time allowed and total Amount at \$300.00/hour	
7/28/2020	Informed by client that OPRA request was denied. Also discussed the options of filing in court or with GRC.	0.4	\$120.00		0.4	\$120.00
7/29/2020	Client forwarded all correspondence with Custodian for legal review and filing of complaint. Reviewed items that were sent by Custodian in response to the OPRA request. Focused on denied item numbers and reasons for the denials.	0.4	\$120.00		0.4	\$120.00
7/30/2020	Researched and reviewed relevant laws and relevant items that were denied by the Custodian.	1.1	\$330.00	Review of the two (2) denied request items due to the imposition of a special service charge does not warrant the time expended.	0.5	\$150.00
8/3/2020 – 8/4/2020	Drafted/wrote OPRA complaint, gathered and kept exhibits to include related cases and responses from other police departments in anticipation of opposition by the custodian’s Attorney.	0.9	\$270.00	The Denial of Access Complaint comprised the four (4) page form and the five (5) pages response from the Custodian. No other correspondence between the parties were included, nor other related cases and police responses. The space reserved for a statement of facts comprised just a handful of sentences. Therefore, the time expended is unwarranted.	0.3	\$90.00
8/11/2020	Prepared form rejecting mediation	0.1	\$30.00	A mediation form is included with the Denial of Access Complaint, along with boxes to check to indicate whether the Complainant requests to participate in mediation. Thus, the time expended is unwarranted.	0.0	\$0.00
8/13/2020	Reviewed, edited and electronically filed complaint.	0.3	\$90.00	The GRC finds that the within time entry denotes administrative work—filing	0.0	\$0.00

				of the complaint. The GRC is cognizant that with the advent of advanced electronics, computers and e-filing, attorneys often work alone and/or perform tasks traditionally executed by support staff. Notwithstanding, an attorney may not be compensated at his or her standard hourly rate for counsel for tasks which could be performed by administrative and para-professional staff. The GRC finds that this task should be billed at a paraprofessional or administrative rate. Because the record lacks any evidence of the rates Counsel routinely bills for administrative or paraprofessional time, no award can be made.		
9/8/2020	Received and reviewed letter from GRC to the Custodian asking for Statement of Information (“SOI”).	0.1	\$30.00		0.1	\$30.00
9/29/2020	Received and reviewed SOI and supporting documents the Custodian filed with the GRC to include certification from Lt. Wyatt.	0.6	\$180.00		0.6	\$180.00
02/23/2022	Received and reviewed Interim Order issued by the GRC.	0.4	\$120.00		0.4	\$120.00
3/3/2022	Received and reviewed e-mail from Custodian with attached letter that was sent to Custodian.	0.2	\$60.00		0.2	\$60.00
3/22/2022	Received and reviewed records sent via 4 e-mails due to size by Custodian. Reviewed for proper redactions, completeness, and full compliance.	3.8	\$1,140.00	127 pages of records were provided with redactions. The GRC does not find that 3.8 hours taken to review the records appropriate redactions is warranted. The redactions were minimal, being the identities of minors and domestic violence victims.	1.0	\$300.00
4/5/2022	Received and reviewed supplemental records via e-mail from the Custodian. Reviewed for proper redactions, completeness, and full compliance.	0.6	\$160.00	The record demonstrates that four (4) pages of records were provided, and therefore does not warrant the time expended to review.	0.1	\$30.00

