



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 27, 2021 Government Records Council Meeting

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

Complaint No. 2020-56

v.

Paterson Police Department (Passaic)
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 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 submitted her certification on July 16, 2021, one (1) business day after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action within the allotted period 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, 76 (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 27th Day of July 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: July 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 27, 2021 Council Meeting**

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

GRC Complaint No. 2020-56

v.

**Paterson Police Department (Passaic)²
Custodial Agency**

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

1. Record(s) showing the complaint number of each one of the complaints that were prepared by the Police Department between January 2019 and December 2019 for drug possession offenses.
2. Record(s) showing the complaint number of each one of the complaints that were prepared by the Police Department between January 2019 and December 2019 for drug paraphernalia offenses.
3. Record(s) showing the complaint number of each one of the complaints that were prepared by the Police Department between January 2019 and December 2019 for [DUI/DWI] offenses.

Custodian of Record: Sonia Gordon

Request Received by Custodian: January 27, 2020

Response Made by Custodian: February 21, 2020; February 24, 2020

GRC Complaint Received: February 27, 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 provided the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Additionally, the Custodian has borne her burden of proof that the proposed special service charge of

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

² Represented by Harlynn A. Lack, Esq., Assistant Corporation Counsel (Paterson, NJ).

\$807.52 comprising fifty-six (56) hours at a rate of \$14.42 per hour 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, 199 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the Custodian demonstrated that the \$82.20 in 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 grant access to the responsive records, with redactions where applicable once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The 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 deliver³ 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. 1:4-4.⁴**
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 July 16, 2021, the Custodian's Counsel responded to the Council's Interim Order, providing a certification from the Custodian. The Custodian certified that as of July 16, 2021, the City of Paterson ("City") has not received any payment from the Complainant for the incurred special service charge and copying costs. The Custodian certified that since the Complainant failed to provide any payment, the matter should be dismissed.

³ 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.

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."

Later that same day, the Complainant submitted an e-mail to the GRC, stating that the allotted charge was excessive and that he reserved his right to appeal the instant matter.

Analysis

Compliance

At its June 29, 2021 meeting, the Council ordered the Complainant to remit payment of the special service charge and copying costs 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 also 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.⁵

On July 16, 2021, the eleventh (11th) business day after receipt of the Order, Counsel e-mailed the GRC a certification from the Custodian. The Custodian certified that the Complainant failed to provide payment for the special service charge and associated copying costs. However, 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 submitted her certification on July 16, 2021, one (1) business day after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action within the allotted period and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

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.

⁵ Independence Day was observed on July 5, 2021.

[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 and associated copying costs were 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 submitted her certification on July 16, 2021, one (1) business day after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action within the allotted period 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, 76 (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

July 20, 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. 2020-56

v.

Paterson Police Department (Passaic)
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 provided the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Additionally, the Custodian has borne her burden of proof that the proposed special service charge of \$807.52 comprising fifty-six (56) hours at a rate of \$14.42 per hour 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, 199 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the Custodian demonstrated that the \$82.20 in 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 grant access to the responsive records, with redactions where applicable once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The 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 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

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."

**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. 2020-56

v.

**Paterson Police Department (Passaic)²
Custodial Agency**

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

1. Record(s) showing the complaint number of each one of the complaints that were prepared by the Police Department between January 2019 and December 2019 for drug possession offenses.
2. Record(s) showing the complaint number of each one of the complaints that were prepared by the Police Department between January 2019 and December 2019 for drug paraphernalia offenses.
3. Record(s) showing the complaint number of each one of the complaints that were prepared by the Police Department between January 2019 and December 2019 for [DUI/DWI] offenses.

Custodian of Record: Sonia Gordon

Request Received by Custodian: January 27, 2020

Response Made by Custodian: February 21, 2020; February 24, 2020

GRC Complaint Received: February 27, 2020

Background³

Request and Response:

On January 24, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 5, 2020, Jacqueline Murray responded on the Custodian’s behalf disclosing certain records not at issue here and stating that a fourteen (14) business day extension was needed to respond to the remainder of the subject OPRA request.

