



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

December 14, 2021 Government Records Council Meeting

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

Complaint No. 2018-178

v.
City of Long Branch (Monmouth)
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 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 the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 14th Day of December 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: December 16, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
December 14, 2021 Council Meeting**

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

GRC Complaint No. 2018-178

v.

**City of Long Branch (Monmouth)²
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints prepared and filed by the Police Department from January 2016 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.
3. Copies of the Police Department’s “Arrest Listings” from January 2016 to present.
4. Copies of drug paraphernalia complaints, summonses, and tickets prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathy L. Schmelz³
Request Received by Custodian: July 17, 2018
Response Made by Custodian: July 27, 2018
GRC Complaint Received: August 14, 2018

Background

September 28, 2021 Council Meeting:

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

1. The current Custodian complied with the Council’s December 15, 2020 Interim Order because he responded in the prescribed time frame certifying that the Complainant took

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

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, Attorneys at Law (Iselin, NJ).

³ The current Custodian of Record is Jeffrey Jotz.

no action after the Council affirmed the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.

2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and unlawfully denied access under N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council's September 29, 2020 and December 15, 2020 Interim Orders. 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 September 29, 2020 and December 15, 2020 Interim Orders the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to either produce the responsive records or assess a special service charge for production. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties. On November 3, 2021, the GRC informed the parties that the deadline to notify the GRC of a settlement for counsel fees expired on October 28, 2021 and provided a deadline of November 30, 2021 for the Complainant to submit a fee application.

On November 10, 2021, the Complainant e-mailed the GRC informing that the parties have resolved the issue of counsel fees pending formal approval by the City of Long Branch. That same day, the GRC e-mailed Counsel acknowledging the Complainant's notification and inquired as to whether additional time was needed to formalize the settlement. Counsel responded to the GRC confirming that the parties have reached a settlement and that no approval from the City Council was required.

Analysis

Compliance

At its September 28, 2021 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that 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 Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On September 29, 2021, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on October 28, 2021. On November 3, 2021, the GRC informed the parties that the deadline to notify the GRC of a settlement for counsel fees expired on October 28, 2021 and provided a deadline for the Complainant to apply for counsel fees. On November 10, 2021, the Complainant notified the GRC that the parties resolved the issue of counsel fees. The GRC thereafter inquired with Counsel as to whether additional time was needed to formalize the settlement. Counsel responded confirming that a settlement had been reached and required no approval from the City Council.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

December 8, 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

September 28, 2021 Government Records Council Meeting

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

Complaint No. 2018-178

v.
City of Long Branch (Monmouth)
Custodian of Record

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

1. The current Custodian complied with the Council’s December 15, 2020 Interim Order because he responded in the prescribed time frame certifying that the Complainant took no action after the Council affirmed the special service charge. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and unlawfully denied access under N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council’s September 29, 2020 and December 15, 2020 Interim Orders. 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 September 29, 2020 and December 15, 2020 Interim Orders the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to either produce the responsive records or assess a special service charge for production. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties**

shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 28th Day of September 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2018-178

v.

**City of Long Branch (Monmouth)²
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUP”) complaints prepared and filed by the Police Department from January 2016 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.
3. Copies of the Police Department’s “Arrest Listings” from January 2016 to present.
4. Copies of drug paraphernalia complaints, summonses, and tickets prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathy L. Schmelz³
Request Received by Custodian: July 17, 2018
Response Made by Custodian: July 27, 2018
GRC Complaint Received: August 14, 2018

Background

December 15, 2020 Council Meeting:

At its December 15, 2020 public meeting, the Council considered the December 8, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s September 29, 2020 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special

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

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, Attorneys at Law (Iselin, NJ).

³ The current Custodian of Record is Jeffrey Jotz.

service charge by submitting his certification to the Executive Director within the extended period.

2. The current Custodian has borne his burden of proof that the proposed special service charge of \$4,458.10 comprising 199.2 hours at a rate of \$22.38 to locate, retrieve, redact 10,122 potentially responsive records 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 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 199.2 hours, the Custodian should adjust the special service charge accordingly 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 deliver⁴ 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.

