



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

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2018-70

Complainant

v.

Borough of Middlesex (Middlesex)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 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 should 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 9th Day of November 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: November 15, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

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

GRC Complaint No. 2018-70

v.

**Borough of Middlesex (Middlesex)²
Custodial Agency**

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

1. Complaints prepared by the Police Department relating to the DRE Rolling Logs.
2. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints prepared and filed by the Police Department from January 2016 through present.
3. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathleen Anello⁴
Request Received by Custodian: March 5, 2018
Response Made by Custodian: March 13, 2018
GRC Complaint Received: April 16, 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 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

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

² Represented by Kaitlyn Michko, of Scavo, Schalk, Gillespie, O’Grodnick & Fisher, P.A. Previously represented by Aravind Aithal, Esq., of Bob Smith and Associates (Piscataway, NJ).

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

⁴ The current Custodian of Record is Linda Chismar.

service charge by timely submitting her certification to the Executive Director. Additionally, the Council need not address this issue any further because the Complainant took no action and the current Custodian certified to this fact. Thus, per the Council's Order, the current Custodian is under no obligation to disclose the records.

2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant Therefore, pursuant to the Council's November 10, 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 revise the special service charge amount 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 September 9, 2021, the Complainant e-mailed the Government Records Council ("GRC") notifying that the parties have settled the issue of counsel fees and was scheduled for approval by the Borough of Middlesex ("Borough"). On September 10, 2021, the GRC requested whether an extension of time was needed for the Borough to approve the settlement. That same day, the Custodian responded stating that approval was anticipated prior to September 23, 2021.

On September 21, 2021, the Custodian e-mailed the GRC, stating that formal approval was rescheduled for September 28, 2021, and requesting an extension of time to notify the GRC of the approval. That same day, the GRC granted an extension until October 1, 2021 to provide notification of the approved settlement.

On September 30, 2021, the Custodian notified the GRC that the Borough approved the settlement agreement on counsel fees on September 28, 2021 and provided a copy of the resolution. That same day, the Complainant confirmed that the matter has been resolved to include counsel fees.

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 September 9, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval by the Borough. On September 21, 2021, the Custodian requested an extension of time to notify the GRC of an approved settlement. The GRC granted an extension until October 1, 2021. On September 30, 2021, the Custodian informed the GRC that the Borough approved the settlement on September 28, 2021 and provided a copy of the resolution authorizing same.

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 should 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

October 26, 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 African American
Data and Research Institute)

Complaint No. 2018-70

Complainant

v.

Borough of Middlesex (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 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 timely submitting her certification to the Executive Director. Additionally, the Council need not address this issue any further because the Complainant took no action and the current Custodian certified to this fact. Thus, per the Council’s Order, the current Custodian is under no obligation to disclose the records.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant Therefore, pursuant to the Council’s November 10, 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 revise the special service charge amount 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 African
American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2018-70

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3. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathleen Anello⁴
Request Received by Custodian: March 5, 2018
Response Made by Custodian: March 13, 2018
GRC Complaint Received: April 16, 2018

Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 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. Although the current Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the seventy-four (74)-hour charge to review and redact the responsive records accurately

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

² Represented by Kaitlyn Michko, of Scavo, Schalk, Gillespie, O’Grodnick & Fisher, P.A. Previously represented by Aravind Aithal, Esq., of Bob Smith and Associates (Piscataway, NJ).

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

⁴ The current Custodian of Record is Linda Chismar.

reflects the necessary time needed, and therefore been revised to 18.2 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011); Owoh, Esq. (O.B.O. AADARI) v. Twp. of Washington (Gloucester), GRC Complaint No. 2018-80 (May 2020). Furthermore, the current Custodian failed to prove that the copying costs associated with providing the records electronically was the "actual cost." Thus, the total recalculated special service charge is \$333.97, and the current Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Complainant shall comply with conclusion No. 1 above by, within five (5) business days from receipt of the special service charge, delivering to the current 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 current 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). Should the Complainant remit payment, the current Custodian shall provide access to the responsive records and simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director⁷ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the current 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 as described above.**
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 November 12, 2020, the Council distributed its Interim Order to all parties. On

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.

November 20, 2020, the current Custodian responded to the Council's Interim Order, providing a certification to the Executive Director.

The current Custodian certified that the Borough of Middlesex ("Borough") did not receive any correspondence from the Complainant expressing his willingness to pay the amended special service charge within the allotted five (5) business days from receipt of the Interim Order.

Analysis

Compliance

At its November 10, 2020 meeting, the Council ordered the Complainant to remit payment of the amended special service charge or state his rejection to purchase the records. Further, the Council noted that the Complainant's failure to act within five (5) business days would be treated as a rejection of the records. The Council also ordered the Custodian to certify to the Complainant's willingness or refusal to pay the special service charge. The Council provided the Custodian ten (10) business days from receipt of the Council's Interim Order to provide certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rules, R. 1:4-4.

