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 African American Data & Research Institute)
Complainant
v.
City of Union City (Union)
Custodian of Record

Complaint No. 2020-19

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 current Custodian complied with the Council's March 29, 2022 Interim Order because she responded in the prescribed time frame seeking confirmation of the Complainant's willingness or refusal to pay the special service charge and simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian provided an insufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g). However, the current Custodian complied with the Council's subsequent Interim Orders, and provided the Complainant the opportunity to pay a reasonable and warranted special service charge for access to the records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's May 18, 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, 76 (2008). Specifically, the Council ordered the Custodian to provide responsive records to the Complainant, with the opportunity to impose a reasonable and warranted special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **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 African American Data & Research Institute)[1]
Complainant

GRC Complaint No. 2020-19

v.

City of Union (Union)[2]
Custodial Agency

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

1. Drug Recognition Evaluation/Expert ("DRE") Rolling Log from January 2019 through present.
2. Summons and complaints that were prepared by the City of Union Police Department ("UPD") relating to each one of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints, tickets, and summonses that were prepared by the UPD from January 2019 through present.
4. Drug possession summonses and complaints that were prepared by UPD from January 2019 through present.
5. Drug paraphernalia summonses and complaints that were prepared by UPD from January 2019 through present.
6. "Arrest Listings" from January 2019 through present.

Custodian of Record: Erin Knoedler[3]
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2020

Background

March 29, 2022 Council Meeting:

At its March 29, 2022 public meeting, the Council considered the March 22, 2022 Supplemental Findings and Recommendations of the Executive Director and all related

[1] The Complainant represents the African American Data & Research Institute.
[2] Represented by Jorge R. de Armas, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ). Previously represented by Angelo Auteri, Esq.
[3] The current Custodian of Record is Acting City Clerk Hilda Rosario.

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 current Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the extended time frame providing a supplemental certification from Officer Romero and simultaneously provided certified confirmation of compliance to the Executive Director.

2. The current Custodian has borne her burden of proof that the proposed special service charge of $6,000.00 per requested month, comprising approximately 60 hours at an hourly rate of $110.12 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the current Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of the estimated 60 hours per requested month, the current Custodian should adjust the special service charge and notify the Complainant.

3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days of receipt of such statement by delivering to the current Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the current Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the current Custodian shall deliver[4] to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The current Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.[5]**

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

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

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

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

Procedural History:

On March 30, 2022, the Council distributed its Interim Order to all parties. On April 13, 2022, the current Custodian responded to the Council's Interim Order. The current Custodian certified that more than five (5) days have passed since delivery of the Order, and the Complainant has not submitted any payment for the special service charge or a statement declining to purchase the records.

The current Custodian certified that in accordance with the Order, the current Custodian was no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Analysis

Compliance

At its March 29, 2022 meeting, the Council ordered the Complainant to remit payment of the special service charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the current Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the current Custodian ten (10) business days from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4.

On March 30, 2022, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on April 6, 2022. Further, the current Custodian's response was due by close of business on April 13, 2022.

On April 13, 2022, the tenth (10th) business day after receipt, the Custodian responded to the Council's Order. The current Custodian certified that as of April 13, 2022, the Complainant had not responded to the City of Union City ("City") either providing payment or stating his rejection of the special service charge. The current Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's March 29, 2022 Interim Order because she responded in the prescribed time frame seeking confirmation of the Complainant's willingness or refusal to pay the special service charge and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access

under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

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

In the instant matter, the Custodian provided an insufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g). However, the current Custodian complied with the Council's subsequent Interim Orders, and provided the Complainant the opportunity to pay a reasonable and warranted special service charge for access to the records. 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).
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> [Id. at 76.]

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> [Id. at 76.]

The Complainant filed the instant complaint asserting that the Custodian failed to respond to his OPRA request. Thereafter, the Custodian responded to the Complainant's request deny access in part on the basis that processing the request would cause a substantial disruption of agency proceedings.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's May 18, 2021 Interim Order, the Custodian was required to provide the responsive records, with the opportunity impose a reasonable and warranted special service charge, which was the Complainant's desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason, 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.[6]

Therefore, pursuant to the Council's May 18, 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 76. Specifically, the Council ordered the Custodian to provide responsive records to the Complainant, with the opportunity to impose a reasonable and warranted special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **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:

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

1. The current Custodian complied with the Council's March 29, 2022 Interim Order because she responded in the prescribed time frame seeking confirmation of the Complainant's willingness or refusal to pay the special service charge and simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian provided an insufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g). However, the current Custodian complied with the Council's subsequent Interim Orders, and provided the Complainant the opportunity to pay a reasonable and warranted special service charge for access to the records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's May 18, 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, 76 (2008). Specifically, the Council ordered the Custodian to provide responsive records to the Complainant, with the opportunity to impose a reasonable and warranted special service charge. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **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

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shall deliver[1] to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The current Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.[2]

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

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

Interim Order Rendered by the
Government Records Council
On The 29th Day of March 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: March 30, 2022

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

STATE OF NEW JERSEY
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Complainant

GRC Complaint No. 2020-19

v.

