



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

May 31, 2022 Government Records Council Meeting

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

Complaint No. 2020-67

v.

Borough of Kenilworth (Union)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 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 31st Day of May 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

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

GRC Complaint No. 2020-67

v.

**Borough of Kenilworth (Union)²
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each one of the defendants listed in DRE Rolling Logs.
3. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
6. “Arrest Listings” from January 2019 through present.

Custodian of Record: Laura Reinertsen
Request Received by Custodian: December 30, 2019
Response Made by Custodian: January 2, 2020
GRC Complaint Received: March 18, 2020

Background

April 26, 2022 Council Meeting:

At its April 26, 2022 public meeting, the Council considered the April 19, 2022 Supplemental Findings and Recommendations of the Executive Director and all related

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

² Represented by R. Scott Fahrney, Esq. of DeCotiis, FitzPatrick, Cole & GIBLIN, LLP (Paramus, NJ). Previously represented Frank G. Capece, Esq., of Garrubbo & Capece, P.C. (Union, NJ).

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

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 February 22, 2022 Interim Order because she responded in the extended time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly imposed a special service charge to process the Complainant's OPRA request. N.J.S.A. 47:1A-5(c). However, the Custodian complied with the Council's February 22, 2022 Interim Order and provided the Complainant with the requested records. 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 February 22, 2022 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, 76 (2008). Specifically, the Council found the assessed special service charge to be unwarranted, and ordered the Custodian to provide responsive records without charge. 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. at 432, and Mason, 196 N.J. at 76. **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 April 27, 2022, the Council distributed its Interim Order to all parties. On May 18, 2022, the Complainant's Counsel notified the GRC that the parties have resolved the issue of counsel fees per the Interim Order.

Analysis

Compliance

At its April 26, 2022 meeting, the Council ordered the parties to "confer in an effort to decide the amount of reasonable attorney's fees" and notify the GRC of any fee agreement.

Further, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel "shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13." On April 27, 2022, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by May 25, 2022.

On May 18, 2022, Complainant's Counsel notified the GRC that the parties have settled the issue of attorney's fees.

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

Conclusions and Recommendations

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

Prepared By: Samuel A. Rosado
Staff Attorney

May 24, 2022



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

April 26, 2022 Government Records Council Meeting

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

Complaint No. 2020-67

v.

Borough of Kenilworth (Union)
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 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 February 22, 2022 Interim Order because she responded in the extended time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly imposed a special service charge to process the Complainant’s OPRA request. N.J.S.A. 47:1A-5(c). However, the Custodian complied with the Council’s February 22, 2022 Interim Order and provided the Complainant with the requested records. 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 February 22, 2022 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, 76 (2008). Specifically, the Council found the assessed special service charge to be unwarranted, and ordered the Custodian to provide responsive records without charge. 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. at 432, and Mason, 196 N.J. at 76. **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 26th Day of April 2022

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: April 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 26, 2022 Council Meeting**

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

GRC Complaint No. 2020-67

v.

**Borough of Kenilworth (Union)²
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each one of the defendants listed in DRE Rolling Logs.
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5. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
6. “Arrest Listings” from January 2019 through present.

Custodian of Record: Laura Reinertsen
Request Received by Custodian: December 30, 2019
Response Made by Custodian: January 2, 2020
GRC Complaint Received: March 18, 2020

Background

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Council considered the February 15, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted

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

² Represented by R. Scott Fahrney, Esq. of DeCotiis, FitzPatrick, Cole & GIBLIN, LLP (Paramus, NJ). Previously represented Frank G. Capece, Esq., of Garrubbo & Capece, P.C. (Union, NJ).

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

by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to demonstrate that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record lacks sufficient information to justify the estimated fee imposed. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002). Thus, the Custodian shall disclose the responsive records without the imposition of a special service charge.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. 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 February 23, 2022, the Council distributed its Interim Order to all parties. That same day, Counsel for the Custodian requested a twenty-one (21) day extension of time to respond to the Council's Order. Counsel stated that the extension was needed because the Custodian was on leave. The GRC responded to the Custodian granting the extension until March 23, 2022.

On March 21, 2022, the Custodian responded to the Council's Interim Order. The Custodian certified that she conducted a search for responsive records in accordance with the Council's Order and located responsive records to the Complainant's OPRA request. The Custodian further certified that the records were made available electronically to the Complainant that same day, along with a redaction index. The Custodian also provided certified confirmation of compliance to the Executive Director.