4/5/2022	Also received and reviewed certification that was filed by Custodian with the GRC.	0.1	\$30.00		0.1	\$30.00
4/27/2022	Received and reviewed GRC's Supplemental Findings that declared Complainant as prevailing party and asked the parties to try and resolve counsel fees.	0.3	\$90.00	Review of e-mail from the GRC and Supplemental Findings does not warrant 0.3 hour expenditure of time by an experienced practitioner.	0.1	\$30.00
4/27/2022	Sent an e-mail Custodian and opposing counsel to see if matter can be resolved.	0.1	\$30.00		0.1	\$30.00
4/27/2022 – 4/29/2022	Exchanged e-mail with opposing counsels.	0.3	\$90.00		0.3	\$90.00
4/29/2023	As directed by opposing counsel, finalized itemized list of services and gather supporting documents to show hour rate of \$300 per hour that was/were approved by different courts to include the Appellate Division and Superior Court Judges.	0.9	\$270.00	An experienced practitioner should have an itemized list of services already prepared and readily available upon request. Thus, the expended time is unwarranted.	0.3	\$90.00
4/29/2022	Edited and e-mailed the billing for counsel fees to opposing counsel with the supporting Exhibits as part of the negotiation to resolve counsel fees.	0.5	\$150.00			
6/18/2022	Sent e-mail requesting extension of time to file application for counsel fees.	0.2	\$60.00	The time expended requesting an extension of time is not chargeable to the Custodian. See <u>Carter v. Franklin Fire Dist. No. 1 (Somerset)</u> , GRC Complaint No. 2011-228 (Interim Order dated March 25, 2014).	0.0	\$0.00
6/19/2022	Received and reviewed e-mail by opposing counsel opposing the extension of time to file for counsel fees.	0.2	\$60.00			
6/19/2022	Sent a response to Mr. Rosado regarding opposing counsel's objection to the extension of the time to file the application for counsel fees. Draft and edit the e-mail response.	0.2	\$60.00			
6/27/2022	Received and reviewed e-mail from Mr. Rosado (GRC) granting the request to extend time to file counsel fees application until 7/28/2022.	0.1	\$30.00			
6/27/2022	Sent an e-mail response thanking Mr. Rosado (GRC).	0.1	\$30.00			
7/26/2022	Gathered supporting prior court orders to include decisions by the Appellate Division approving counsel fees in favor of AADARI's attorney.	0.5	\$150.00		0.5	\$150.00

7/27/2022	Drafted and edited attorney certification in support of application for counsel fees to the GRC. It became necessary since the parties could not resolve counsel fees.	1.2	\$360.00		1.2	\$360.00
7/27/2022	Updated, reviewed the itemized services and e-mail records for accuracy. The focus of the review and update was/were items relating to the OPRA request of 6/4/2022 for opposing counsel's billing records and items that were outstanding.	0.5	\$150.00	As noted previously, Counsel cannot charge for time expended on or pertaining to an OPRA request that is irrelevant to the calculation of a reasonable attorney's fee. Therefore, the Complainant cannot bill for this time.	0.0	\$0.00
9/29/2022	Sent an e-mail to Mr. Rosado stating that counsel had not received a copy of the GRC's decision.	0.1	\$30.00		0.1	\$30.00
Total:		14.2	\$4,260.00		6.7	\$2,010.00

In sum, the GRC conducted a review of the Amended Time Log and Supplemental Certification and found that the time spent on the file exceeds what would be reasonable for a OPRA practitioner of his experience. For example, some of Complainant Counsel's charges reflect administrative work not reasonably performed at a rate of \$300.00 per hour. More importantly, Complainant's Counsel included several hours billed for actions that were irrelevant, unwarranted, or not performed at all, such as an OPRA request submitted to Custodian's Counsel for billing statements pertaining to the instant matter.

For the reasons set forth above and within the table, the Council finds that the time expended was not reasonable. The Council finds that 6.7 hours at \$300 per hour is reasonable for the work performed by Complainant's Counsel instant matter. Teeters, 387 N.J. Super. 423; Mason, 196 N.J. 51. **Accordingly, the Executive Director recommends that the Council award fees to the Complainant, representing AADARI, for the about of \$2,010.00, representing 6.7 hours of service at \$300 per hour.**