City of Union (Union)[2]
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Records Relevant to Complaint: Electronic copies via e-mail of:

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2. Summons and complaints that were prepared by the City of Union Police Department ("UPD") relating to each one of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
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6. "Arrest Listings" from January 2019 through present.

Custodian of Record: Erin Knoedler[3]
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2020

Background

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Council considered the February 15, 2022 Supplemental Findings and Recommendations of the Executive Director and all related

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[3] The current Custodian of Record is Acting City Clerk Hilda Rosario.

documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

> The current Custodian has failed to establish in their request for reconsideration of the Council's June 29, 2021 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The current Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a change in circumstances. The current Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the current Custodian failed show that providing a more detailed special service charge estimate constituted an extraordinary circumstance. Further, the current Custodian failed to show that the Custodian's resignation qualified as a change in circumstance within the context of a request for reconsideration. Thus, the current Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Council's June 29, 2021 Interim Order remains in full force and effect and the current Custodian must comply accordingly.

Procedural History:

On February 23, 2022, the Council distributed its Interim Order to all parties. On March 1, 2022, the current Custodian e-mailed the GRC stating that the City of Union City ("City") received the Interim Order that day and confirmed whether the response was due by March 8, 2022. The GRC responded that same day, stating that the Interim Order was distributed on February 23, 2022 via e-mail, but nevertheless granted an extension of time to respond until March 8, 2022.

On March 8, 2022, the Custodian's Counsel e-mailed the GRC, requesting an additional extension until March 11, 2022 to respond, which the GRC granted that same day. On March 11, 2022, the current Custodian responded to the Council's Interim Order providing a certification from Officer Edward Romero on the details of his search and discovery of responsive records to the Complainant's OPRA request. The current Custodian also provided certified confirmation of compliance to the Executive Director.

In his supplemental certification, Officer Romero certified that he expended 24 hours of labor to locate and retrieve responsive records to item No. 3 of the request for July 2019. Officer Romero further certified that he reviewed 219 pages of DUI/DWI documents and located 19 responsive records therein. Officer Romero certified that the requested summons were paper records or e-ticket records, and not within eCDR system. Officer Romero also certified that most of the copies were kept by the City of Union City Municipal Court ("Municipal Court") and designated liaisons such as Officer Romero have limited access to conduct a search for records. Officer Romer certified that he was limited to conduct searches to Wednesday evenings after

regular hours. Officer Romero certified that the above factors contributed to the hours expended fulfilling this portion of the request, as well as the application of overtime. Officer Romero also certified that that the process would need to be repeated for each requested month, in addition to the actions required to fulfill the remaining request items.

Analysis

Compliance

At its February 22, 2022 meeting, the Council denied the Custodian's request for reconsideration and maintained that the June 29, 2021 Interim Order was in full force and effect. That order required the Custodian to submit a full and complete special service charge estimate and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On February 23, 2022, the Council distributed its Interim Order to all parties, providing the current Custodian five (5) business days to comply with the terms of said Order. Thus, the current Custodian's response was due by close of business on March 2, 2022.

On March 1, 2022, the fourth (4th) business day after receipt of the Council's Order, the current Custodian asserted that the City received the Interim Order that day, and inquired whether the response was due on March 8, 2022. The GRC responded the Custodian that same day, granting an extension until March 8, 2022.

On March 8, 2022, Counsel requested an additional extension of time until March 11, 2022, which the GRC granted. On March 11, 2022, the current Custodian responded to the Council's Interim Order, providing a supplemental certification from Officer Romero. The current Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the extended time frame providing a supplemental certification from Officer Romero and simultaneously provided certified confirmation of compliance to the Executive Director.

Special Service Charge

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

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

[Id. (emphasis added).]

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

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

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

In the instant matter, Officer Romero certified that he expended 24 hours of labor to locate and retrieve responsive records to item No. 3 of the request for July 2019. Officer Romero further certified that he reviewed 219 pages of DUI/DWI documents and located 19 responsive records therein. Officer Romero certified that fulfilling all the request items ultimately required a manual search and review of case files located at the municipal court, which warranted the hours expended for the DUI/DWI records for one month. The Custodian then provided an estimated charge of $6,000.00 per month for the remaining requested months based upon this expended time. See Owoh, Esq. (O.B.O. AADARI) v. City of Union City (Union), GRC Complaint No. 2020-19 (Interim Order dated June 29, 2021). This estimate is further based upon Officer Romero's hourly rate of $110.12. Officer Romero previously certified that he was the lowest paid employee at Union City Police Department ("UPD") capable of performing the work, as he was one of only two UPD employees with the ability to access the records. Id. See also Owoh, Esq. (O.B.O. AADARI) v. City of Union City (Union), GRC Complaint No. 2020-19 (Interim Order dated February 22, 2022).

A review of the foregoing firmly supports that a special service charge is warranted based upon the estimated disruption to Officer Romero's regular duties and the potential number of

records requiring review. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the GRC is persuaded by Officer Romero's current and previous certifications noting that nearly all the records were physically maintained, and the search required to locate same was and will be a time-consuming affair.

