



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

September 28, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o O.O.)
Complainant

Complaint No. 2018-58

v.

Township of Plainsboro (Middlesex)
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 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 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 30, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

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

GRC Complaint No. 2018-58

v.

**Township of Plainsboro (Middlesex)²
Custodial Agency**

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

1. One (1) page of each of “Driving Under the Influence”/Driving While Intoxicated” (“DUI/DWI”) (N.J.S.A. 39:4-50) criminal complaints and motor vehicle summonses for complaints filed in Plainsboro Municipal Court (“PMC”) from May 27, 2016 through March 7, 2018.
2. The first (1st) page of each drug possession charge (N.J.S.A. 2C:35-10) complaint filed with PMC from May 27, 2016 through March 7, 2018.³

Custodian of Record: Carol Torres
Request Received by Custodian: March 5, 2018
Response Made by Custodian: March 19, 2018
GRC Complaint Received: April 5, 2018

Background

August 24, 2021 Council Meeting:

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

1. The Custodian complied with the Council’s September 29, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.

¹ The Complainant represents O.O.

² Represented by George M. Morris, Esq., of Parker, McCay, P.A. (Mt. Laurel, NJ).

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

2. Although the Custodian imposed an unwarranted special service charge under N.J.S.A. 47:1A-5(c), the Custodian provided the responsive records to the Complainant and fully complied with the Council's September 29, 2020 Interim Order by timely refunding the assessed special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's September 29, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 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 August 25, 2021, the Council distributed its Interim Order to all parties. On August 27, 2021, the Complainant e-mailed the Government Records Council ("GRC") stating that the parties have amicably resolved the issue of counsel fees per the Order. The Complainant also stated that the Township of Plainsboro ("Township") needed thirty (30) days to finalize payment.

On September 9, 2021, the GRC e-mailed the parties, inquiring as to whether additional time was needed for the Township to finalize the settlement. That same day, Custodian's Counsel responded to the GRC stating that all has been settled, and that time was needed only for the next Township meeting to approve payment.

On September 13, 2021, Counsel e-mailed the GRC attaching a cover letter and photocopy of a check written to the Complainant dated that same day. Counsel stated that the enclosed check was for the full and final settlement regarding the instant matter. On September 17, 2021, the Complainant e-mailed the GRC, confirming that he received payment for attorney fees on September 16, 2021.

Analysis

Prevailing Party Attorney's Fees

At its August 24, 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 August 25, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant's response was due by close of business on September 23, 2021. On August 27, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval by the Township. On September 13, 2021, Counsel provided the GRC with a photocopy of a check issued to the Complainant in accordance with the settlement agreement, dated that same day. On September 17, 2021, the Complainant confirmed receipt of the agreed upon fee.

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 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

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

August 24, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o O.O.)
Complainant

Complaint No. 2018-58

v.

Township of Plainsboro (Middlesex)
Custodian of Record

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

1. The Custodian complied with the Council’s September 29, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian imposed an unwarranted special service charge under N.J.S.A. 47:1A-5(c), the Custodian provided the responsive records to the Complainant and fully complied with the Council’s September 29, 2020 Interim Order by timely refunding the assessed special service charge. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s September 29, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 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 24th Day of August 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2018-58

v.

**Township of Plainsboro (Middlesex)²
Custodial Agency**

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

1. One (1) page of each of “Driving Under the Influence”/Driving While Intoxicated” (“DUI/DWI”) (N.J.S.A. 39:4-50) criminal complaints and motor vehicle summonses for complaints filed in Plainsboro Municipal Court (“PMC”) from May 27, 2016 through March 7, 2018.
2. The first (1st) page of each drug possession charge (N.J.S.A. 2C:35-10) complaint filed with PMC from May 27, 2016 through March 7, 2018.³

Custodian of Record: Carol Torres
Request Received by Custodian: March 5, 2018
Response Made by Custodian: March 19, 2018
GRC Complaint Received: April 5, 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 has not borne her burden of proof that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 6.5 hours represents an “extraordinary amount of time and effort” to prepare and disclose 213 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199, 204 (Law Div. 2002). Thus, the Custodian must refund the total amount of the charge (\$139.17) to the Complainant.

¹ The Complainant represents O.O.

² Represented by George M. Morris, Esq., of Parker, McCay, P.A. (Mt. Laurel, NJ).

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

Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
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 September 30, 2020, the Council distributed its Interim Order to all parties. On October 2, 2020, the Custodian responded to the Council's Interim Order. The Custodian provided a copy of a check in the amount of \$139.17 for the assessed special service charge, as well as a certified confirmation of compliance to the Executive Director. The Custodian certified that the check was mailed to the Complainant that same day.