Procedural History:

On December 16, 2020, the Council distributed its Interim Order to all parties. On January 4, 2021, the current Custodian responded to the Council's Interim Order, submitting a certification. The current Custodian certified that to date he has not received a response from the Complainant as to accepting or rejecting the special service charge. The current Custodian therefore asserted

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."

that the Custodian and the City of Long Branch (“City”) are no longer required to disclose the records pursuant to N.J.S.A. 47:1A-5(b). That same day, the Complainant responded via e-mail maintaining that the special service charge was excessive to produce electronic records.

Analysis

Compliance

At its December 15, 2020 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 December 16, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant’s response was due by close of business on December 23, 2020. Further, the current Custodian’s response was due by close of business on January 4, 2021, accounting for the Christmas and New Year’s Day holidays.

On January 4, 2021, the tenth (10th) business day after receipt of the Council’s Order, the current Custodian responded to the Council’s Order, submitting a certification. The current Custodian certified that as of that date the Complainant had not submitted a response either accepting or rejecting the special service charge.

Therefore, the current Custodian complied with the Council’s December 15, 2020 Interim Order because he responded in the prescribed time frame certifying that the Complainant took no action after the Council affirmed the special service charge. Thus, per the Council’s Order, the Custodian is under no obligation to disclose the records.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated

OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 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 matter before the Council, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and unlawfully denied access under N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council's September 29, 2020 and December 15, 2020 Interim Orders. 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 (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.]

Here, the Complainant sought tickets, complaints and summonses prepared by the City’s police department pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Complainant also sought arrest listings prepared by the City’s police department. The Custodian asserted that Lt. Shirley of the Long Branch Police Department attempted to contact the Complainant to seek clarification of the request. The Complainant thereafter filed the instant complaint, asserting that no response was provided within the allotted period. The Custodian

subsequently provided arrest listings but maintained that the request was overly broad and required research.

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 September 29, 2020 and December 15, 2020 Interim Order, the current Custodian assessed a warranted and reasonable special service charge to provide the responsive records to the Complainant. Notwithstanding whether the Complainant accepted or reject the charge, the imposition was a reversal of the Custodian's initial denial of access. 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 September 29, 2020 and December 15, 2020 Interim Orders 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. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to either produce the responsive records or assess a special service charge for production. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's December 15, 2020 Interim Order because he responded in the prescribed time frame certifying that the Complainant took no action after the Council affirmed the special service charge. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and unlawfully denied access under N.J.S.A. 47:1A-6. Notwithstanding, the current Custodian lawfully imposed a special service charge under N.J.S.A. 47:1A-5(c) and complied with the Council's September 29, 2020 and December 15, 2020 Interim Orders.

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).

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 September 29, 2020 and December 15, 2020 Interim Orders the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to either produce the responsive records or assess a special service charge for production. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

September 21, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

December 15, 2020 Government Records Council Meeting

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

Complaint No. 2018-178

v.
City of Long Branch (Monmouth)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 November 10, 2020 Interim Order seeking confirmation of the Complainant’s willingness or refusal to pay the special service charge by submitting his certification to the Executive Director within the extended period.
2. The current Custodian has borne his burden of proof that the proposed special service charge of \$4,458.10 comprising 199.2 hours at a rate of \$22.38 to locate, retrieve, redact 10,122 potentially responsive records 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 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 199.2 hours, the Custodian should adjust the special service charge accordingly 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 deliver¹ 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 15 Day of December 2020

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: December 16, 2020

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**

**Supplemental Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

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

GRC Complaint No. 2018-178

v.

**City of Long Branch (Monmouth)²
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUP”) complaints prepared and filed by the Police Department from January 2016 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.
3. Copies of the Police Department’s “Arrest Listings” from January 2016 to present.
4. Copies of drug paraphernalia complaints, summonses, and tickets prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathy L. Schmelz³
Request Received by Custodian: July 17, 2018
Response Made by Custodian: July 27, 2018
GRC Complaint Received: August 14, 2018

Background

September 29, 2020 Council Meeting:

At its September 29, 2020 public meeting, the Council considered the September 22, 2020 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying

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

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, Attorneys at Law (Iselin, NJ).