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.

Analysis

Compliance

At its February 22, 2022 meeting, the Council ordered the Custodian to disclose responsive records to the Complainant. 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 February 23, 2022, 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 March 2, 2022.

On February 23, 2022, the date of receipt of the Council's Order, the Custodian requested a twenty-one (21) day extension of time to respond to the Order. That same day, the GRC granted the extension, moving the deadline to March 23, 2022. On March 21, 2022, the Custodian responded to the Council's Order, disclosing records electronically along with a redaction index.

Therefore, the Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the extended time frame providing records and simultaneously providing 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, the Custodian improperly imposed a special service charge to process the Complainant's OPRA request. N.J.S.A. 47:1A-5(c). However, the Custodian complied with

the Council's February 22, 2022 Interim Order and provided the Complainant with the requested records. 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 requested summonses and complaints prepared by the Borough of Kenilworth (“Borough”) based upon DRE rolling logs, as well as complaints and summonses pertaining to drug possession, drug paraphernalia, or DUI/DWI offenses. The Complainant also sought arrest listings prepared by the Borough. The Custodian assessed a special service charge to process the request. The Complainant then filed the instant action, challenging the assessed charge.

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 February 22, 2022 Interim Order, the Custodian was required to provide the responsive records without imposing the 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

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. Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of Kenilworth (Union), 2020-67 – Supplemental Findings and Recommendations of the Executive Director 5

Therefore, pursuant to the Council's February 22, 2022 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 Council found the assessed special service charge to be unwarranted, and ordered the Custodian to provide responsive records without charge. 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. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the extended time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly imposed a special service charge to process the Complainant's OPRA request. N.J.S.A. 47:1A-5(c). However, the Custodian complied with the Council's February 22, 2022 Interim Order and provided the Complainant with the requested records. 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 February 22, 2022 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, 76 (2008). Specifically, the Council found the assessed special service charge to be unwarranted, and ordered the Custodian to provide responsive records without charge. 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. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of**

(O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

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

April 19, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 22, 2022 Government Records Council Meeting

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

Complaint No. 2020-67

v.

Borough of Kenilworth (Union)
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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 failed to demonstrate that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record lacks sufficient information to justify the estimated fee imposed. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002). Thus, the Custodian shall disclose the responsive records without the imposition of a special service charge.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. 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 22nd Day of February 2022

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: February 23, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

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

GRC Complaint No. 2020-67

v.

**Borough of Kenilworth (Union)²
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each one of the defendants listed in DRE Rolling Logs.
3. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
6. “Arrest Listings” from January 2019 through present.

Custodian of Record: Laura Reinertsen
Request Received by Custodian: December 30, 2019
Response Made by Custodian: January 2, 2020
GRC Complaint Received: March 18, 2020

Background⁴

Request and Response:

On December 30, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to Captain Fred Soos of the Kenilworth Police Department (“KPD”) seeking

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

² Represented by Frank G. Capece, Esq., of Garrubbo & Capece, P.C. (Union, NJ).

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

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

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the above-mentioned records. On January 2, 2020, the Custodian's Counsel responded in writing providing correspondence by Capt. Soos. Therein, Capt. Soos estimated that it would take approximately 10-12 hours to complete the Complainant's request and would be handled by Lt. Grady of the KPD. Capt. Soos stated that Lt. Grady's hourly rate was \$66.94, and the total estimated cost would be between \$669.40 and \$803.26.

That same day, the Complainant responded to Counsel requesting whether the Borough of Kenilworth ("Borough") would reconsider the excessive fees, stating that the requested records were stored electronically. The Complainant also stated that other police departments have not charged excessive fees for the same records. Counsel responded stating that he would speak to KPD's Chief, and asked the Complainant what other municipalities were saying regarding costs. The Complainant replied stating that he looked forward to hearing the Chief's position.

Denial of Access Complaint:

On March 18, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the estimated special service charge was excessive since the records were stored electronically. The Complainant also stated that the hourly rate of \$66.94 was also excessive since the required redactions were minimal and could be done by employees at a lower hourly rate. The Complainant asserted that the GRC declare the estimate charge excessive and award counsel fees.

Additional Correspondence:

On March 19, 2020, Counsel sent a fax to the Complainant in response to the complaint filing. Counsel stated that he made attempts to accommodate the Complainant to resolve the matter. Counsel then stated that to resolve the matter KPD would be able to provide access at a total cost of \$201.32.