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

² Represented by Harlynn A. Lack, Esq., Assistant Corporation Counsel (Paterson, 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Paterson Police Department (Passaic), 2020-56 – Findings and Recommendations of the Executive Director

On February 21, 2020, Ms. Murray responded in writing stating that a special service charge would be assessed to process the requested records. Ms. Murray stated that she “[awaited the Complainant’s] further instructions regarding the Special Service Charge.” Ms. Murray subsequently provided a 14-point analysis regarding the charge with a total estimate of \$889.72 in a separate e-mail. The Complainant responded that same day, asking to which OPRA request the charge pertained. The Complainant also asked whether Ms. Murray already provided responsive records.

On February 24, 2020, Ms. Murray responded to the Complainant stating that the special service charge estimate pertained to the instant request. Ms. Murray also stated that the records provided pertained to a request item that was not part of the estimate.

Denial of Access Complaint:

On February 27, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian imposed a special service charge without giving prior notice that a fee would be assessed. The Complainant argued that he was denied an opportunity to object to the special service charge as required under N.J.S.A. 47:1A-5(c). The Complainant also asserted that the imposed charge was excessive.

The Complainant therefore requested that the GRC declare the special service charge was unlawfully imposed. The Complainant also requested the GRC award counsel fees.

Statement of Information:

On March 24, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 27, 2020. The Custodian certified that the Paterson Police Department’s (“PPD”) third party vendor, Enforsys, was contacted to see if a report for the request could be created. The Custodian certified that PPD was successful in running a report, comprising 1,108 records, or 1,644 pages. The Custodian certified that on February 21, 2020, Ms. Murray responded on her behalf to the Complainant, providing an estimated cost of \$889.72, along with a 14-point analysis.

The Custodian initially asserted that the Complainant neither accepted, rejected, or otherwise challenge the reasonableness of the special service charge, but instead filed the instant matter. The Custodian asserted that in the February 21, 2020 response, Ms. Murray did not ask the Complainant to remit payment, but instead stated that PPD would wait for a response from the Complainant regarding the charge. The Custodian asserted that to date PPD has not fulfilled the OPRA request since the Complainant did not accept the charge.

Regarding the charge itself, the Custodian provided a copy of the 14-point analysis provided to the Complainant, with the responses as follows:

1. What records are requested?

Response: Records showing the complaint number of each of the complaints prepared by

the Police Department between January 2019 and December 2019 for the following offenses:

- a. Drug possession.
- b. Drug paraphernalia.
- c. DWI/DUI.

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

Response: Report printed from Enforsys detailing each complaint number, offense person is charge with, name, date, personal identifying information, description, totalling 1,644 pages.

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

Response: One year – January 1, 2019 through December 31, 2019

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

Response: No – all are through the computer program Enforsys.

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

Response: The PPD's Records Division has twelve (12) civilian employees.

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

Response: There are five (5) civilian employees with the title Record Support Technician 1. However, only one will probably be available to accommodate the request.

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

Response: The records will have to be redacted for any personal identifying information.

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:

- a. A report needs to be run off of Enforsys, there are a total of 1,108 reports.
- b. There are a total of 1,644 pages for 1,108 reports.
- c. PPD estimates seven (7) full days (8 hours per day, total of 56 hours) to print, redact, and copy the reports.
- d. Lowest salaried employee's hourly rate is \$14.42/hour.
- e. $\$14.42 \times 56 \text{ hours} = \807.52 .

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: Not applicable – Complainant is asking for copies of records.

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 – No files are kept in storage.

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

Response: PPD is using the lowest salaried employee who works for PPD's Records Division.

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: There are five (5) employees with the title of Records Support Technician 1. However, only one will be able to handle the request as the Records Division is already short-staffed.

- a. Bavennia Franklin, Janice Hall, Nancy McNeill, Bianca DeCando, Nadia Villanueva.
- b. All earn \$30,000/year for an hourly rate of \$14.42.

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

Response: There is one copier located in the Records Division for all employees to use.

