



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 24, 2021 Government Records Council Meeting

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

Complaint No. 2020-39

v.

Elizabeth Police Department (Union)
Custodian of Record

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

1. The Custodian did not fully comply with the Council’s June 29, 2021 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until fourteen (14) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 24th Day of August 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2020-39

v.

**Elizabeth Police Department (Union)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.

Custodian of Record: Yolanda Roberts

Request Received by Custodian: December 27, 2019

Response Made by Custodian: January 7, 2020; January 15, 2020; January 21, 2020; February 10, 2020

GRC Complaint Received: February 13, 2020

Background

June 29, 2021 Council Meeting:

At its June 29, 2021 public meeting, the Council considered the June 22, 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 Custodian has borne her burden of proof that the proposed special service charge of \$7,285.52, comprising 216 hours at a rate of \$33.72 to locate, retrieve, and copy records responsive to the Complainant’s OPRA request is warranted and reasonable

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

² Represented by Jorge Estrada, Esq., Special Counsel (Elizabeth, NJ).

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

here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the Custodian demonstrated that the copying costs estimated to provide the records electronically was the "actual cost." See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁴ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 30, 2021, the Council distributed its Interim Order to all parties. On August 4, 2021, the GRC e-mailed the Custodian to request an update on compliance with the Interim Order.

Later that same day, Custodian's Counsel responded to the Council's Interim Order, providing a certification from the Custodian. Therein, the Custodian certified that as of August 4, 2021, the Complainant has failed to contact the Custodian or Counsel and express his willingness to pay the special service charge. The Custodian also certified that the Complainant has not contacted her office to request additional time to provide a response.

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."

Analysis

Compliance

At its June 29, 2021 meeting, the Council ordered the Complainant to remit payment of the special service charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the 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 June 30, 2021, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on July 8, 2021. Further, the Custodian's response was due by close of business on July 15, 2021. Both deadlines accounted for the Independence Day holiday.⁶

On August 4, 2021, the twenty-fourth (24th) business day after receipt of the Order, the Custodian submitted her certification to the GRC. Therein, the Custodian certified that as of that date, the Complainant has failed to provide payment or make known his refusal to pay the special service charge. Based on the foregoing, the Custodian did not fully comply with the Order due to a timeliness issue.

Therefore, the Custodian did not fully comply with the Council's June 29, 2021 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until fourteen (14) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

Knowing & Willful

Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA 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 . .

⁶ Independence Day was observed on July 5, 2021.

. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

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

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

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

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

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

The Court in Mason, further held that:

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

[Id. at 76.]

The Complainant filed the instant complaint asserting that the Custodian improperly imposed a special service charge to locate and retrieve responsive records. However, the evidence of record indicates that the special service charge was warranted and reasonable. Thus, the Complainant has not achieved the desired result and is not a prevailing party in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s June 29, 2021 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification to the GRC until fourteen (14) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief

ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Samuel A. Rosado
Staff Attorney

August 17, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 29, 2021 Government Records Council Meeting

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

Complaint No. 2020-39

v.

Elizabeth Police Department (Union)
Custodian of Record

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

1. The Custodian has borne her burden of proof that the proposed special service charge of \$7,285.52, comprising 216 hours at a rate of \$33.72 to locate, retrieve, and copy records responsive to the Complainant’s OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the Custodian demonstrated that the copying costs estimated to provide the records electronically was the “actual cost.” See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall deliver¹ to the Executive Director a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s**

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.

response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.²

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

Interim Order Rendered by the
Government Records Council
On The 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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**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. 2020-39

v.

**Elizabeth Police Department (Union)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.

Custodian of Record: Yolanda Roberts

Request Received by Custodian: December 27, 2019

Response Made by Custodian: January 7, 2020; January 15, 2020; January 21, 2020; February 10, 2020

GRC Complaint Received: February 13, 2020

Background⁴

Request and Response:

On December 27, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 7, 2020, the Custodian responded in writing advising that an extension until January 15, 2020 was needed to complete the request. On January 15, 2020, the Custodian responded to the Complainant in writing seeking an additional seven (7) business days to respond.

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

² Represented by Jorge Estrada, Esq., Special Counsel (Elizabeth, NJ).