2. Enhancement Analysis

The GRC notes that in his Original Application, Complainant's Counsel did not request a lodestar enhancement, and the Council therefore held that no such enhancement should be awarded in its September 29, 2022 Interim Order. Abruptly, in his Amended Application Complainant's Counsel now requests a lodestar enhancement. However, in neither his Supplemental Certification nor anywhere else in the Amended Application does Complainant's Counsel provide arguments in favor of awarding such an enhancement. Therefore, in keeping with the Council's September 29, 2022 Interim Order, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Complainant's Counsel complied with the Council's September 29, 2022 Interim Order because he responded in the prescribed time frame providing an Amended Application and Amended Time Log and provided certified conformation of compliance to the Executive Director.
2. The Council finds that Complainant Counsel's fee application confirms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and with the table, the Council finds that the time expended was not reasonable. The Council finds that 6.7 hours at \$300 per hour is reasonable for the work performed by Complainant's Counsel instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Executive Director recommends that the Council award fees to the Complainant, representing AADARI, for the amount of \$2,010.00, representing 6.7 hours of service at \$300 per hour.**
3. As was the case with the Council's initial adjudication on fees, no enhancement should be awarded.

Prepared By: Samuel A. Rosado
Staff Attorney

July 18, 2023



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 29, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-157

v.

Glassboro Police Department (Gloucester)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 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:

1. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided bill for services fails to log each entry in increments of tenths of an hour. Therefore, the bill for services must be amended so that the Council is able to determine the reasonableness of the hours expended. See Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013). **Accordingly, because the Council does not award fees to Complainant’s Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel’s application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney’s fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September 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: October 4, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
September 29, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-157

v.

**Glassboro Police Department (Gloucester)²
Custodial Agency**

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

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

Custodian of Record: Samantha Bellebuono
Request Received by Custodian: May 6, 2020
Response Made by Custodian: July 27, 2020
GRC Complaint Received: August 13, 2020

Background

April 26, 2022 Council Meeting:

At its April 26, 2022 public meeting, the Council considered the April 19, 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, found that:

1. The Custodian complied with the Council’s February 22, 2022 Interim Order because

¹ The Complainant represents Baffi Simmons.

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ). Also represented by Gary M. Marek, Esq., of the Law Offices of Gary M. Marek (Mount Laurel, NJ).

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

she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.

2. The Custodian's initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive 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 February 22, 2022 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. at 432, and Mason, 196 N.J. at 71. **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 April 27, 2022, the Council distributed its Interim Order to all parties. On May 17, 2022, the Custodian submitted a certification to the GRC. Therein, the Custodian certified that the parties have not reached a settlement on the fee issue.

On May 31, 2022, 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, or until June 29, 2022.

On June 19, 2022, Complainant's Counsel requested a thirty (30) day extension to file a fee application. Complainant's Counsel stated that he requested the attorney billing records from the Custodian pertaining to the instant OPRA request but has not received most of the records. That same day, Custodian's Counsel e-mailed the parties stating that granting an extension was premature and contended that the requested attorney bills had no relevance to the issue of Complainant's Counsel's fee application. Custodian's Counsel also stated that Complainant's

Counsel provided the Borough of Glassboro (“Borough”) with a bill on April 29, 2022, which the Borough rejected. Complainant’s Counsel responded later that day stating that his extension request remained standing and that he would decide what was needed to support his fee application. On June 27, 2022, the GRC granted Complainant’s Counsel’s extension request until July 28, 2022.

On July 28, 2022, Complainant’s Counsel submitted a fee application. The fee application and Certification for Counsel Fees (“Certification”) set forth the following:

1. Counsel certified that he is licensed to practice law in the State of New Jersey.
2. Counsel’s law firm affiliation: Counsel is employed with The Law Office of Rotimi Owoh.
3. A statement of client representation: Counsel certified his representation towards AADARI, and the organization’s certificates issued by the State of New Jersey.
4. The hourly rate of all attorneys and support staff involved in the complaint: Counsel certified that he charged \$300.00 per hour.
5. Copies of time sheets for each professional involved in the complaint: Counsel supplied an itemized list of services (“Bill”) from July 28, 2020, through July 27, 2022 (“Fee Period”). During the Fee Period, Counsel billed a total of 17.5 hours, rounded from 17 hours and 38 minutes, for a total fee of \$5,250.00.
6. Evidence that the rates charges are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: as part of his Bill, Counsel included multiple exhibits demonstrating that courts have approved his hourly rate of \$300.00 in the same or similar litigation. Counsel also noted his victory as counsel of record in the New Jersey Supreme Court case Simmons v. Mercado, 247 N.J. 24 (2021).
7. Detailed documentation of expenses: Counsel did not provide any documentation pertaining to expenses incurred in this matter.