On November 12, 2020, the Council distributed its Interim Order to all parties. Thus, the Complainant's response was due by close of business on November 19, 2020. Further, the Custodian's response was due by close of business on November 27, 2020, accounting for the Thanksgiving holiday.⁸

On November 20, 2020, the sixth (6th) business day after receipt of the Order, the current Custodian responded to the Council's Interim Order, certifying that the Complainant failed to contact the Borough regarding his willingness to pay the amended special service charge, which therefore constituted a refusal to pay. The current Custodian thus certified that she was no longer required to disclose the records pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Therefore, 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 timely submitting her certification to the Executive Director. Additionally, the Council need not address this issue any further because the Complainant took no action and the current Custodian certified to this fact. Thus, per the Council's Order, the current Custodian is under no obligation to disclose the records.

Prevailing Party Attorney's Fees

OPRA provides that:

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

⁸ Thanksgiving Day was observed on November 26, 2020.

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.]

In the instant matter, the Complainant sought complaints and summonses prepared by the Borough based upon DRE rolling logs, as well as complaints pertaining to drug possession or DUI/DWI offenses. The Custodian assessed a special service charge to process the request. The Complainant filed this instant matter 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 November 10, 2020 Interim Order, although the imposition of the special service charge was warranted, the assessed amount was unreasonable. 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.⁹

Therefore, pursuant to the Council’s November 10, 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. 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 revise the special service charge amount 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.**

⁹ 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).

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 timely submitting her certification to the Executive Director. Additionally, the Council need not address this issue any further because the Complainant took no action and the current Custodian certified to this fact. Thus, per the Council's Order, the current Custodian is under no obligation to disclose the records.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant Therefore, pursuant to the Council's November 10, 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 revise the special service charge amount 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
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African
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v.

Borough of Middlesex (Middlesex)
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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. Although the current Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the seventy-four (74)-hour charge to review and redact the responsive records accurately reflects the necessary time needed, and therefore been revised to 18.2 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011); Owoh, Esq. (O.B.O. AADARI) v. Twp. of Washington (Gloucester), GRC Complaint No. 2018-80 (May 2020). Furthermore, the current Custodian failed to prove that the copying costs associated with providing the records electronically was the “actual cost.” Thus, the total recalculated special service charge is \$333.97, and the current Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. **The Complainant shall comply with conclusion No. 1 above by, within five (5) business days from receipt of the special service charge, delivering to the current 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 current 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). Should the Complainant remit payment, the current Custodian shall provide access to the**

responsive records and simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director³ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the current 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 as described above.

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

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 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: November 12, 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."

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

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

GRC Complaint No. 2018-70

v.

**Borough of Middlesex (Middlesex)²
Custodial Agency**

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

1. Complaints prepared by the Police Department relating to the DRE Rolling Logs.
2. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints prepared and filed by the Police Department from January 2016 through present.
3. Drug possession complaints prepared and filed by the Police Department from January 2016 through present.

Custodian of Record: Kathleen Anello⁴
Request Received by Custodian: March 5, 2018
Response Made by Custodian: March 13, 2018
GRC Complaint Received: April 16, 2018

Background⁵

Request and Response:

On March 4, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 13, 2018, Purchasing Agent Carmen Modica responded in writing on behalf of the Custodian advising that an extension of the seven (7) business days was required due to the voluminous nature of the OPRA request. Ms. Modica thus extended the response time frame through April 20, 2018.

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

² No representation listed on record. Previously represented by Aravind Aithal, Esq., of Bob Smith and Associates (Piscataway, NJ).

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

⁴ The current Custodian of Record is Linda Chismar.

⁵ 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. Borough of Middlesex (Middlesex), 2018-70 – Findings and Recommendations of the Executive Director

On March 22, 2018, Ms. Modica responded in writing advising the Complainant that the Borough of Middlesex (“Borough”) was charging a special service charge in accordance with N.J.S.A. 47:1A-5(c) for time spent searching for, printing, reviewing, and redacting responsive records. Ms. Modica stated that she was providing the Complainant a chance to review the cost in accordance with OPRA as follows:

1. DRE Complaints	1.0 hours	\$40.00
2. DWI/DUI Complaints	18.0 hours	\$720.00
3. Drug Possession Complaints	18.0 hours	\$720.00

Ms. Modica requested that the Complainant advise whether he would accept or reject the charge, noting that the Borough would not process the complaint until receiving acceptance.