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

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

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Elizabeth Police Department (Union), 2020-39 – Findings and Recommendations of the Executive Director

That same day, Custodian's Counsel e-mailed the Complainant requesting that he contact him via telephone to discuss the request. The Complainant responded stating that Counsel could ask any questions via e-mail. Custodian's Counsel replied stating that a telephone conversation would be a more expedient method of being able to process the request, and he would be willing to memorialize the conversation if required. Counsel also requested that the Complainant contact him the next day if he was unwilling to communicate via telephone.

On January 21, 2020, Counsel e-mailed the Complainant stating that the subject request involved approximately 1,300 offenses for which responsive records could exist. Counsel stated that because of the voluminous nature of the request and the need for review and potential redaction required the imposition of a special service charge under N.J.S.A. 47:1A-5(c). Counsel then stated that in the alternative, the Elizabeth Police Department ("EPD") could provide reports containing the same or similar information as the requested summonses and complaints, but in a more expedient manner. The Complainant responded that same day, stating that he requested the actual summonses and complaints, and to let him know the estimated charge.

On February 10, 2020, Counsel e-mailed the Complainant stating that the City of Elizabeth ("City") identified approximately 1,300 responsive records comprising 9,100 pages of printed material. Counsel stated that the total estimated charge was \$7,740.52. Counsel stated that the estimate was based upon 10 minutes taken to identify, retrieve, review, and scan prior to production for an approximated 216 hours of work performed by EPD clerks at an overtime rate of \$33.72 per hour.

That same day, the Complainant responded to Counsel stating that the estimated charge was excessive and requested reconsideration of the amount. Counsel responded stating that the charge was reasonable and based upon the lowest paid public employee able to complete the task. Counsel also stated that obtaining records containing the same or similar information was still an available option.

Denial of Access Complaint:

On February 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that imposed charge was far more than what other police departments have assessed for electronically stored summonses and complaints.

The Complainant therefore requested that the GRC declare estimated amount as excessive in violation under OPRA. The Complainant also requested the GRC award counsel fees.

Statement of Information:

On March 6, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 27, 2019. The Custodian certified that EPD personnel reviewed the eCDR database and local criminal statistics databases. The Custodian certified that on January 7, 2020, she sought an extension of time to respond until January 15, 2020. The Custodian certified that on January 15, 2020, she sought an additional seven

(7) business days to respond. The Custodian then certified that on February 10, 2020, Counsel responded on her behalf providing an estimated special service charge to provide the responsive records.

The Custodian initially asserted that the complaint itself was materially defective. The Custodian asserted that was not properly verified by the requestor, Baffi Simmons. The Custodian also asserted that the evidence demonstrates there were several conversations between the parties prior to the complaint filing. The Custodian also noted that the complaint incorrectly identified that the date the request was submitted was on February 13, 2020, the same date as the complaint filing.

Regarding the charge itself, the Custodian asserted that completing the request required an “extraordinary expenditure of time and effort” to process. N.J.S.A. 47:1A-5(c). The Custodian argued that the estimated 9,100 pages of responsive records was because each of the 1,300 records comprised a minimum of seven (7) pages. The Custodian also stated that the records were stored only within the Judiciary’s database, and the City could only retrieve one (1) record at a time. The Custodian also asserted that the ten (10) minute per record estimate was based on: the time taken to identify a responsive crime from a spreadsheet list; entering identifying information into the database to search and retrieve the record; confirm whether the record was a duplicate; print the record; redact personally identifying information; review for additional redactions; scan the redacted record; and transfer the record to a removable drive to be provided to the Complainant.

As part of the SOI, the Custodian included responses to the GRC’s 14-point analysis for imposing a special service charge:

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.

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

Response: See the paragraph above.

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

Response: From January 2019 to present.

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

Response: See the paragraph above.

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

Response: The City is the 4th largest municipality in the State of New Jersey with over 1,200 employees.

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

Response: Two (2) EPD clerks who have access to the Judiciary database.

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

Response: Each record contains multiple instances of an individual's driver's license number, social security number, and telephone number. Additionally, some records may contain information subject to redaction based upon OPRA's reasonable expectation of privacy exemption, as well as domestic violence prevention statutes and juvenile protection statutes.

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 work will be performed by clerks with an hourly rate of \$33.72. The reason these clerks were chosen is because they are the lowest paid public employees that have been granted access to the njcourts.gov database that houses the requested records. The estimate provided to the Complainant was based upon the determination that each record would take approximately ten (10) minutes to perform the following work as laid out above.