On August 10, 2022, the Custodian’s Co-Counsel requested an extension of time to submit objections to the fee application. The GRC granted the extension that same day, providing a new deadline of August 25, 2022. On August 25, 2022, Co-Counsel requested an additional extension of one (1) business day, which the GRC granted.

On August 26, 2022, the Custodian, through Counsel and Co-Counsel, submitted objections to the fee application. The Custodian initially argued that Counsel’s fee application did not comply with the GRC’s regulations. The Custodian asserted that an attorney’s fee application must include copies of weekly timesheets which contained descriptions of activities in tenth of an hour increments. See N.J.S.A. 5:105-2.13(b)(5). The Custodian argued that Complainant Counsel’s fee application failed to include the required time sheets in 0.1-hour increments and should be compelled to produce them. The Custodian alternatively argued that Counsel should not be permitted to bill the Borough for compiling his bill for services submitted on April 29, 2022,

and again in preparation for his fee application. The Custodian therefore requested that the fee application be denied in its entirety on this basis alone.

The Custodian next argued that the fee application should be denied in its entirety for seeking fees for work not performed in the instant matter. The Custodian argued that in the Bill and the April 29, 2022 bill for services, Counsel listed entries dated between October 20, 2020 through October 22, 2020, where Counsel allegedly performed services pertaining to drafting, editing, and submitting an opposition to the Custodian's Statement of Information ("SOI"). The Custodian asserted that no such filing was submitted to the GRC in the instant matter and was made known to Counsel prior to filing the fee application. The Custodian contended that under New Jersey law, a factfinder has the right to reject the entirety of witness testimony if the factfinder believes the witness provided misleading information on a material fact. See State v. Young, 448 N.J. Super. 206, 228 (App. Div. 2017). Thus, the Custodian argued that the GRC is permitted to disregard Counsel's fee application in its entirety due to billing for services not rendered.

The Custodian next argued that the other requested fees were unwarranted, unreasonable, and excessive, and in part for services not performed. The Custodian noted that the fee applicant bears the burden of documenting the appropriate hours expended and hourly rates. Hensley v. Eckerhart, 46 U.S. 424, 437 (1983). Further, the Custodian asserted that the Borough cannot be charge for legal work previously done in other matters, noting that a lawyer who was able to reuse old work product has not re-earned the hours previously billed. ABA Formal Op. 93-379 (Dec. 6, 1993). The Custodian asserted that if Counsel could not charge his client for such work, he could not charge the Borough, and such hours should be deducted from the total expended.

The Custodian further noted that in the cases Counsel submitted in support of his \$300.00 hourly rate, the courts in all but one substantially reduced Counsel's requested fee on the basis that same were excessive and/or wholly unnecessary. In the instant matter, the Custodian asserted that nearly every entry was similarly excessive, unwarranted, or unreasonable. Specifically, the Custodian pointed to Counsel's previous filings with the GRC on behalf of AADARI and its individual members pertaining to the same or similar OPRA requests, asserting that many entries were excessive or unwarranted. Further, the Custodian asserted that Counsel was "double-dipping" by billing for time taken to prepare bills for service on two separate occasions, only for the bills to be nearly identical to each other and submitted in other GRC complaints. Additionally, the Custodian argued that many of the entry descriptions did not reflect the facts of the instant matter, further evidencing that the submitted Bill was a reconstruction of billing records that should have been maintained contemporaneously with the work performed.