³ The current Custodian of Record is Jeffrey Jotz.

access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

2. The Complainant’s July 17, 2018 OPRA request seeking arrest listings, complaints, summonses, and tickets was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). Thus, the Custodian 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 analysis and provide the Complainant with the estimated cost to provide the responsive records.
3. **The Custodian shall comply with conclusion No. 3 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**
4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis⁶ 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**

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>.

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.

Procedural History:

On September 30, 2020, the Council distributed its Interim Order to all parties. On October 1, 2020, the Custodian's Counsel requested an extension of time for compliance with the Council's Interim Order. On October 5, 2020, the Government Records Council ("GRC") responded to Counsel's request and granted an extension until October 15, 2020 to comply with the Council's Order.

On October 15, 2020, Counsel e-mailed the Complainant stating that a special service charge was necessary to process the OPRA request. In support, Counsel provided responses to the 14-point analysis as follows:

1. What records are requested?

Response:

1. Copies of Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints prepared and filed by the Police Department from January 2016 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.
3. Copies of the Police Department's "Arrest Listings" from January 2016 to present.
4. Copies of drug paraphernalia complaints, summonses, and tickets prepared and filed by the Police Department from January 2016 through present.

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

Response: The total number of records requested is 10,122.

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

Response: Four (4) years.

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

Response: Some of the records are maintained in a computer database while some of the records are physically stored in archives.

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

Response: 222 total employees consisting of both sworn law enforcement officers and civilians.

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

Response: Two (2).

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

Response: Each and every responsive document requires redactions for 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: The [City of Long Branch (“City”)] is utilizing the lowest salaried employees (\$22.38/hour) capable of carrying out the compilation and subsequent redactions of the documents.

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 #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: See answer to #8.

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

Response: The two (2) civilian employees are responsible for assisting with records management and other clerical tasks on behalf of the City’s Police Department.

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: Shanice Williams and Catherine Camacho, Records Support Technician I.

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

Response: The information contained in the records can be culled into an Excel Spreadsheet and provide to the requestor for no service charge fee. However, to compile,

pull, print, and redact 10,122 documents that expand the duration of four (4) years requires extensive work on the part of these two (2) employees.

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

Response: One document will require four (4) minutes of time to locate, pull, print, and redact. Each employee has additional responsibilities apart from complying with this request. Since there are 10,122 documents it would take 40,488 minutes to complete the task assuming that every minute of every working day is devoted to this assignment.

Counsel also stated that in the interest of good faith, since the City initially certified that only 2,988 records were responsive to the balance of the request, that number would be used to calculate the fee. Counsel therefore stated that the estimated total cost was \$4,458.10, taking four (4) minutes per page for a total estimated time of 199.2 hours. Counsel then requested that the Complainant notify whether he would accept or reject the charge within five (5) business days.

That same day on October 15, 2020, the Complainant asked Counsel how many records were responsive per year, stating that he may purchase less than the originally requested four (4) years.

On November 9, 2020, Counsel provided the Complainant with the number of documents response to each requested year, broken down as follows:

- 2016 – 2,585
- 2017 – 1,822
- 2018 – 2,497
- 2019 – 2,207
- 2020 – 1,010

Counsel requested the Complainant identify which set of documents he wished for, stating that a special service charge would still apply.

On November 30, 2020, the GRC requested an update from Counsel regarding compliance with the Council's Interim Order, noting that the GRC has not received a certification from the current Custodian as to whether the Complainant accepted or rejected to purchase responsive records. Counsel responded that same day, stating that since his November 9, 2020 e-mail he has not received any correspondence from the Complainant. The GRC responded by stating that per the Council's Interim Order, the Custodian was still required to provide a certification.

On November 30, 2020, Counsel submitted a certification to the GRC, stating therein that the City has not received any correspondence from the Complainant as to whether he would purchase responsive records, either in whole or in part, since his November 9, 2020 e-mail. Counsel therefore stated that the City had no further obligation to disclose responsive records in the matter.