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

Response:

- a. A query was already run to determine how many reports exist in response to this request.
- b. A total of 1,108 reports exist for a total of 1,644 pages.
- c. All 1,644 pages must be printed using the one copier in the Records Division.
- d. All 1,644 pages must be examined and redacted for any personal identifying information.
- e. Those pages which were redacted must be copied again to ensure the redactions were done correctly.
- f. PPD estimates a total of seven (7) full days (8 hours per day for a total of 56 hours) to complete this request.
 $56 \text{ hours} \times \$14.42 = \$807.52$

1,644 x \$0.05 = \$82.20
Total = \$889.72

The Custodian added that PPD was not charging for overtime and that were charging for only one (1) set of copies. The Custodian argued that the special service charge was reasonable based upon the volume of records, the redactions to be made, and that only one (1) copier was available to print and scan the records. The Custodian also noted that the Records Division comprised of just five (5) staff members with only one (1) member available to process the request. The Custodian thus asserted that the charge was reasonable under N.J.S.A. 47:1A-5(c).

Additional Submissions:

On April 8, 2020, the Complainant filed a letter brief in response to the SOI. Therein, the Complainant maintained that the Custodian violated OPRA by not providing him an opportunity to review and object to the special service charge prior to being incurred, and that the charge itself was excessive. N.J.S.A. 47:1A-5(c).

Analysis

Special Service Charge

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

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

[Id. (emphasis added).]

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

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

In the instant matter, the GRC first addresses the Complainant’s claim that he was not given prior notice of the charge, nor the opportunity to review and reject same in violation of N.J.S.A. 47:1A-5(c). The Custodian asserted that the Complainant was not asked to remit payment at the time of the response, but rather was provided the 14-point analysis and estimated total. The Custodian argued that the Complainant was provided the opportunity to accept or reject the charge, as the records had not been provided.

Upon review, the GRC finds that the Custodian did not violate OPRA’s requirement that a requestor is given an opportunity to review and reject a special service charge prior to its imposition. At the time of the response, the Custodian provided the Complainant with the estimated charge and the 14-point analysis. The Custodian did not demand payment or provide the records to the Complainant, but in fact waited to see whether the Complainant would accept or reject the estimate provided.

The GRC shall now address whether the special service charge was warranted and reasonable. The Custodian provided a 14-point analysis reflecting the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, as part of the SOI. The Custodian argued that while the records were held electronically, they needed to be printed and reviewed for redactions

of personal identifying information as well as mugshots. The Custodian noted that PPD's Records Division was understaffed and had only one (1) employee available to process the request. The Custodian also asserted that the Records Division possessed only one (1) copier to share amongst the staff.

A review of the forgoing supports that the estimated expenditure of fifty-six (56) hours represents an extraordinary amount of time and effort to produce responsive records given the volume of records and the limited resources available to fulfill the request. See Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). The GRC is further persuaded by the fact that most of the records had to be manually redacted for personal information. An additional factor includes the contention that just one (1) employee can be utilized to complete the task given the staff shortage at the Records Division. Furthermore, because the Records Division shares just one (1) copier, processing the request would invariably disrupt the regular duties of the other staff members.

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 electronically and had to be printed to be redacted, and then rescanned to confirm whether the redactions were properly implemented. Therefore, the estimated cost of \$82.20 is supported by the evidence.

Accordingly, the Custodian provided the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Additionally, the Custodian has borne her burden of proof that the proposed special service charge of \$807.52 comprising fifty-six (56) hours at a rate of \$14.42 per hour 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 \$82.20 in copying costs estimated to provide the records electronically was the "actual cost." See Paff, GRC 2010-09. Thus, the Custodian shall grant access to the responsive records, with redactions where applicable once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Additionally, the Custodian has borne her burden of proof that the proposed special service charge of \$807.52 comprising fifty-six (56) hours at a rate of \$14.42 per hour 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, 199 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Furthermore, the Custodian demonstrated that the \$82.20 in 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 grant access to the responsive records, with redactions where applicable once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The 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.

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

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."

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Paterson Police Department (Passaic), 2020-56 – Findings and Recommendations of the Executive Director