On April 8, 2018, the Complainant e-mailed Ms. Modica asking for a specific cost of the items at issue in this complaint to include the total page number for each item. On April 13, 2018, Ms. Modica responded in writing attaching a table indicating a cost of \$1,357.90 to produce 364 pages of records at an hourly rate of \$18.35, plus \$18.20 in copying costs. Ms. Modica also extended the time frame to respond through May 1, 2018.

Denial of Access Complaint:

On April 16, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Borough attempted to charge an excessive fee to disclose records responsive to his OPRA request. The Complainant noted that another municipality responded to the same OPRA request disclosing 1,200 pages of records and only charged \$60.00.

Statement of Information:

On May 7, 2018, the Custodian filed a Statement of Information (“SOI”) attaching a certification from Ms. Modica. The Custodian certified that she received the Complainant’s OPRA request on March 5, 2018. The Custodian certified that the Police Department Records Clerk located, copied, and redacted the responsive records (removing driver’s license numbers, telephone numbers, and dates of birth). The Custodian certified that on March 13, 2018, Ms. Modica responded in writing on her behalf initially extending the response time frame through April 20, 2018.

The Custodian affirmed that Ms. Modica responded again on March 23, 2018 providing the Complainant an estimated special service charge for his review. The Custodian certified that the parties communicated a few more times, but that the Complainant never accepted or rejected the fee. The Custodian certified that the Borough endeavored to prepare the responsive records for disclosure, which were ready on April 27, 2018 upon receipt of payment. The Custodian affirmed that as of the date of the SOI, the Complainant has not responded to the Borough.

The Custodian argued that no unlawful denial of access occurred here. The Custodian contended that the Complainant instead never accepted the Borough's estimated special service charge.

Additional Submissions:

On May 28, 2018, the Complainant filed a letter brief refuting the Custodian's SOI. Therein, the Complainant reiterated that the estimated fee of \$1,357.90 for 364 pages of records was excessive. The Complainant noted that he received multiple records from twenty-two (22) other municipalities at drastically less cost. The Complainant noted that fourteen (14) of the municipalities disclosed records free of charge. The Complainant thus contended that a "comparative market analysis shows" that the Borough's special service charge was excessive. The Complainant contended that OPRA was not intended to become a municipal revenue generator. The Complainant thus requested that the Council: 1) determine the Borough violated OPRA; and 2) determine that he is a prevailing party entitled to attorney fees.

On September 25, 2020 the GRC requested a 14-point special service charge analysis from the Custodian. On October 1, 2020, the current Custodian provided the following responses to the request:

1. What records are requested?

Response:

- a. Complaints prepared by the Police Department relating to the DRE Rolling Logs.
- b. Copies of Driving While Intoxicated/Driving under the Influence ("DWI/DUI") complaints prepared and filed by the Police Department from January 2016 through present.
- c. Drug possession complaints 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 requestor sought copies of records from and/or prepared by the Borough related to DRE rolling logs/reports, DWI/DUI and drug possession complaints, and arrest listings. No specific number of records was requested.

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

Response: The request was for a specified time period of January 2016 through March 5, 2018.

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

Response: At the time the request was made, the records were not archived or in storage.

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

Response: Currently, the Borough employs a total of 110 employees. The Borough Police Department employs 29 of the 110 employees.

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

Response: Three (3) employees.

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

Response: Approximately 466 pages required various redactions.

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: Please refer to Exhibit A, attached hereto.

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

Response: Not applicable. "Monitoring" costs were not included in the quotation(s).

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

Response: Not applicable. "Return[ing] records to original storage place" costs were not included in the quotations(s).

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 Borough employs and designates a records clerk within the Police Department who accommodates the OPRA requests.

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: Diane Roy, Secretary within the Police Department, who receives an hourly rate of \$19.96 may have performed tasks associated with this OPRA request.

Sharon Smigel, Records Clerk, who receives an hourly rate of \$20.96 may have performed tasks associated with this OPRA request, as needed.

However, as evidenced in Exhibit A, each task was quoted at the lowest applicable salary of \$18.35 per hour.

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

Response: All IT related tasks and copying of records are performed on site at the Borough's municipal complex.

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

Response: Please refer to Exhibit A, attached hereto.

Analysis

Special Service Charge

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

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

[Id. (emphasis added).]

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

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were

received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

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

Initially, the GRC notes that the current Custodian’s responses to the 14-point analysis, as well as the table referenced as Exhibit A therein, included the estimated cost to provide records that are not at issue in this complaint. However, the GRC will address the special service charge issue using the estimated time and cost to process the records at issue since same formed the basis of the Complainant’s Denial of Access Complaint.