Furthermore, the GRC finds that the application of Officer Romero's rate to the special service charge comports with Courier Post's justification requirements. Officer Romero certified that he was one of only two UPD employees with access to the physical records, and that the other employee had a higher rank and hourly rate. Officer Romero further certified that access to the records was restricted to Wednesdays during off hours, thereby incurring overtime rates. Thus, GRC finds that the Custodian's estimate of $6,000.00 per month, or approximately 60 hours at $110.12 per hour, to process the request was reasonable.

Accordingly, the current Custodian has borne her burden of proof that the proposed special service charge of $6,000.00 per requested month, comprising approximately 60 hours at an hourly rate of $110.12 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-311. Thus, the current Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of the estimated 60 hours per requested month, the current Custodian should adjust the special service charge and notify the Complainant.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the extended time frame providing a supplemental certification from Officer Romero and simultaneously provided certified confirmation of compliance to the Executive Director.

2. The current Custodian has borne her burden of proof that the proposed special service charge of $6,000.00 per requested month, comprising approximately 60 hours at an hourly rate of $110.12 is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier

Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (October 28, 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the current Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Finally, should the total amount of time expended fall short of the estimated 60 hours per requested month, the current Custodian should adjust the special service charge and notify the Complainant.

3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days of receipt of such statement by delivering to the current Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the current Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the current Custodian shall deliver[4] to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The current Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.[5]**

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

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

Prepared By: Samuel A. Rosado
Staff Attorney

March 22, 2022

[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."

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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 22, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American Data & Research Institute)
Complainant
v.
City of Union City (Union)
Custodian of Record

Complaint No. 2020-19

At the February 22, 2022 public meeting, the Government Records Council ("Council") considered the February 15, 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 the current Custodian has failed to establish in their request for reconsideration of the Council's June 29, 2021 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The current Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a change in circumstances. The current Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the current Custodian failed show that providing a more detailed special service charge estimate constituted an extraordinary circumstance. Further, the current Custodian failed to show that the Custodian's resignation qualified as a change in circumstance within the context of a request for reconsideration. Thus, the current Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Council's June 29, 2021 Interim Order remains in full force and effect and the current Custodian must comply accordingly.

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

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute)[1]
Complainant

GRC Complaint No. 2020-19

v.

City of Union (Union)[2]
Custodial Agency

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

1. Drug Recognition Evaluation/Expert ("DRE") Rolling Log from January 2019 through present.
2. Summons and complaints that were prepared by the City of Union Police Department ("UPD") relating to each one of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints, tickets, and summonses that were prepared by the UPD from January 2019 through present.
4. Drug possession summonses and complaints that were prepared by UPD from January 2019 through present.
5. Drug paraphernalia summonses and complaints that were prepared by UPD from January 2019 through present.
6. "Arrest Listings" from January 2019 through present.

Custodian of Record: Erin Knoedler[3]
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2020

Background

June 29, 2021 Council Meeting:

At its June 29, 2021 public meeting, the Council considered the June 22, 2021 Supplemental Findings and Recommendations of the Executive Director and all related

[1] The Complainant represents the African American Data & Research Institute.
[2] Represented by Jorge R. de Armas, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ). Previously represented by Angelo Auteri, Esq.
[3] Ms. Knoedler resigned as the Custodian of Record as of July 1, 2021.

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 May 18, 2021 Interim Order because she responded within the prescribed time frame providing the Complainant with an estimated special service charge, as well as a certification to the Executive Director stating that the Complainant has rejected the estimate.

2. The Council shall grant the current Custodian a final opportunity to provide a full and complete response to the 14-point analysis. The response shall include an estimated total cost of the special service charge, inclusive of the estimated time to review and redact the responsive records. The response shall also elaborate as to Ofc. Romero and the other employee's role in processing the request to ensure that the City of Union City is utilizing the lowest pay employee capable of processing the request.

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

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

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

Procedural History:

On June 30, 2021, the Council distributed its Interim Order to all parties. On July 8, 2021, the Custodian's Counsel filed a request for reconsideration of the Council's June 29, 2021 Interim Order based on extraordinary circumstances. Counsel also stated that as of July 1, 2021, the Custodian resigned as City Clerk for Union City ("City"), resulting in a change in circumstances.

Counsel asserted that the estimated charge was based upon the work already conducted by Officer Edward Romero of the Union City Police Department ("UCPD"). Counsel asserted that to supplement the 14-point analysis as required by the Interim Order, the City would have 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.

undertake the search that serves the basis for imposing the special service charge. Counsel argued that OPRA did not require the City to process the request before imposing the charge.

Counsel also asserted that the Complainant has refused to obtain those records already located at the incurred cost of $2,000.00. Counsel argued that the Complainant's refusal should end the matter. However, Counsel offered an amended Interim Order as a solution: 1) requiring the Complainant pay the $2,000.00 fee incurred prior to the City processing the request further, and 2) permitting the City to respond to the remainder of the Complainant's request and charge the actual cost by month and the item of records requested. Counsel added that if the Complainant wishes for an additional month or item thereafter, the Complainant would be required to pay for the actual cost of any search conducted up to that point.