On December 1, 2020, the GRC responded to the Custodian, stating that notwithstanding his certification, the Interim Order required a certification from the Custodian if available to do so.

On December 3, 2020, Counsel provided a certification from the current Custodian. Therein, the current Custodian certified to the same facts as those within Counsel's November 30, 2020 certification. That same day, the Complainant responded to Counsel stating that the special service charge was excessive for electronically stored records. The Complainant asserted that access to electronic records should not be used to generate income.

Analysis

Compliance

At its November 10, 2020 meeting, the Council ordered the Custodian to provide responsive records, or if applicable, provide an estimated special service charge along with a 14-point analysis within five (5) business days. The Council then 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 refusal to pay the special service charge in accordance with N.J. Court Rules, R. 1:4-4, and provide same to the Executive Director.

On September 30, 2020, the Council distributed its Interim Order to all parties. Thus, the Custodian's response was due by close of business on October 7, 2020. On October 1, 2020, Counsel requested an extension of time to respond to provide a response to the Complainant in accordance with the Interim Order. On October 5, 2020, the GRC granted Counsel's extension request until October 15, 2020, accounting for the Columbus Day holiday.⁷

On October 15, 2020, Counsel submitted a 14-point analysis and estimated special service charge to the Complainant. That same day, the Complainant requested the total number of responsive records broken down by year. On November 9, 2020, Counsel provided the breakdown to the Complainant.

On November 30, 2020, the thirteenth (13th) business day after providing the records breakdown, the GRC requested an update on the Custodian's compliance with the Interim Order. That same day, Counsel submitted a certification stating that the Complainant has not responded to the November 9, 2020 e-mail. The GRC replied stating that a certification from the Custodian was still required for compliance with the Order. On December 3, 2020, the sixteenth (16th) business day from the November 9, 2020 e-mail, Counsel provided a certification from the current Custodian. Therein, the current Custodian certified that the Complainant failed to provide payment or make known his refusal to pay the special service charge.

Therefore, the current Custodian complied with the Council's September 29, 2020 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service

⁷ Columbus Day was observed on October 12, 2020.

charge by submitting his certification to the Executive Director within the extended period.

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, Counsel 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. Counsel certified that the proposed charge of \$4,458.10 represented 674.8 hours of time to locate, pull, print, and redact 10,122 potentially responsive records. Counsel certified that two (2) employees, would be assigned to process the request at a rate of \$22.38, which was the lowest hourly rate. Counsel also certified that in the interest of good faith, the \$4,458.10 cost was calculated based on the initial estimate of 199.2 hours to produce 2,988 potentially responsive records, expending four (4) minutes per page.

A review of the forgoing firmly supports the Township's estimated expenditure of 674.8 hours represents an "extraordinary time and effort" to produce responsive records given the number of potentially records. See Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). The GRC is further persuaded by the fact that, assuming the two (2) designated employees' average workweek spans 35 hours, complying with the request would consume over nine (9) full work weeks for both employees. Counsel also provided a per-record time estimate to base the overall time expenditure. Taken together, the time commitment necessary to respond to the subject OPRA requests is extraordinary. Thus, the evidence of record adequately supports that a special service charge for seventy (70) hours is warranted here.

Furthermore, the GRC is persuaded that the proposed fee of \$4,458.10 is reasonable. Specifically, the GRC concludes that the calculation based on the City's lowest hourly rate of \$22.38 comports with Courier Post's requirements. Moreover, while Counsel certified that some of the potentially responsive records are stored electronically, the total estimated cost is based upon the City's earlier estimate of 2,988 potentially responsive records. The GRC finds this factor compelling given that the current number of potentially responsive records is three (3) times the initial estimate, as well as the need to review each document for redaction of personally identifying information.