The Custodian also rejected Counsel's entries pertaining to OPRA requests submitted to the Borough seeking its attorney bills related to the instant matter. The Custodian argued that the attorney costs incurred by the Borough in this matter have no relevance to Counsel's fee application and should be stricken from the Bill.

The Custodian maintained that the Complainant was not entitled to any fee in this matter due to the reasons set forth above. The Custodian further argued that if the Complainant was entitled to any fee, same should be reduced to no more than 2.1 hours at the requested rate of \$300 per hour, for a total of \$630.00.

On September 17, 2022, Counsel submitted a response to the Custodian's objections. Counsel asserted that his total bill of 17.5 hours was reasonable for a matter initiated in 2020 and is still ongoing. Counsel noted that Custodian's Counsels have collected more than \$1.3 million from the Borough for services since 2020 by comparison. Counsel also questioned how a firm who lost made more money than the firm who won.

Analysis

Compliance

At its April 26, 2022 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 April 27, 2022, 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 May 24, 2022.

On May 31, 2022, 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 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On June 19, 2022, Complainant's Counsel requested an extension of time to submit a fee application, which the GRC granted until July 28, 2022. On July 28, 2022 the date of the extended deadline, Complainant's Counsel submitted his fee application.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.

Prevailing Party Attorney Fee Award

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrections, ("NJMDP") 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney’s fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties’ ability to reach an agreement, the Council provided the Complainant’s Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley, 461 U.S. at 434). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a

reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (*quoting Szczepanski v. Newcomb Med. Ctr.*, 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (*quoting Hensley*, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (*citing Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (*applying R.P.C. 1.5(a)*).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (*quoting Furey v. Cnty. of Ocean*, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$5,250.00, representing 17.5 hours at \$300.00 per hour. In support of this hourly rate, Counsel submits exhibits containing orders awarding Counsel prevailing parties fees at the requested hourly rate in litigation representing the same client pertaining to the same or similar issues.

Although the GRC is not required to adhere to court determinations on a practitioner’s experience, it is persuasive when combined with prior GRC decisions which permitted awards of

\$300.00 per hour. See Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Paff v. Cnty. Of Salem, GRC Complaint No. 2015-342 (June 2017). It should be noted that although Custodian's Counsel filed objections to the fee application, same did not dispute the requested hourly rate.

Based on the foregoing, the rate of \$300.00 per hour is reasonable for a practitioner with Counsel's experience and skill level.

b. Time Expended

N.J.A.C. 5:105-2.13(b)(5) states that as part of the fee application, a complainant's attorney must provide "[c]opies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments."

In Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013), complainant's counsel submitted a prevailing party fee application for review and approval. The Council found that the time log provided by complainant's counsel was overly broad as to time periods and vague regarding the work performed, and therefore did not fully conform with the requirements set forth under N.J.A.C. 5:105-2.13. The Council thus ordered complainant's counsel to submit an amended time log to the Council in support of his application for attorney's fees.

In the instant matter, Counsel submitted a Bill in support of his request for fees. For the period from July 28, 2020, through July 27, 2022, Counsel billed a total of 17.5 hours for work on the file. However, Counsel's entries are not logged in increments of tenths of an hour. Rather, the Bill's entries are logged in total minutes and/or hours expended, absconding the GRC's regulations. Thus, like time log in Carter, the GRC is unable to adequately determine the reasonableness of the hours expended without a concise accounting of the hours expended on each entry in Counsel's Bill.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided Bill fails to log each entry in increments of tenths of an hour. Therefore, the Bill must be amended so that the Council is able to determine the reasonableness of the hours expended. See Carter, GRC 2011-228. **Accordingly, because the Council does not award fees to Complainant's Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

2. Enhancement Analysis

Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided bill for services fails to log each entry in increments of tenths of an hour. Therefore, the bill for services must be amended so that the Council is able to determine the reasonableness of the hours expended. See Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013). **Accordingly, because the Council does not award fees to Complainant's Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Prepared By: Samuel A. Rosado
Staff Attorney

September 22, 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

April 26, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-157

v.