As part of the filing Counsel provided a certification from Officer Romero. Therein, Officer Romero certified that the GRC's request as part of its June 30, 2021 Interim Order was impossible to provide given the logistics of record keeping with the City and the Union City Municipal Court ("Municipal Court"). Officer Romero certified that the estimated time provided was the best estimate available based on the work already done to process the request. Officer Romero certified that the only way to determine the number of pages of documents for each request item would require a manual search of the physical complaints and summonses held by the Municipal Court. Officer Romero certified that there was no way for the City or UCPD to determine how many potentially responsive records exist without conducting the actual search and review.

Officer Romero next certified that the requested DUI/DWI summons records were in paper form or as e-tickets, and not within the Municipal Court's eCDR system. Officer Romero certified that while some of the paper copies were held by the City, most were held by the Municipal Court, and UCPD officers have limited access to Municipal Court files. Additionally, Officer Romero certified that the Municipal Court did not permit any member of UCPD to search its records except for designated court officers, of which he is one. Officer Romero also certified that the Municipal Court would only allow him to search their records on Wednesday nights, when overtime compensation would be required. Officer Romero certified that only one other officer can search the Municipal Court's files but receives a higher hourly rate.

Officer Romero also certified that the electronic programs accessible by the City did not permit for an estimated count of summonses and complaints that may have been issued for a particular offense during a given period. Officer Romero certified that the City did not maintain a report of "arrest listings" and to create one would require a manual search similar to the other request items. Officer Romero also certified that while the requested summonses and complaints could be printed from eCDR, UCPD would have to run a search of its CAD system to begin to compile a list of every potential "drug" offense. Officer Romero certified that the requested records could not be electronically filtered by offense, but instead required manual review to determine whether they are responsive to the request. Officer Romero also certified that some of the eCDR complaints and summonses were not electronically signed and would thus require a search of the Municipal Court's records to obtain a signed copy.

On July 10, 2021, the Complainant submitted objections to the request for reconsideration. The Complainant asserted that the City was making the same arguments that were made by the

City of Millville in Simmons v. Mercado, 347 N.J. 24 (2021). The Complainant asserted that the Court rejected the arguments and ruled in favor of AADARI. The Complainant asserted that based upon the decision, police departments such as UCPD have electronic access to the requested records and should be able to provide them to the Complainant electronically without charge.

On July 12, 2021, Counsel submitted a reply to the Complainant's objections. Counsel asserted that the issues addressed by the Court in Simmons were not the same issues raised by the City in the current matter. Counsel argued that the issues in Simmons dealt with whether the request was properly submitted to a police department and whether the request was vague and overbroad. Counsel contended that the City's sole issue on its request for reconsideration was the proper estimate of a special service charge in light of the manner in which the requested records were maintain by the City and the nature of the search required to process the request. Counsel asserted that the issue of a special service charge was never addressed in Simmons, nor was the issue of the way the requested records were maintained by the municipality.

Counsel also argued that given the breadth of the Complainant's request and the City's electronic and manual search capabilities, the special service charge was warranted and with the amount set forth in the City's 14-point analysis. Counsel contended that the Complainant refuses to address the points raised by the City regarding how the estimated charge was to be calculated and refuses to pay for the costs already incurred. Counsel argued that because the Complainant failed to challenge the City's position on the estimated special service charge, the City's request for reconsideration should be granted, and the proposed amended Interim Order be adopted.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order dated June 29, 2021 on July 8, 2021, five (5) business days from the issuance of the Council's Order.

Applicable case law holds that:

> "A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The

> moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.
>
> [In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon review, the current Custodian's request for reconsideration should be denied. Although the Counsel asserted that the estimated special service charge was based upon the labor expended fulfilling one month's worth of responsive records, neither Counsel nor Officer Romero provided details on the actions already taken which totaled an estimated $2,000.00 in labor costs.

While Officer Romero's certification provided more information on the process engaged to fulfill the request, it did not provide any detail on what parts of the process pertained to the estimated twenty (20) hours expended to locate one (1) months' worth of responsive records. Moreover, the certification did not provide the number of pages located, and to which request item they were responsive. Without this information, the GRC cannot adequately determine whether the Custodian's estimated charge is reasonable based solely on the blanket claim of twenty (20) hours expended for one (1) responsive month. Lastly, Counsel provided no additional argument to the claim that the Custodian's resignation during the pendency of this matter qualifies as a "change in circumstances" warranting reconsideration.

As the moving party, the current Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The current Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a change in circumstances. The current Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the current Custodian failed show that providing a more detailed special service charge estimate constituted an extraordinary circumstance. Further, the current Custodian failed to show that the Custodian's resignation qualified as a change in circumstance within the context of a request for reconsideration. Thus, the current Custodian's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. The Council's June 29, 2021 Interim Order remains in full force and effect and the current Custodian must comply accordingly.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the current Custodian has failed to establish in their request for reconsideration of the Council's June 29, 2021 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational

basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The current Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a change in circumstances. The current Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the current Custodian failed show that providing a more detailed special service charge estimate constituted an extraordinary circumstance. Further, the current Custodian failed to show that the Custodian's resignation qualified as a change in circumstance within the context of a request for reconsideration. Thus, the current Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Council's June 29, 2021 Interim Order remains in full force and effect and the current Custodian must comply accordingly.