Given the volume of records involved (approximately 1,300) as of the date of the estimate, to accommodate the request would take approximately 13,000 minutes or over 216 hours. Multiplied by the hourly rate of the employees (\$33.72), the cost of labor is \$7,285.52. The approximate 9,100 pages of printed material is quoted at a rate of \$0.05 per page, or \$455.00. Thus, the special service charge rendered was \$7,740.52.

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 No. 8 above.

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

Response: See No. 8 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: See No. 8 above.

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 No. 8 above.

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

Response: See No. 8 above.

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

Response: See No. 8 above.

The Custodian argued that the special service charge was warranted when weighing the above factors such as the volume of records requested, and the extensive labor required to provide redacted digital copies of same. The Custodian also asserted that the estimated time to complete the process reflected the most conservative estimates required by the lowest paid employees that can do the work.

Additional Submissions:

On March 14, 2020, the Complainant filed a brief in response to the Custodian's SOI. Therein, the Complainant asserted that the estimated charge of \$7,740.52 was "grossly" excessive for records that could be retrieved via eCDR and delivered electronically. The Complainant noted that other municipalities have complied with similar requests without imposing any charge or charged the copying rates set by OPRA.⁵ The Complainant asserted that the City charged far more than was reasonable when making a comparative market analysis with other municipalities. Lastly, the Complainant asserted that modern technology allows for the electronic redaction of records and municipalities should be encouraged to enable its use.

Analysis

Special Service Charge

⁵ The Complainant identified twenty-one (21) municipalities that complied with similar requests submitted by the Complainant on behalf of AADARI.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Elizabeth Police Department (Union), 2020-39 – Findings and Recommendations of the Executive Director

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. However, a custodian must provide a requestor with “the opportunity to review and object to the charge prior to it being occurred.” Id.

Moreover, OPRA provides that providing access to records electronically “shall be provided free of charge, but the public agency may charge for the actual costs of any needed

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

In the Denial of Access Complaint at issue here, the Complainant disputed the estimated special service charge of \$7,285.52 for 216 hours of time to process 1,300 responsive summonses and complaints, comprising an estimated 9,100 pages. The Complainant asserted that the fee was excessive given the number of potentially responsive records, and on the basis that the records could be obtained electronically through eCDR.

Here, the Custodian provided a 14-point analysis reflecting the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the electronic system used to locate the requested summonses and complaints was cumbersome and did not allow for the efficient retrieval of records. The Custodian asserted that the proposed charge reflected the work of two (2) employees at an hourly rate of \$33.72. The Custodian also asserted that the two (2) employees were the only ones with access to eCDR.

A review of the foregoing supports that the City’s estimated expenditure of 216 hours represents an “extraordinary time and effort” to produce responsive records given the record volume, and the method in which the records are located, retrieved, and redacted. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Specifically, the Custodian certified that the eCDR system only allowed a user to locate a responsive record through the complaint or summons number. The Custodian certified that the database did not allow the user to search and collate cases by the offense and period. The GRC is further persuaded by the Custodian’s certification as to the ten (10) minute estimate needed to process each record, including locating, printing, redacting, and scanning. Thus, the evidence of record adequately supports that a special service charge for 216 hours is warranted here.

Moreover, the Custodian has demonstrated that costs had to be incurred in order to disclose the responsive complaints and summons. As was the case in Paff, GRC 2010-09, the Custodian certified that the records were only available via eCDR and had to be printed to be redacted. Therefore, the estimated cost of \$455.00 is supported by the evidence.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$7,285.52, comprising 216 hours at a rate of \$33.72 to locate, retrieve, and copy records responsive to the Complainant’s OPRA request 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. Furthermore, the Custodian demonstrated that the copying costs estimated to provide the records electronically was the “actual cost.” See Paff, GRC 2010-09. Thus, the Custodian shall disclose the responsive records, with

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

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$7,285.52, comprising 216 hours at a rate of \$33.72 to locate, retrieve, and copy records responsive to the Complainant's OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the Custodian demonstrated that the copying costs estimated to provide the records electronically was the "actual cost." See Paff v. Twp. of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁶ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's**

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.

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response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁷

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

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

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."
Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Elizabeth Police Department (Union), 2020-39 – Findings and Recommendations of the Executive Director