Glassboro Police Department (Gloucester)
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 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:

1. The Custodian complied with the Council’s February 22, 2022 Interim Order because she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian’s initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive 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 February 22, 2022 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. at 432, and Mason, 196 N.J. at 71. **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 26th Day of April 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: April 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 26, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-157

v.

**Glassboro Police Department (Gloucester)²
Custodial Agency**

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

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

Custodian of Record: Samantha Bellebuono
Request Received by Custodian: May 6, 2020
Response Made by Custodian: July 27, 2020
GRC Complaint Received: August 13, 2020

Background

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Council considered the February 15, 2022 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. 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 full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt’s hourly rate. See

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

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ).

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

N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.

2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated 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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director⁶ 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.

Procedural History:

On February 23, 2022, the Council distributed its Interim Order to all parties. On March 2, 2022, the Custodian e-mailed the GRC, forwarding correspondence sent to the Complainant. Therein, the Custodian stated that the revised special service charge was \$424.40, broken down to

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

the cost to process request item Nos. 2 (\$265.12) and 3 (\$159.28). Thereafter, the Custodian provided a certification to the GRC reflecting the revised special service charge.

On April 5, 2022, the Custodian responded to the Council's Interim Order. The Custodian certified that on March 2, 2022, the Complainant responded to the Custodian's correspondence reflecting the revised charge and asserted that he would be willing to pay for the cost of processing one (1) years' worth of records responsive to item Nos. 2 & 3. The Custodian certified that on March 4, 2022, she provided the Complainant with a revised estimated total of \$169.76. The Custodian certified that on or after March 4, 2022, the Complainant submitted a money order for \$169.79. The Custodian certified that on March 22, 2022, and April 5, 2022, she submitted responsive records to the Complainant for item Nos. 3 & 2, respectively. The Custodian certified that the actual hours expended were lower than the revised estimate, and therefore the Complainant was entitled to a refund of \$115.03, and would be transmitted to the Complainant upon approval from the Borough of Glassboro ("Borough").

Analysis

Compliance

At its February 22, 2022 meeting, the Council ordered the Custodian to provide the Complainant the revised special service charge within five (5) business days of the Council's Order. The Council also ordered the Complainant to remit payment of the revised special service charge or state his rejection to purchase the records, and that a failure to act within five (5) business days of receipt 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, or from receipt of payment from the Complainant, to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4.

On February 23, 2022, the Council distributed its Interim Order to all parties. Thus, the Custodian was required to provide the Complainant with the revised special service charge by the end of business on March 2, 2022.

On March 2, 2022, the fifth (5th) business day after receipt of the Council's Order, the Custodian provided the Complainant with the revised special service charge and provided the GRC with a certification confirming same. Thereafter, the parties agreed on a revised charge based on processing one (1) requested year of records for both items. On or after March 4, 2022, the Complainant provided payment to the Custodian. Then on March 22, 2022 and April 5, 2022, the Custodian certified that she provided responsive records to the Complainant.

On April 5, 2022, the same day she provided the Complainant with records responsive to item No. 2, she submitted certified confirmation of Compliance to the Executive Director.

Therefore, the Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the instant matter, the Custodian’s initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive 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 records and reports pertaining to the Borough’s EW System as well as use of force reports for a given period. The Custodian assessed a special service charge to process the request. The Complainant filed this instant matter asserting that the estimated charge was excessive.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council’s February 22, 2022 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.⁷

Therefore, pursuant to the Council’s February 22, 2022 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. 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. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s February 22, 2022 Interim Order because

⁷ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.

2. The Custodian's initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive 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 February 22, 2022 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. at 432, and Mason, 196 N.J. at 71. **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

April 19, 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

February 22, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-157

v.

Glassboro Police Department (Gloucester)
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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. 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 full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt’s hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated 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**

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.

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 22nd Day of February 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: February 23, 2022

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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-157

v.