In first determining whether the assessed charge was warranted, the GRC compares the facts here and those in Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). There, the Borough Police Department (“BPD”) was more than three (3) times the size as the Police Department at approximately 100 employees. Further, the BPD’s task was to review and redact 411 pages of records containing sensitive information similar to the records at issue. Also, the BPD utilized three (3) employees to complete the task, just as the current Custodian noted that three (3) out of the Police Department’s twenty-nine (29) employees were available to complete the task. Based on the foregoing, the GRC is persuaded that, in principle, a special service charge is warranted in this complaint. An additional factor includes the current Custodian’s reference to two (2) employees that may have assisted in completing the task, but their labor was charged at the lowest hourly rate rather than their actual rates.

Now that the GRC has determined that a special service charge is warranted here, it must now determine whether the proposed fee of \$1,357.90 was reasonable. Although decided during the pendency of this complaint, the GRC looks to Owoh, Esq. (O.B.O. AADARI) v. Twp. of

Washington (Gloucester), GRC Complaint No. 2018-80 (May 2020) for reference. In that matter, the Council found that the Custodian's estimate of three (3) minutes needed to review and redact each page of the requested complaints and summonses was reasonable given the amount and type of sensitive information contained therein. Furthermore, in Rivera, GRC 2009-285, the BPD estimated just seven (7) hours to review and redact 411 pages containing the same or similar information as the records at issue.

In the current matter, the GRC does not find that the estimated time of seventy-four (74) hours to process 364 pages is reasonable. The current Custodian certified that the records were not archived or in storage, and the estimated time did not include the time taken to return the records to their proper location. Additionally, while the Custodian stated in the SOI that the records were physically retrieved, it was never made explicit whether the records were solely available in physical format. Therefore, the estimated numbers of hours should be reduced to three (3) minutes per page, or 18.2 hours, to allow the assigned employee(s) time to review and redact the responsive records. Such a calculation is consistent with Owoh, 2018-80, where the records at issue were exactly the same as those here. Therefore, the total allowable charge should be reduced to \$333.97 based upon the lowest hourly rate.

Additionally, the Custodian provided no evidence to support that the requested complaints required copying costs, as was the case in Paff, GRC 2010-09. While the GRC understands the need to protect original records, neither the original Custodian nor current Custodian certified that the records were solely available in physical format. Additionally, there is no evidence in the record that the Custodian could not redact the records electronically. Therefore, the estimated copying cost of \$18.20 is not supported by the evidence.

Therefore, although the current Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the seventy-four (74)-hour charge to review and redact the responsive records accurately reflects the necessary time needed, and therefore been revised to 18.2 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199; Rivera, GRC 2009-285; Owoh, Esq. (O.B.O. AADARI), GRC 2018-80. Furthermore, the current Custodian failed to prove that the copying costs associated with providing the records electronically was the "actual cost." Thus, the total recalculated special service charge is \$333.97, and the current Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the current Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the seventy-four (74)-hour charge to review and redact the responsive records accurately reflects the necessary time needed, and therefore been revised to 18.2 hours. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (Law Div. 2002); Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011); Owoh, Esq. (O.B.O. AADARI) v. Twp. of Washington (Gloucester), GRC Complaint No. 2018-80 (May 2020). Furthermore, the current Custodian failed to prove that the copying costs associated with providing the records electronically was the "actual cost." Thus, the total recalculated special service charge is \$333.97, and the current Custodian shall grant access to the responsive records, with redactions where applicable, once the Complainant has remitted payment of same. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Complainant shall comply with conclusion No. 1 above by, within five (5) business days from receipt of the special service charge, delivering to the current 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 current 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). Should the Complainant remit payment, the current Custodian shall provide access to the responsive records and simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director⁸ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the current 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 as described above.**

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.

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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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

October 27, 2020

Exhibit A

Description	Approx	Page Ct	Page Cost	Manhours	Rate	Labor Cost	Total Cost
#1 DRE Rolling Logs from January, 2016 to present	1		\$0.05	0.25	\$18.35	\$4.59	\$4.64
#2 Copies of Complaints prepared relating to DRE Logs	18		\$0.90	2.00	\$18.35	\$36.70	\$37.60
#3 Copies of DRE Reports from January, 2016 to present	12		\$0.60	1.00	\$18.35	\$18.35	\$18.95
#4 Copies of DWI/DUI Complaints from January, 2016 to present	178		\$8.90	36.00	\$18.35	\$660.60	\$669.50
#5 Copies of Drug Possession Complaints January, 2016 to present	168		\$8.40	36.00	\$18.35	\$660.60	\$669.00
#6 Copy of Arrest Listings from January, 2016 to Present	194		\$9.70	32.00	\$18.35	\$587.20	\$596.90
	571			107.25		\$1,968.04	

\$28.55
\$1,996.59

\$0.05
\$28.55