Prepared By: Samuel A. Rosado
Staff Attorney

February 15, 2022

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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 29, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American Data & Research Institute)
Complainant
v.
City of Union City (Union)
Custodian of Record

Complaint No. 2020-19

At the June 29, 2021 public meeting, the Government Records Council ("Council") considered the June 22, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's May 18, 2021 Interim Order because she responded within the prescribed time frame providing the Complainant with an estimated special service charge, as well as a certification to the Executive Director stating that the Complainant has rejected the estimate.

2. The Council shall grant the current Custodian a final opportunity to provide a full and complete response to the 14-point analysis. The response shall include an estimated total cost of the special service charge, inclusive of the estimated time to review and redact the responsive records. The response shall also elaborate as to Ofc. Romero and the other employee's role in processing the request to ensure that the City of Union City is utilizing the lowest pay employee capable of processing the request.

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

[1] The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.
[2] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
[3] Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

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

Interim Order Rendered by the
Government Records Council
On The 29th Day of June 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 30, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute)[1]
Complainant

GRC Complaint No. 2020-19

v.

City of Union (Union)[2]
Custodial Agency

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

1. Drug Recognition Evaluation/Expert ("DRE") Rolling Log from January 2019 through present.
2. Summons and complaints that were prepared by the City of Union Police Department ("UPD") relating to each one of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints, tickets, and summonses that were prepared by the UPD from January 2019 through present.
4. Drug possession summonses and complaints that were prepared by UPD from January 2019 through present.
5. Drug paraphernalia summonses and complaints that were prepared by UPD from January 2019 through present.
6. "Arrest Listings" from January 2019 through present.

Custodian of Record: Erin Knoedler
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2020

Background

May 18, 2021 Council Meeting:

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

[1] The Complainant represents the African American Data & Research Institute.
[2] Represented by Angelo Auteri, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ).

1. Because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant's OPRA request item Nos. 3-6 before denying access on the basis that the request would substantially disrupt agency operations, the Custodian's response to this portion of the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5(g). See Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009). Thus, the Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian must therefore: (1) disclose to the Complainant the records responsive to his OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point special service charge analysis and provide the Complainant with the estimated cost to provide the responsive records.

2. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[3] to the Executive Director.[4]**

3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis[5] and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

4. The Custodian lawfully denied access to the Complainant's OPRA request item Nos. 1 and 2. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects,

[3] "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."
[4] Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.
[5] See https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf .

that the City of Union City does not possess or maintain the requested complaints and summonses for this portion of the request. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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

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

Procedural History:

On May 19, 2021, the Council distributed its Interim Order to all parties. On May 26, 2021, the Custodian provided the Complainant with a special service charge statement in accordance with the Council's Interim Order. Therein, the Custodian assessed an estimated $48,000.00 to process the request. The Custodian also included the City of Union's ("City") 14-point analysis. On May 27, 2021, the Complainant responded to the Custodian stating that the asserted estimate was grossly excessive.

On June 9, 2021, the fourteenth (14th) business day after receiving the Council's Order, the Complainant submitted a letter to the GRC stating that the estimated charge was excessive. That same day, the Custodian provided the GRC with a certification in accordance with the Council's Order. Therein, the Custodian certified that she provided the Complainant with the assessed special service charge along with the 14-point analysis. The Custodian attached a copy of the 14-point analysis containing the following responses:

1. **What records are requested?**

   Response:
   a. Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints and summonses prepared and filed by the Police Department from January 2019 through present.
   b. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
   c. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.
   d. "Arrest Listings" from January 2019 through present.

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

   Response: See response to Item 1 Above.

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

   Response: July 1, 2019 [sic] through December 31, 2019.

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

   Response: These records are kept in the Municipal Court's CDR and other databases systems.

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

   Response: [City] employs approximately 800 employees.

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

   Response: The [City] can only deploy at most two (2) employees to work on this request due workload, access to the documents, and use of employees at the lowest rate.

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

   Response: Each record has to be manually reviewed to redact personal identifiers, information required to be redacted by court rule, and juvenile and domestic violence records have to be individually identified for non-production as required by law.

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

   Response: The employee with the lowest rate that can work on this request is Ofc. Romero @ the rate of $110.12 per hour at the regular rate. As Ofc. Romero is assigned to the Court overtime rates may be required to be charged.

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

   Response: See answer to Question No. 8.

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

    Response: Not applicable – records are electronically stored see response to No. 4 above.

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

    Response: Given the type of record, where and how the records are stored and the required access, it is necessary to employ a member of the [UPD] search, identify, retrieve, and redact the requested records. Ofc. Romero is the lowest paid employee who is able to perform the tasks required.

12. **Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?**

    Response: See response to question No. 8.

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

    Response: Each report, which is stored in the Municipal Court's CDR and other database systems as to which only the [UPD] who have access, has to be identified and reviewed individually by the employee assigned to identify, retrieve, and redact any potentially responsive record.