Analysis

Compliance

At its September 29, 2020 meeting, the Council ordered the Custodian to refund the total amount assessed to the Complainant as a special service charge. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 30, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 7, 2020.

On October 2, 2020, the second (2nd) business day after receipt of the Council's Order, the Custodian responded in writing, providing a certified confirmation of compliance to the Executive Director, and a scanned copy of the check issued to the Complainant in the amount of \$139.17.

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

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

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

Furthermore, the Custodian certified that the check was mailed to the Complainant on October 2, 2020.

Therefore, the Custodian complied with the Council's September 29, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the instant matter, although the Custodian imposed an unwarranted special service charge under N.J.S.A. 47:1A-5(c), the Custodian provided the responsive records to the Complainant and fully complied with the Council's September 29, 2020 Interim Order by timely refunding the assessed special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the

custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

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

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

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

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

(2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

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

The Court in Mason, further held that:

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

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by PPD pertaining to drug possession or DUI/DWI offenses. The Custodian assessed a special service charge to process the request. Although the Complainant paid the assessed charge, he filed the instant complaint asserting that the special service charge was unwarranted.

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 Interim Order, the Custodian was required to refund the assessed special service charge, which was the Complainant’s desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁷

Therefore, pursuant to the Council’s September 29, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 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**

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

attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 29, 2020 Interim Order because she responded in the prescribed time frame providing a refund and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian imposed an unwarranted special service charge under N.J.S.A. 47:1A-5(c), the Custodian provided the responsive records to the Complainant and fully complied with the Council's September 29, 2020 Interim Order by timely refunding the assessed special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's September 29, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to refund the total amount of the special service charge assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 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

August 17, 2021



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

September 29, 2020 Government Records Council Meeting

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Complainant

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Township of Plainsboro (Middlesex)
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 has not borne her burden of proof that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 6.5 hours represents an “extraordinary amount of time and effort” to prepare and disclose 213 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199, 204 (Law Div. 2002). Thus, the Custodian must refund the total amount of the charge (\$139.17) to the Complainant. Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
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.

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

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

4. The Council defers analysis of whether the 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

**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 O.O.)¹
Complainant**

GRC Complaint No. 2018-58

v.

**Township of Plainsboro (Middlesex)²
Custodial Agency**

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

1. One (1) page of each of “Driving Under the Influence”/Driving While Intoxicated” (“DUI/DWI”) (N.J.S.A. 39:4-50) criminal complaints and motor vehicle summonses for complaints filed in Plainsboro Municipal Court (“PMC”) from May 27, 2016 through March 7, 2018.
2. The first (1st) page of each drug possession charge (N.J.S.A. 2C:35-10) complaint filed with PMC from May 27, 2016 through March 7, 2018.³

Custodian of Record: Carol Torres
Request Received by Custodian: March 5, 2018
Response Made by Custodian: March 19, 2018
GRC Complaint Received: April 5, 2018

Background⁴

Request and Response:

On March 5, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On March 19, 2018, Custodian’s Counsel responded in writing to the Complainant’s OPRA request on behalf of the Custodian. Counsel stated that that 141 tickets for violations of N.J.S.A. 39:4-50 and thus responsive to OPRA request item No. 1 exist. Counsel further stated review and redaction would take approximately one (1) minute per record. Counsel thus stated that the Township of Plainsboro (“Township”) was assessing a special service charge of \$97.00 for 2.3

¹ The Complainant represents O.O.

² Represented by George M. Morris, Esq., of Parker, McCay, P.A. (Mt. Laurel, NJ).

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

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

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hours at “Ms. Grau’s” rate of \$42.17 per hour. Counsel further stated that 72 violations of N.J.S.A. 2C:35-10 responsive to OPRA request item No. 2 exist, and review and redaction of same would take approximately one (1) minute per record. Counsel thus stated that the Township was assessing a special service charge of \$42.17 for 1 hour at “Ms. Grau’s” rate of \$42.17 per hour.

On March 30, 2018, the Complainant remitted payment to the Custodian via two (2) money orders.

Denial of Access Complaint:

On April 5, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that the fees assessed by the Custodian were reasonable and warranted. The Complainant contended that the Custodian had “no good reason” to charge a special service charge here. The Complainant further contended that the hourly rate was excessive.

Supplemental Response:

On April 9, 2018, Custodian’s Counsel responded in writing on behalf of the Custodian. Counsel stated that the Township received the Complainant’s money orders on April 2, 2018 and began preparing the responsive records for disclosure. Counsel stated that the Township incurred additional costs of \$134.94 for 2.2 hours of work over its initial estimate. Counsel stated that the Township chose to waive the additional fee and was providing all 213 responsive records (with redactions) to the Complainant.