Accordingly, the current Custodian has borne his burden of proof that the proposed special service charge of \$4,458.10 comprising 199.2 hours at a rate of \$22.38 to locate, retrieve, redact 10,122 potentially responsive records 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 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 199.2 hours, the Custodian should adjust the special service charge accordingly 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 November 10, 2020 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge by submitting his certification to the Executive Director within the extended period.
2. The current Custodian has borne his burden of proof that the proposed special service charge of \$4,458.10 comprising 199.2 hours at a rate of \$22.38 to locate, retrieve, redact 10,122 potentially responsive records 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 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 199.2 hours, the Custodian should adjust the special service charge accordingly 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 deliver⁸ 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. 1:4-4.⁹**
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

⁸ 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.

⁹ "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."

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

December 8, 2020



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 29, 2020 Government Records Council Meeting

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

Complaint No. 2018-178

v.
City of Long Branch (Monmouth)
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 2020 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 bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Complainant’s July 17, 2018 OPRA request seeking arrest listings, complaints, summonses, and tickets was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). Thus, the Custodian 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 analysis and provide the Complainant with the estimated cost to provide the responsive records.
3. **The Custodian shall comply with conclusion No. 3 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

4. In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis³ 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.
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 29th Day of September 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 30, 2020

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>.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

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

GRC Complaint No. 2018-178

v.

**City of Long Branch (Monmouth)²
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUP”) complaints prepared and filed by the Police Department from January 2016 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.
3. Copies of the Police Department’s “Arrest Listings” from January 2016 to present.
4. Copies of drug paraphernalia complaints, summonses, and tickets prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathy L. Schmelz
Request Received by Custodian: July 17, 2018
Response Made by Custodian: July 27, 2018
GRC Complaint Received: August 14, 2018

Background³

Request and Response:

On July 17, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 27, 2018, the eighth (8th) business day after receipt, Deputy Clerk Mary Moss responded in writing on behalf of the Custodian requesting that the Complainant contact Lieutenant Charles Shirley of the Long Branch Police Department (“LBPD”). Ms. Moss noted that Lt. Shirley attempted to contact the Complainant via telephone several times without success. Ms. Moss stated that once the

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

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, Attorneys at Law (Iselin, 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. City of Long Branch (Monmouth), 2018-178 – Findings and Recommendations of the Executive Director

Complainant has spoken with Lt. Shirley, he should submit a new OPRA request. Ms. Moss finally stated that she was “closing out this current [OPRA] request.”

On the same day, the Complainant responded advising that all responses, including questions about the subject OPRA request, be sent via e-mail. The Complainant further requested that the subject OPRA request remain open because no records were provided. Ms. Moss responded via e-mail confirming that she would not close the OPRA request and that Lt. Shirley would advise if additional time was necessary.

Denial of Access Complaint:

On August 14, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian failed to properly respond to the subject OPRA request either providing records or obtaining an extension of time. The Complainant thus requested that the GRC determine that the Custodian lawfully denied access to the responsive records. The Complainant further requested that the GRC find that he is a prevailing party entitled to an award of attorney’s fees.

Supplemental Response:

On August 15, 2018, the Custodian responded in writing disclosing 1,521 pages of arrest listings. On the same day, the Complainant responded acknowledging receipt of the arrest listings “*after* [City of Long Branch (“City”)] received a copy of the [Denial of Access Complaint].” (Emphasis in original). The Complainant further noted that his OPRA request item Nos. 1, 2, and 4 remained outstanding.

On August 20, 2018, the Custodian responded in writing disclosing “lists” of cases that Lt. Shirley was attempting to contact the Complainant about. The Custodian stated that should the Complainant need any information beyond that present in the disclosed records, a special service charge would apply. On the same day, the Complainant confirmed receipt of the list and reiterated that OPRA request item Nos. 1, 2 and 4 remained outstanding.