Statement of Information:⁵

On May 18, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that Capt. Soos received the OPRA request on December 30, 2019. The Custodian certified that on January 2, 2020, Counsel responded on her behalf stating that completing the request would cost an estimated \$669.40 to \$803.26 for 10-12 hours of labor.

The Custodian, through Counsel, maintained that efforts were made to accommodate the Complainant's request, including reducing the total estimated charge from up to \$803.26 to \$201.32.

Additional Submissions:

On May 27, 2020, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant provided a timeline of the correspondence between the parties, noting

⁵ The Custodian's Counsel submitted multiple correspondence to the GRC prior to submitting the SOI. The relevant information from same has been incorporated within the SOI.

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that the Custodian offered a reduced special service charge only after the Complainant filed the instant matter. The Complainant asserted that but for the filing of the instant matter, the Borough would not have reduced the fee to \$201.32. The Complainant therefore argued that the complainant was a catalyst for the Borough's decision and the GRC should therefore declare the Complainant a prevailing party entitled to attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). That same day, the Custodian, through Counsel, responded to the Complainant's brief, asserted that the cost to process the request was never in dispute and the reduction was offered by the Borough of its own initiative based on the Complainant's expressed hardship. The Custodian asserted that the reduction was an act of good faith by the Borough.

On May 28, 2020, the Complainant filed a supplemental brief, maintaining that the cost reduction was only offered after the complaint was filed. The Complainant maintained that the complaint was the catalyst to the Borough's act of providing a reduced cost to process the request. That same day, the Custodian, through Counsel, submitted a letter in response to the Complainant. Therein, the Custodian maintained that the original fee was reasonable, and that the reduction was based upon an attempt to accommodate the Complainant. The Custodian argued that the original fee had not changed, and that punishing the Borough for a good faith effort to accommodate the Complainant was not the purpose of OPRA.

On January 27, 2022, the GRC requested a 14-point special service charge analysis from the Custodian. On January 28, 2022, the Custodian, through Counsel, responded to the GRC by providing correspondence by and between the parties and the GRC. The Custodian also provided a copy of correspondence between the parties dated May 7, 2021, and May 28, 2021.⁶ No special service charge analysis was provided by the Custodian.

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).]

⁶ The correspondence did not pertain to the OPRA request at issue, but rather a subsequent request. Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of Kenilworth (Union), 2020-67 – Findings and Recommendations of the Executive Director

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 (October 28, 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

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

Here, the Complainant disputed the assessed special service charge of \$669.40 - \$803.26, encompassing 10-12 hours of work performed by Lt. Grady at an hourly rate of \$66.94. The Complainant asserted that the records were stored electronically, and that any required redactions would be minimal and could be performed by other employees at a lower hourly rate.

Conversely, the Custodian failed to provide a 14-point special service charge analysis when requested by the GRC. Rather, the Custodian’s response provided correspondence already in the GRC’s possession, and correspondence pertaining to an unrelated OPRA request involving the same parties. In the Custodian’s January 2, 2020 response, Capt. Soos stated that any responsive records would need to be reprinted and redacted of any personal information, then copied and scanned into a file for transfer. Capt. Soos further stated that Lt. Grady was assigned to the task since he had the required access to obtain the records.

A review of the forgoing does not find that a special service charge was warranted based upon the insufficiency of information provided by the Custodian. Since the Custodian failed to provide a 14-point special service charge analysis, the GRC is limited to reviewing evidence currently on the record. As such, necessary details such as the size of the agency, the estimated number pages to be reviewed, or whether Lt. Grady was the lowest paid employee capable of performing the work are missing. Without such information, the GRC cannot reasonably conclude that a special service charge was warranted in this matter.

Accordingly, the Custodian failed to demonstrate that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record lacks sufficient information to justify the estimated fee imposed. See N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. 191. Thus, the Custodian shall disclose the responsive records without the imposition of a special service charge.

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 failed to demonstrate that a special service charge is warranted or reasonable here. N.J.S.A. 47:1A-6. Specifically, the evidence of record lacks sufficient information to justify the estimated fee imposed. See N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 199 (October 28, 2002). Thus, the Custodian shall disclose the responsive records without the imposition of a special service charge.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
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.

⁷ 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.

⁸ "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."

⁹ 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

February 15, 2022