**Glassboro Police Department (Gloucester)²
Custodial Agency**

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

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

Custodian of Record: Samantha Bellebuono
Request Received by Custodian: May 6, 2020
Response Made by Custodian: July 27, 2020
GRC Complaint Received: August 13, 2020

Background⁴

Request and Response:

On April 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 27, 2020, the Custodian responded in writing, stating that a special service charge would be assessed to process request item No. 1. The Custodian estimated that it would take approximately four (4) hours to complete and would be handled by Lt. Rick Watt of the Glassboro Police Department (“GPD”). The

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

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ), and Gary M. Marek, Esq., of the Law Offices of Gary M. Marek (Mount Laurel, NJ).

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

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

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Glassboro Police Department (Gloucester), 2020-157 – Findings and Recommendations of the Executive Director

Custodian stated that Lt. Watt's hourly rate was \$66.28, and the total estimated cost would be \$265.12. Regarding request item No. 2, the Custodian stated that a special service charge would be assessed and would also be fulfilled by Lt. Watt. The Custodian stated that the process would take approximately five (5) hours and total \$331.40.

Denial of Access Complaint:

On August 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the estimated special service charges were excessive. The Complainant therefore requested the GRC to reject the special service charge assessment and to award counsel fees.

Statement of Information:

On September 29, 2020, the Custodian filed a Statement of Information ("SOI") attaching a certification from. The Custodian certified that she received the Complainant's OPRA request on May 6, 2020. The Custodian certified that the search for records included conferences with Lt. Watt and the Borough Solicitor regarding the scope of the request and location of responsive records. On July 27, 2020, the Custodian responded to the Complainant in writing, stating that a special service charge would be assessed to process to request items at issue.

The Custodian maintained that processing the request items required a substantial and extraordinary level of work to fulfill. The Custodian included a certification from Lt. Watt, detailing the basis and justification for the charge. The Custodian asserted that the total expenditure of nine (9) hours to complete the request represents an extraordinary time and effort to produce responsive records given the size of the agency, and the disruption to Lt. Watt's regular duties. Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012); Rotimi Owoh, Esq. (O.B.O. AADARI) v. Borough of Fair Lawn (Monmouth), GRC Complaint No. 2018-146 (Interim Order dated May 19, 2020).

In his certification, Lt. Watt provided information normally requested via the GRC's 14-point special service charge analysis. Lt. Watt certified that GPD employed a total of sixty-six (66) personnel. Lt. Watt certified that he was one of three (3) Lieutenants at GPD, and his primary duties pertained to Internal Affairs matters, including disciplinary matters. Lt. Watt certified that he was also in charge of GPD's Firearms Unit, Bike Unit, and K-9 Unit.

Lt. Watt certified that processing the request could not be delegated to another party due to the sensitive nature of the records, which included juvenile matters, domestic violence matters, disciplinary matters, and other records containing private information. Lt. Watt certified that the estimated nine (9) hours of labor did not include additional time expended by the Custodian and Borough Solicitor for their roles in processing the request.

Lt. Watt certified that regarding item No. 1, a preliminary search located eleven (11) notifications stemming from the EW System. Lt. Watt certified that the actual number of records stemming from those notifications would be far greater than eleven (11) pages, since the request sought various types of "records, reports, and notifications" of the "conduct" which triggered the

EW System. Lt. Watt certified that he provided his estimate of four (4) hours to complete this portion of the request based upon his familiarity with the types of records potentially responsive to item No. 1.

Regarding item No. 2, Lt. Watt certified that a preliminary search of available records located approximately 237 separate Use of Force Reports (“UFRs”) that would be responsive to the Complainant’s request. Lt. Watt certified that based upon his familiarity with the records, he estimated that it would take five (5) hours to process this portion of the request. Lt. Watt certified that the estimate was based upon the time needed to compile the requested records, plus the average time of one (1) minute to review and redact each UFR. Lt. Watt also certified that while preliminary redactions could have been done by a Police Records clerk, he would nonetheless have to spend the identical amount of time to review the UFRs.