Statement of Information:

On April 25, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 5, 2018. The Custodian certified that she responded in writing on March 19, 2018 assessing a special service charge of \$139.17 for 3.2 hours of time at an hourly rate of \$42.17. The Custodian certified that she received payment on April 2, 2018 and thereafter disclosed the responsive records on April 9, 2018; having waived additional costs incurred by the Township.

The Custodian argued that the subject OPRA request was one of approximately twenty (20) OPRA requests that the Complainant submitted since July 2016. The Custodian noted that several of the requests resulted on complaints filed with the Superior Court. The Custodian stated that the court addressed the special service charge issue in O.O. v. Plainfield Twp., Docket No. MID-L-5752-16 (June 30, 2017), where the Township charged to review and disclose “[ten]s of thousands of pages of materials.” The Custodian stated that the court rejected the Complainant’s arguments and upheld the charge that the Township developed based on the 14-point analysis.

The Custodian asserted that here, responding to the relevant OPRA request items became substantially disruptive to the Township’s operations. The Custodian averred that staff were required to locate tickets and complaints “one by one” and review responsive records for redactions. The Custodian stated that it did not charge for the five (5) other items that were not at

issue in this complaint. The Custodian further averred that the Township attempted to minimize costs by received permission from the Complainant to forgo providing a document index. The Custodian noted that at no point prior to filing this complaint did the Complainant protest the fee. The Custodian argued that the special service charge at issue here was consistent with that permitted by the Superior Court. The Custodian asserted that the Complainant has attempted to shift the issue away from the court and to the GRC in hopes of achieving a different result.

Additional Submissions:

On April 30, 2018, the Complainant submitted a letter brief refuting the Custodian's SOI. The Complainant first argued that both the New Jersey Courts and GRC have found that special service charges must be addressed on a case-by-case basis. The Complainant thus argued that just because the O.O. court found a special service charge to produce between 19,000 and 20,000 e-mails reasonable does not mean that the charge at issue here also valid. The Complainant asserted that although he agreed that a special service charge was reasonable, the court agreed with him that the Township had to revise the cost to reflect using a digital redaction tool.

The Complainant contended that here, the Township identified 213 records with easily identifiable redactions. The Complainant further argued that Ms. Grau was not the lowest hourly rate employee needed to redact the responsive records. The Complainant averred that the Township justified Ms. Grau's hourly rate in O.O. because she was properly trained to redact the records at issue there. The Complainant argued that no training or expertise is needed here; redactable information included birth dates, driver's license numbers, social security numbers, or telephone numbers. The Complainant noted that he included payroll records evidencing that Ms. Grau was not the lowest paid employee in either the Clerk's Office or Police Department capable of performing the work on this OPRA request.

The Complainant further argued that at least six (6) other Police Departments in the State charge significantly less or no fees for the same records. The Complainant also argued that he never consented to a special service charge or waived his right to file a complaint regarding same. The Complainant argued that instead, the Township gave him no choice but to pay the fee. The Complainant argued that his payment did not amount to an agreement that was warranted and reasonable. The Complainant noted that the Council previously required agencies to reimburse complainants where they found a fee to be excessive or unreasonable. See e.g. Rozzi v. Lacey Twp. Bd. of Educ. (Ocean), GRC Complaint No. 2015-224 (Interim Order dated January 31, 2017).

In closing, the Complainant also noted that no court cases are currently pending; however, the Township has paid over \$17,843 in attorney's fees stemming from various violations of OPRA.

On May 7, 2018, Counsel submitted a reply to the Complainant's letter brief. Counsel asserted that in O.O., the court found the Township's fee was warranted and reasonable. Counsel noted that the Complainant originally requested 19,000 e-mails, only to reduce the number to 100 since the court upheld the special service charge.

Counsel also asserted that the Custodian assessed the special service charge based upon the GRC's 14-point analysis. Counsel reiterated that when the actual costs were totaled, the Township could have pursued the additional amount but instead chose to waive them. Counsel then provided the following responses to the 14-point analysis:

1. What records are requested?

Response: The Complainant requested materials which are highly sensitive criminal complaints and motor vehicle summons which contain significant personal information about individuals that require redaction.

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

Response: The documents contain social security numbers, driver's license numbers, dates of birth and potentially other information which may need to be redacted.

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

Response: The documents requested spanned a two (2) year time frame.

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

Response: The motor vehicle complaints are stored electronically and each individual ticket had to be searched and retrieved individually. The criminal complaints are kept in individual files which needed to be located and scanned.

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

Response: The Township has a modest size police department with approximately five (5) individuals authorized to retrieve documents for public records purposes.

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

Response: The documents can be retrieved by the Chief of Police, the police command and a confidential secretary.