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

    Response: In preparing a response to this request, in order to estimate the time and cost expenditure that will be required it is noted, that the Police Department personnel assigned, has so far required 20 hours to retrieve potentially response records for the month of July 2019, as to one item of records only. Therefore, based on this metric it can be presumed that the cost of responding to this request would be $2,000.00 per month (6 months), per item (4 items) requested records requested per item, for an initial estimate $48,000.00 (6 x 4 x $2,000.00). This figure does not include time required to review and redact the records which would be in excess of such amount.

Analysis

Compliance

At its May 18, 2021 meeting, the Council ordered the Custodian to either provide responsive records or provide the Complainant with a special service charge estimate. The Council also order the Custodian to submit a certification in accordance with N.J. Court Rules, R. 1:4-4 to the GRC informing whether the Complainant has accepted or rejected the special service charge amount. On May 19, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's initial response was due by close of business on May 26, 2021.

On May 26, 2021, the fifth (5th) business day after receipt of the Council's Order, the Custodian provided a special service charge estimate to the Complainant, in accordance with the Interim Order. On May 27, 2021, the Complainant responded to the Custodian, stating that the special service charge estimate was excessive.

On June 9, 2021, the fourteenth (14th) business day after receipt, the Custodian submitted a certification to the GRC. Therein, the Custodian certified that the Complainant rejected the special service charge amount on May 27, 2021 and again on June 9, 2021.

Therefore, the Custodian complied with the Council's May 18, 2021 Interim Order because she responded within the prescribed time frame providing the Complainant with an estimated special service charge, as well as a certification to the Executive Director stating that the Complainant has rejected the estimate.

Special Service Charge

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

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

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

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

The court determined that in the context of OPRA, the term "extraordinary" will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities,

the nature, size and number of documents sought, as well as other relevant variables. Id. at 202. "[W]hat may appear to be extraordinary to one school district might be routine to another." Id.

Here, the Custodian provided responses to the 14-point analysis as required by the Council's Interim Order. However, while the Custodian detailed the hourly wage of the employee tasked with performing the work, she failed to provide an estimated page count for each item. Further, the Custodian's estimated time was solely based upon the hours expended to process a one month of one request item, without regard to the variance of each month and the number of potentially responsive records for each month. Therefore, the GRC is unable to make an adequate determination as to whether the special service charge is excessive.

Accordingly, the Council shall grant the current Custodian a final opportunity to provide a full and complete response to the 14-point analysis. The response shall include an estimated total cost of the special service charge, inclusive of the estimated time to review and redact the responsive records. The response shall also elaborate as to Ofc. Romero and the other employee's role in processing the request to ensure that the City is utilizing the lowest pay employee capable of processing the request.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 18, 2021 Interim Order because she responded within the prescribed time frame providing the Complainant with an estimated special service charge, as well as a certification to the Executive Director stating that the Complainant has rejected the estimate.

2. The Council shall grant the current Custodian a final opportunity to provide a full and complete response to the 14-point analysis. The response shall include an estimated total cost of the special service charge, inclusive of the estimated time to review and redact the responsive records. The response shall also elaborate as to Ofc. Romero and the other employee's role in processing the request to ensure that the City of Union City is utilizing the lowest pay employee capable of processing the request.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order. Further, the current Custodian shall simultaneously deliver[6] certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[7] to the Executive Director.[8]**

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

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

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

[6] 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.

[7] "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."

[8] 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
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 18, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American Data & Research Institute)
Complainant
v.
City of Union City (Union)
Custodian of Record

Complaint No. 2020-19

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

1. Because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant's OPRA request item Nos. 3-6 before denying access on the basis that the request would substantially disrupt agency operations, the Custodian's response to this portion of the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5(g). See Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009). Thus, the Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian must therefore: (1) disclose to the Complainant the records responsive to his OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point special service charge analysis and provide the Complainant with the estimated cost to provide the responsive records.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[1] to the Executive Director.[2]**

3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis[3] and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant**

[1] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
[2] Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.
[3] See https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf .

shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

4. The Custodian lawfully denied access to the Complainant's OPRA request item Nos. 1 and 2. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the City of Union City does not possess or maintain the requested complaints and summonses for this portion of the request. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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

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

Interim Order Rendered by the
Government Records Council
On The 18th Day of May 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 19, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute)[1]
Complainant

GRC Complaint No. 2020-19

v.

City of Union (Union)[2]
Custodial Agency

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

1. Drug Recognition Evaluation/Expert ("DRE") Rolling Log from January 2019 through present.
2. Summons and complaints that were prepared by the City of Union Police Department ("UPD") relating to each one of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints, tickets, and summonses that were prepared by the UPD from January 2019 through present.
4. Drug possession summonses and complaints that were prepared by UPD from January 2019 through present.
5. Drug paraphernalia summonses and complaints that were prepared by UPD from January 2019 through present.
6. "Arrest Listings" from January 2019 through present.

Custodian of Record: Erin Knoedler
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2020

Background[3]

Request:

On December 7, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records.

[1] The Complainant represents the African American Data & Research Institute.
[2] Represented by Angelo Auteri, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ).
[3] 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.