Lt. Watt further certified that the estimated nine (9) hours to complete the request equaled one-quarter of his entire work week. Lt. Watt also certified that the COVID-19 pandemic brought in additional unforeseen effects to GPD, including staggered work schedules and additional duties. Lt. Watt certified that one example was a major influx in firearms applications, the processing of which was one of his duties.

Analysis

Special Service Charge

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.

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:

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

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

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 the variety of factors

discussed in The Courier Post v. Lenape Reg'l High Sch., 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 Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015), the Council was tasked with determining whether a proposed special service charge was warranted and reasonable. The custodian provided to the GRC a response to its 14-point analysis request that included specific details such as the hours spent by employee, the task performed during those hours, and the hourly rate. The Council reviewed the response and found that the charge was warranted. However, the Council also found that the charge was not reasonable. Specifically, the Council found that the Borough Administrator was not the lowest paid employee qualified to perform some of the work the custodian credited him with in the 14-point analysis response. Thus, the Council adjusted the fee less the amount identified as unreasonable. Id. at 8.

In the instant matter, the Custodian argued that the estimated fee was warranted and reasonable. The Custodian argued that potentially responsive records would invariably contain sensitive information requiring review and redaction. The Custodian further asserted that Lt. Watt was the lowest paid employee capable of performing the necessary work, and that allocating nine (9) hours to process the request would substantially disrupt the performance of his other duties and responsibilities at GPD. Lt. Watt further noted GPD’s size of 66 employees and how the COVID-19 pandemic further affected the department’s daily functions. Lt. Watts contended that the estimated time was based upon allocating one (1) minute to each of the estimated 237 UFRs responsive to item No. 2, as well as reviewing the records responsive to item No. 1.

The GRC must determine whether the assessed charge was reasonable and warranted. When special service charges are at issue, the GRC will typically require a custodian to complete a 14-point analysis questionnaire prior to deciding on the charge issue. However, the facts of this complaint as presented to the GRC do not require the submission of such a questionnaire.

In first determining whether the assessed charge was warranted, the GRC compares the facts here with those in Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). There, the custodian's 14-point analysis indicated that the Borough of Fort Lee Police Department ("BPD") comprised approximately 100 employees, whereas GPD employed more than one-quarter fewer at sixty-six (66). Also, the custodian identified a member of the BPD as one of the employees capable of performing work on the request, just as the Custodian did in the instant matter. Furthermore, although the BPD estimated seven (7) hours of work to review and redact 411 pages of records compared to the nine (9) hours for an estimated fewer than 300 pages here, Lt. Watt adequately demonstrated how the allocation would have interfered with his other responsibilities in addition to handling internal affairs and disciplinary matters. Based on the foregoing, the GRC is persuaded that, in principle, a special service charge is warranted in this complaint.

However, the Council must now address whether the proposed fee is reasonable. In Courier Post, 360 N.J. Super. at 204, the court held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the custodian can prove that the professional level of human resource was needed to fulfill the request. Thus, as part of the calculation of a special service charge, a custodian must prove that same was based upon the lowest paid, qualified employee's hourly rate to perform the work required to respond to the subject OPRA request. Palkowitz, GRC 2014-302. See also Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007).

Here, Lt. Watt calculated the charge based upon his own hourly rate (\$66.28) for all nine (9) hours. However, the GRC is not satisfied that this number is a correct calculation, given that Lt. Watt certified that a records clerk at the police department could have completed the task of redacting the records. Notwithstanding this admission, Lt. Watt asserted that he would still be tasked with reviewing the redactions made, and still calculated the charge based upon his hourly rate. For this reason, the estimated charge should be revised to reflect the hourly rate of the lowest paid employee capable of performing the work.

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 full nine (9)-hour charge should be calculated based solely on Lt. Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Janney, GRC 2006-205; Palkowitz, GRC 2014-302. Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.

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. 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 full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated 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**

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.

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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.

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Staff Attorney

February 15, 2022