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

Response: As previously indicated, every document needed to be redacted and reviewed for accuracy in the redactions. In discussions about the fee, the Complainant agreed to waive the requirement for a redactions log to help minimize the fee to be charged.

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 Township originally estimated 3.3 hours of time to perform the work. The actual time was 6.5 hours of work. The redaction log, which the Complainant agreed to waive in negotiations on the fee would have likely added at least one (1) more hour to this task.

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: The confidential secretary was identified for this task. Her rate is \$42.17 per hour. As confirmed by the Superior Court, she is trained in OPRA and authorized to access police documents unlike the Township Clerk or Deputy Clerk who are not authorized to access or return the 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: Return of the motor vehicle summons was not required because they were each individually printed from a computer system after a case-by-case search. The criminal complaints were copied and returned as part of the estimate.

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

Response: See No. 9

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

Response: See No. 9

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

Response: As noted, the motor vehicle summonses are in the State's database, but each had to be searched individually.

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

Response: The detailed estimate was provided to the Complainant explaining the time needed to perform the task (see No. 8). The Complainant agreed to waive the requirement for a redactions log to reduce the total time and lower the fee. The Township waived the additional fee when the actual time was more than double the original estimate.

Counsel maintained that the person chosen to review the records was the lowest paid employee authorized to retrieve and return the documents. Counsel asserted that this issue was

raised on multiple occasions in O.O. and the court confirmed that the confidential secretary was the appropriate individual to perform this task.

Counsel further argued that the fact that other departments provided records without charge did not thereby invalidate the estimate in this instance. Counsel asserted that those departments could have had the resources to handle the Complainant's request, or that they did not wish to waste resources to defend a special service fee they could have rightfully imposed.

On May 11, 2018, the Complainant submitted a letter brief refuting Custodian Counsel's May 7, 2018 response. Initially, the Complainant asserted that the court did not find O.O. to be frivolous and unreasonable: the court instead awarded him prevailing party attorney fees. The Complainant also noted that his filing O.O. resulted in the Township waiving a special service charge for production of metadata.

The Complainant also argued that the court did not approve a special service charge for just 100 e-mails in O.O., but upon the original total of 19,000 e-mails. The Complainant asserted that the reduction to 100 e-mails was to determine whether redactions made via software reduced the processing time versus redactions made manually. The Complainant maintained that unlike O.O., the instant matter, involved only 213 pages of records.

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., 360 N.J. Super. 191, 199, 204 (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.

Additionally, in complaints where the complainant paid an assessed fee and the Council subsequently determined that the fee was unwarranted or unreasonable, the Council has ordered the public agency to refund monies to complainant. See Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009) (citing Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008)) (holding that the assessed special service charge was unreasonable and ordering the Custodian to refund the difference between the \$5.00 fee and the actual cost of \$0.96 (or \$4.04)). See also White v. Monmouth Reg'l High Sch., GRC Complaint No. 2012-218 (Interim Order dated July 23, 2013).

Here, the Complainant disputed the assessed special service charge of \$139.17 for 213 pages of DWI/DUI summonses and drug possession complaints. Conversely, the Custodian argued that the fee was warranted and reasonable, as the request sought records spanning a 2-year period. As part of the 14-point analysis, Counsel asserted that the records totaled 213 pages, with each page requiring reviewed for redactions of personal information. Counsel also identified one (1) individual available to process the request, as she was authorized to retrieve and access the requested records. Counsel also noted that despite expending 6.5 hours processing the records, the Township charged only for the initial estimate of 3.3 hours.

Upon review of the evidence the GRC is not satisfied that an expenditure of 6.5 hours represents an "extraordinary amount of time and effort" for one (1) employee to review and redact 213 pages of records. See Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Additionally, while Counsel did not provide the total number of employees working at the Township's police department, he indicated there were five (5) individuals authorized to access documents for public records purposes. Furthermore, Counsel did not elaborate how the task would have been beyond the scope of Ms. Grau her duties, given her OPRA training and access to the requested records.

Accordingly, the Custodian has not borne her burden of proof that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 6.5 hours represents an “extraordinary amount of time and effort” to prepare and disclose 213 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199. Thus, the Custodian must refund the total amount of the charge (\$139.17) to the Complainant. Coulter, GRC 2008-220.

Knowing & Willful

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

Prevailing Party Attorney’s Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne her burden of proof that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record does not support that 6.5 hours represents an “extraordinary amount of time and effort” to prepare and disclose 213 pages of records. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 199, 204 (Law Div. 2002). Thus, the Custodian must refund the total amount of the charge (\$139.17) to the Complainant. Coulter v. Twp. of Bridgewater (Somerset), GRC Complaint No. 2008-220 (Interim Order dated November 18, 2009).
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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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

September 22, 2020