Denial of Access Complaint:

On January 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he submitted his OPRA request on December 7, 2019. The Complainant asserted that as of January 22, 2020, the Custodian has not provided any records. The Complainant included a copy of the e-mail containing the OPRA request, which was addressed to Dominick Cantatore. The Complainant requested that the Council find the Custodian in violation of OPRA and to award counsel fees.

Response:

On February 21, 2020, the Custodian e-mailed the Complainant, stating that she was in receipt of the Complainant's Denial of Access Complaint. The Custodian stated that Mr. Cantatore, the previous Custodian of Record, passed away two (2) years ago. The Custodian stated that the Complainant should have received an error message as Mr. Cantatore's e-mail address was no longer active. The Custodian stated that the City of Union ("City") would be responding to the Complainant's OPRA request with a receipt date of February 20, 2020.

Statement of Information:

On February 28, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she did not receive the Complainant's OPRA request dated December 7, 20. The Custodian certified that she received the Complainant's OPRA request when she received a copy of the Denial of Access Complaint that was included with the GRC's request for an SOI. The Custodian asserted that the Complainant submitted his OPRA request to the former Custodian of Record, who passed away two (2) years ago. The Custodian asserted that the Complainant should have received an error message when he submitted his request to the former Custodian's e-mail address.

The Custodian asserted that on February 21, 2020, she e-mailed the Complainant stating that she never received the OPRA request but would submit a response, nonetheless. The Complainant asserted that during the week of February 24, 2020, she met with representatives at UPD pertaining to the OPRA request and submitted a response and clarification to the Complainant on February 28, 2020. The Custodian argued that for item Nos. 1 and 2, no responsive records exist. Regarding item Nos. 3-6, the Custodian argued that processing the volume of records would substantially disrupt agency operations. See Caggiano v. N.J. Dep't of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The Custodian asserted that the volume of documents request would not be able to process the request and maintain normal services, and potentially take a month to complete.

Additional Submissions:

On March 3, 2020, the Custodian submitted an additional correspondence to the GRC. The Custodian forwarded an e-mail chain that she received from the City's IT Consultant. The e-mail chain included an error message received when sending correspondence to the former Custodian's e-mail address.

Analysis

No Correspondence Received

In Krrywda v. Barnegat Twp. Sch. Dist. (Ocean), GRC Complaint No. 2008-138 (February 25, 2009), the complainant submitted an OPRA request to the athletic director and subsequently filed this complaint after receiving no response. In the SOI, the custodian certified that he did not receive the subject OPRA request prior to the filing of the complaint, but that no records responsive exist. The Council held that notwithstanding the fact that ". . . the Custodian was not given an adequate opportunity to respond . . ." prior to the filing of the denial of access complaint, ". . . the Custodian certified that no records . . . exist . . . [and] has borne his burden of proving a lawful denial of access." Id. at 4. See also Bell v. Paterson Pub. Sch. (Passaic), GRC Complaint No. 2013-04 (Interim Order dated October 29, 2013).

Here, the GRC acknowledges that the Custodian similarly certified in the SOI that she never received the Complainant's OPRA request. However, the Custodian subsequently responded to the Complainant's OPRA request on the basis that she received it as part of the Denial of Access Complaint and GRC's request for a completed SOI. Thus, notwithstanding the fact that the Custodian did not receive the Complainant's OPRA request prior to the filing of this complaint, the GRC will consider this complaint based on the Custodian's SOI response. Krrywda, GRC 2008-138.

It should be noted that had the Custodian simply certified that she never received the OPRA request, and the Complainant did not provide evidence refuting the Custodian's certification, this complaint would have been administratively disposed of as no correspondence received. However, once the Custodian responded to each item of the OPRA request attached to the Denial of Access Complaint, she effectively placed the matter appropriately before the GRC for adjudication.

Sufficiency of Response

OPRA provides that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5(g).

Item Nos. 3-6

Regarding voluminous records requests, in Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the custodian certified in the SOI that granting access to all fire safety inspection files from 1986 to 2006 would result in a substantial disruption to the agency's operations. The Council held that the custodian's denial of access was authorized by N.J.S.A. 47:1A-5(g) based on his efforts to reach a "reasonable solution" with the complainant and the voluminous nature of the complainant's request.

In Caggiano v. N.J. Dep't of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007), the complainant sought inspection of multiple records

totaling 745 pages. The custodian responded granting inspection of the responsive records noting that the complainant would be required to pay the per hour rate of the employee supervising the inspection for every hour over 2 hours. The complainant filed a complaint with the GRC contending that he should not have to pay any cost for inspection. In a July 16, 2007 letter, the custodian contended that an extended inspection of the responsive records would cause a substantial disruption to agency operations. The Council agreed, determining that the ". . . Custodian has borne her burden of proving that the denial of access was authorized by law . . ." because "the extended records inspection . . . would substantially disrupt the agency's operations, and because the Custodian made numerous attempts to reasonably accommodate the Complainant's request . . ." Id. at pg. 9.

In Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009), the complainant submitted a fifty (50) page OPRA request to the custodian on December 3, 2007. The custodian responded in writing in a timely manner noting that the complainant's OPRA request was voluminous and fulfilling it would substantially disrupt the agency's operations. The custodian further stated in the SOI that as an attempt to accommodate the complainant's OPRA request, the custodian asked the complainant to narrow his request or provide an alternative suggestion for resolving the matter. However, the complainant's responses were vague and failed to narrow the scope of his request to a more manageable scale. The GRC determined that:

> [B]ecause in the Custodian's timely response to the Complainant's OPRA request, the Custodian attempted to reach a reasonable accommodation of the OPRA request with the Complainant regarding the Complainant's voluminous request which would substantially disrupt the agency's operations, and because once it became evident that the parties could not reach an accommodation, the Custodian informed the Complainant that he would have to deny the Complainant's OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47:1A-5(g), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007), [Vessio, GRC 2007-63] and Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007).
>
> [Id. at 8.]

Conversely, in Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009), the complainant requested a list of the total number of juveniles arrested in the last twelve (12) months organized by race, gender, and offense, and a list of the total number of juveniles sent to Essex County Youth Facility organized by race, gender, and offense. The custodian responded in writing to the complainant's OPRA request on the seventh (7th) business day following receipt of such request stating that 178 juveniles were arrested in Montclair and 32 were sent to the Essex County Youth Facility during the year 2007. The custodian further stated that she would have to research every report to find the race, gender, and offense of each juvenile. Thus, the custodian denied the Complainant access to the requested records stating that fulfilling the request would substantially disrupt the operation of the agency pursuant to N.J.S.A. 47:1A-5(g).

In analyzing the facts of Herron, the Council reasoned that:

> Although OPRA permits a custodian to deny access to a records request on the basis that fulfilling the request would substantially disrupt agency operations, OPRA requires that *the custodian must first attempt to reach a reasonable accommodation* of the request with the requestor before denying access. N.J.S.A. 47:1A-5. See Vessio v. NJ Department of Community Affairs, 2007-63 (May 2007) (holding that the custodian must attempt to reach a reasonable accommodation before denying access based on substantial disruption of agency operation).
>
> [Id. at 3-4 (emphasis added).]

The Council determined that although the custodian asserted that responding to the request would cause a substantial disruption of agency operations, the custodian failed to show that she attempted to reach a reasonable accommodation of the request with the complainant. The Council thus held that:

> [B]ecause the Custodian failed to attempt a reasonable accommodation of the Complainant's OPRA request before denying access to the requested records on the basis that the request would substantially disrupt the Township's operations, the Custodian's response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g."
>
> [Id. See also Caldwell v. Vineland Bd. of Educ. (Cumberland), GRC Complaint No. 2009-278 (March 2011)]

Here, the Complainant's OPRA request item Nos. 3-6 sought in part DWI/DUI, drug possession, and drug paraphernalia complaints, summonses over a one (1) year period. The Complainant also sought "arrest listings" over a one (1) year period. The Custodian asserted that responding to the remaining request items would substantially disrupt agency operations. The Custodian also asserted that she informed the Complainant as much on February 28, 2020 but received no response from the Complainant.

Upon review, the facts in this complaint are similar to those in Herron, in that although reviewing and redacting a large volume of records could take a significant amount of time, the Custodian did not attempt "to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency" beyond submitting a letter on February 28, 2020. Herron, GRC 2008-46. No discussions occurred between the parties, and at no point did the Custodian suggest the imposition of a special service charge to complete the request. See Caggiano, GRC 2007-69. Furthermore, the Complainant's four (4) request items sought specific records over a limited period, whereas the requests in Vessio, Dittrich, and Caggiano involved multiple types of records spanning a substantial number of years.

Therefore, because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant's OPRA request item Nos. 3-6 before denying access on the basis that the request would substantially disrupt agency operations, the Custodian's response to this portion of

the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5(g). See Herron, GRC 2008-46. Thus, the Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian must therefore: (1) disclose to the Complainant the records responsive to his OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point special service charge analysis and provide the Complainant with the estimated cost to provide the responsive records.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Item Nos. 1 and 2

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the instant matter, upon receiving the Complainant's OPRA request on February 20, 2020, the Custodian responded on February 28, 2020, stating that no responsive records exist for item Nos. 1 and 2, and certified to same in the SOI. Additionally, the Complainant did not address the Custodian's response to his OPRA request at any point in the proceedings.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request item Nos. 1 and 2. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the City of Union City does not possess or maintain the requested complaints and summonses for this portion of the request. See Pusterhofer, GRC 2005-49.

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. Because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant's OPRA request item Nos. 3-6 before denying access on the basis that the request would substantially disrupt agency operations, the Custodian's response to this portion of the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5(g). See Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009). Thus, the Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian must therefore: (1) disclose to the Complainant the records responsive to his OPRA request; or (2) if the Custodian believes a special service charge is warranted, complete a 14-point special service charge analysis and provide the Complainant with the estimated cost to provide the responsive records.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[4] to the Executive Director.[5]**

3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis[6] and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

4. The Custodian lawfully denied access to the Complainant's OPRA request item Nos. 1 and 2. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects,

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

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

[6] See https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf .

that the City of Union City does not possess or maintain the requested complaints and summonses for this portion of the request. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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

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

Prepared By: Samuel A. Rosado
Staff Attorney

May 11, 2021