Statement of Information:

On September 7, 2018, the Custodian filed a Statement of Information (“SOI”) attaching a certification from Lt. Shirley. The Custodian certified that she received the Complainant’s OPRA request on July 17, 2018. The Custodian certified that upon receipt of the OPRA request, her office enlisted the assistance of Lt. Shirley to fulfill the OPRA request. Shirley Cert. ¶ 1. The Custodian certified that Lt. Shirley attempted to contact the Complainant via telephone on six (6) occasions between July 24, and 26, 2018 but was disconnected in each call. Shirley Cert. ¶ 5, 12. The Custodian certified that Ms. Moss responded in writing on her behalf on July 27, 2018 asking the Complainant to contact Lt. Shirley and that the request would be closed. The Custodian affirmed that Ms. Moss subsequently advised that she would keep the request open, but that Lt. Shirley would respond to the Complainant. The Custodian certified that on August 15, and 20, 2018, she disclosed 1,521 pages of records and three (3) spreadsheets to the Complainant via e-mail

respectively. The Custodian affirmed that the spreadsheets contained arrest summaries for DWI/DUI cases, drug possession cases, and drug paraphernalia cases.

The Custodian contended that the Complainant's OPRA request was invalid because it was overly broad and required clarification. The Custodian contended that the reason Lt. Shirley attempted to contact the Complainant was because he determined approximately 3,000 pages of records were responsive to the subject OPRA request. The Custodian noted that some of the responsive information was available on the City's website pursuant to the 2016 Police Data Initiative. Shirley Cert. ¶ 6. The Custodian argued that Lt. Shirley tried to contact the Complainant but was rejected on six (6) occasions. The Custodian argued that the City engaged in a good faith effort to reobtain clarification and advise that the records were publicly accessible. The Custodian thus contended that the instant complaint should be dismissed.

The Custodian further contended responding to the subject OPRA request would have substantially disrupted the City's operations. N.J.S.A. 47:1A-5(g); Caggiano v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007). The Custodian argued that the facts here are like those in Caggiano in that Lt. Shirley made multiple attempts to accommodate the OPRA request without success. The Custodian contended that Lt. Shirley and staff would have to work after hours to perform manual searches of paper files, compile responsive records, and redact personal information from the approximately 3,000 pages of records. Shirley Cert. ¶ 8-10. The Custodian contended that because these actions would have substantially disrupted the City's operations. Lt. Shirley followed N.J.S.A. 47:1A-5(g) by attempting to contact the Complainant to reach a reasonable accommodation. Shirley Cert. ¶ 7. The Custodian argued that like Caggiano, the Complainant chose to file this complaint instead of working with the City. The Custodian contended that notwithstanding the City's ability to deny access to the OPRA request as a substantial disruption, she responded in good faith disclosed 1,521 pages of records and three (3) spreadsheets to the Complainant on August 15, and 20, 2018.

The Custodian also argued that her actions did not amount to a knowing and willful violation. N.J.S.A. 47:1A-11. The Custodian contended that there is no evidence in the record to support that she knowingly attempted to withhold records.

The Custodian finally contended that the Complainant is not a prevailing party and should not be awarded prevailing party attorney's fees. N.J.S.A. 47:1A-6. The Custodian contended that there existed no casual nexus between this complaint and the City's disclosure. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). The Custodian contended that she could have denied the request as a substantial disruption but chose to disclose records in good faith. The Custodian argued that the Complainant should not be allowed to benefit from his "lack of response or unwillingness to compromise with" the City.

Additional Submissions:

On September 22, 2018, the Complainant filed a letter brief refuting the Custodian's SOI. Therein, the Complainant argued that the Custodian had an obligation to respond to his OPRA request but failed to do so. The Complainant noted that he reminded the Custodian of this obligation on July 27, 2018 and that Ms. Moss confirmed the City would respond. The

Complainant argued that following the expiration of the statutory time frame and having received no response, he filed the instant complaint. The Complainant stated that notwithstanding the Custodian's failure to timely respond, she disclosed multiple records on August 15 and 20, 2018. The Complainant argued that this response omitted records responsive to OPRA request item Nos. 1, 2, and 4. The Complainant noted that as of the date of this submission, the City has not disclosed any additional records.

The Complainant contended that he was already a prevailing party because this complaint resulted in the August disclosures. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). The Complainant further requested that because the City had failed to disclose additional responsive records, the GRC should order the Custodian to fulfill the remainder of the OPRA request. The Complainant contended that it would be "an error to dismiss the complaint" since he is already a prevailing party and OPRA request item Nos. 1, 2 and 4 remained outstanding.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In the matter before the Council, the Complainant submitted his OPRA request on July 17, 2018. On July 27, 2018, the eighth (8th) business day after receipt, Ms. Moss responded in writing on the Custodian's behalf stating that Lt. Shirley attempted to contact the Complainant by telephone several times. Lt. Shirley certified that he was trying to seek clarification from the Complainant, as there were 2,988 pages of responsive records. The Complainant asserted that his request specifically stated that responses should be made via e-mail only.

Upon review, the evidence of record supports that a "deemed" denial of access occurred. Specifically, the Custodian did not provide a written response to the Complainant until the eighth (8th) business day after receipt, which is after the expiration of the statutory time frame. Although the Custodian asserted that Lt. Shirley tried contacting the Complainant via telephone, OPRA expressly requires that a valid response must be in writing. See N.J.S.A. 47:1A-5(g).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in

⁴ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.
Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Long Branch (Monmouth), 2018-178 – Findings and Recommendations of the Executive Director

writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all" requests seeking "records" generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or

⁵ Affirmed on appeal from Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004). Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Long Branch (Monmouth), 2018-178 – Findings and Recommendations of the Executive Director

asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

The Council addressed the search/research question in Donato, GRC 2005-182. There, the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as "to go or look through carefully in order to find something missing or lost." The word research, on the other hand, means "a close and careful study to find new facts or information." (Footnotes omitted.)

[Id.]

Here, the Complainant's OPRA request sought DWI/DUI, drug possession, and drug paraphernalia complaints, summonses, and tickets over a two (2) year period. The Complainant also sought "arrest listings" over a two (2) year period. The Custodian asserted that the records were overly broad and tried to seek clarification from the Complainant.

Upon review, the GRC is satisfied that the Complainant's OPRA request was valid. The request specifically identified government records spanning a definitive period: complaints, summonses, tickets, and arrest listings. Furthermore, the Custodian was able to conduct an initial search and locate 2,988 pages of responsive documents. Although the universe of responsive records may be voluminous, that does not always necessarily equate to an invalid OPRA request. See Chester v. Pleasantville Hous. Auth. (Atlantic), GRC Complaint No. 2015-50 (Interim Order dated March 28, 2017).

Accordingly, the Complainant's July 17, 2018 OPRA request seeking arrest listings, complaints, summonses, and tickets was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG, 375 N.J. Super. at 549; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Donato, GRC 205-182. Thus, the Custodian 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 analysis and provide the Complainant with the estimated cost to provide the responsive records.

Finally, the GRC will briefly address the Custodian's assertion that the Complainant's OPRA request would have substantially disrupted agency operations. Although reviewing and redacting nearly 3,000 pages of records could take a significant amount of time, the Custodian did not meet the requirements of N.J.S.A. 47:1A-5(g) in order to rely on the substantial disruption exemption. See Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007); Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009); Karakashian v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, Office of Medical Bd. of Examiners, GRC Complaint No. 2013-121, *et seq.* (November 2013). Specifically, the Custodian did not attempt "to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency," as the evidence of record indicates that Lt. Shirley made attempts to contact the Complainant via telephone prior to the statutory deadline, with no discussions. See Caldwell v. Vineland Bd. of Educ. (Cumberland), GRC Complaint No. 2009-278 (March 2011). Furthermore, the Custodian did not suggest the imposition of a special service charge or provide records responsive to Item No. 3 until after the complaint filing.

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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Complainant's July 17, 2018 OPRA request seeking arrest listings, complaints, summonses, and tickets was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super.

166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). Thus, the Custodian 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 analysis and provide the Complainant with the estimated cost to provide the responsive records.

3. **The Custodian shall comply with conclusion No. 3 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. 1:4-4,⁶ to the Executive Director.⁷**
4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁸ 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.**
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 "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁸ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Long Branch (Monmouth), 2018-178 – Findings and Recommendations of the Executive Director

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

September 22, 2020