



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 22, 2022 Government Records Council Meeting

Anonymous Englishtown Taxpayer
Complainant

Complaint No. 2021-18

v.

Borough of Englishtown (Monmouth)
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. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013) because he failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The proposed fee of \$360.00 for use of CJIS Solutions to produce the responsive e-mail logs is lawful and consistent with OPRA. N.J.S.A. 47:1A-5(d); Paff v. Twp. of Galloway, 229 N.J. 340, 354 (2017); O’Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009). For this reason, the Custodian has borne his burden of proof that the charge was warranted and was not required to disclose the responsive e-mail logs until the Complainant remitted payment for same. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. The Custodian’s initial response was insufficient because he failed to include a date certain when obtaining an extension of time. N.J.S.A. 47:1A-5(i). However, the Custodian lawfully passed onto the Complainant the cost for CJIS Solutions to produce the responsive logs. N.J.S.A. 47:1A-5(d). 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.¹



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

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4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian lawfully passed the cost of CJIS Solutions work onto the Complainant and was not required to disclose responsive records until receipt of the fee. Additionally, the GRC has determined that no unlawful denial of access occurred here and has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 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 24, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Anonymous Englishtown Taxpayer¹
Complainant**

GRC Complaint No. 2021-18

v.

**Borough of Englishtown (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mail logs, including send, recipient, date, and subject, for Mayor Thomas Reynolds, Councilman Gregory Wojyn, and Councilwoman Cindy Robilotti from August 1, 2020 through October 31, 2020.

Custodian of Record: Peter Gorbatuk

Request Received by Custodian: November 18, 2020

Response Made by Custodian: November 30, 2020

GRC Complaint Received: January 19, 2021

Background³

Request and Response:

On November 18, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 30, 2020, the sixth (6th) business day after receipt of the subject OPRA request, the Custodian e-mailed the Complainant stating that he was working on the subject OPRA request but would need additional information from the Borough of Englishtown’s (“Borough”) “e-mail company.” The Complainant responded confirming receipt of the Custodian’s e-mail.

Also on November 30, 2020, Michael J. Coppola of CJIS Solutions e-mailed the Custodian seeking specifics regarding the subject OPRA request to determine the records sought. Shortly thereafter, the Custodian sent Mr. Coppola the OPRA request, who confirmed receipt and stated that he would determine the amount of time and cost. On December 7, 2020, Mr. Coppola e-mailed the Custodian and stated that it would cost \$360.00 for two (2) hours of work to produce the requested e-mail logs.

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ) (previously of Law Offices of Walter M. Luers, LLC (Annandale, NJ)).

² Represented by Jonathan F. Cohen, Esq., of Plosia, Cohen, LLC (Chester, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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On December 8, 2020, the Complainant sought a status update on his pending OPRA request. On December 16, 2020, the Complainant again sought a status update on his pending OPRA request, with a formal response “nearly two weeks late.” On the same day, the Custodian responded in writing attaching the e-mail thread between himself and Mr. Coppola regarding the \$360.00 charge and asked the Complainant to advise whether the fee was accepted or rejected. The Complainant responded asking that the Custodian reconsider the proposed fee as his request did not require a “[s]pecial charge” and was not “[e]xtraordinary.” N.J.S.A. 47:1A-5(c). The Complainant noted that he was not previously charged for e-mail logs disclosed under OPRA in January 2019. On December 17, 2020, the Custodian e-mailed the Complainant stating that he was “[s]till gathering the information.”

Denial of Access Complaint:

On January 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that notwithstanding his multiple attempts to obtain updates and request to reconsider the assessed \$360.00 special service charge, the Custodian failed to disclose the responsive logs. The Complainant contended that the charge was unlawful because his OPRA request was “not unusual” and thus no charge was necessary. The Complainant noted that he previously sought e-mail logs in December 2018 that he received without a charge in January 2019; copies of the correspondence regarding that OPRA request were included in the complaint filing.

Statement of Information:⁴

On September 15, 2021, Deputy Clerk Gretchen McCarthy filed a Statement of Information (“SOI”) on behalf of the Custodian, who was out on extended absence. Ms. Gretchen certified that although she was not involved in the initial processing of the subject OPRA request, she could confirm that the Custodian received the Complainant’s OPRA request on November 18, 2020. Ms. Gretchen affirmed that the Custodian contacted Mr. Coppola to produce the e-mail logs; he quoted a total of \$360.00 to obtain them. Ms. Gretchen certified that the Custodian responded in writing on December 16, 2020 providing the proposed fee and asking the Complainant to accept or reject same.

The Custodian’s Counsel submitted a letter brief arguing that the Borough never denied access to the responsive records; rather, the Complainant was assessed a special service charge. Paff v. Twp. of Galloway, 229 N.J. 340, 354 (2017). Counsel contended that the Borough required assistance from CJIS because its employee/official e-mail system did not allow for internal creation of e-mail logs without technical assistance. Counsel noted that the subject OPRA request could not be compared to the December 2018 OPRA request because the Police Department’s e-mail system is different from the Borough’s system. Counsel thus argued that the charge was consistent with OPRA’s provision allowing for charge based on “a substantial amount of manipulation or programing of information technology.” N.J.S.A. 47:1A-5(d). Counsel noted that the Borough only reached out to CJIS after attempting unsuccessfully to create the logs. Counsel contended that Councilman Gregory Wojyn explained the e-mail system issue to the Complainant

⁴ On February 25, 2021, this complaint was referred to mediation. On August 27, 2021, this complaint was referred back to the GRC for adjudication.

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in detail and offered to disclose screenshots of the e-mail account “In/Out boxes,” but received no reply.

Counsel also argued that the instant complaint is distinguishable from Paff, 229 N.J. 340 because creation of the logs here required more than “a couple of keystrokes in a minute or two.” Counsel contended that the Borough was required to contact CJIS to create the logs, which necessitated the \$360.00 charge. Counsel thus argued that the forgoing supports that the logs in question are not “government records” for purposes of OPRA because the Borough was required to create them. Sussex Commons Ass’n, LLC v. Rutgers, 201 N.J. 531, 544 (2012).

Analysis

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013), the custodian responded in a timely manner seeking an extension of time; however, she failed to identify a date certain on which she would respond. The Council determined that, although the custodian timely sought an extension of time, she failed to provide a date certain on which she would respond. N.J.S.A. 47:1A-5(i). Citing Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Here, the Custodian responded in writing on behalf of the Custodian responded on the sixth (6th) business day after receipt of same stating that he would need an extension of time so that the Borough could contact its “e-mail company.” However, the Custodian failed to provide a date certain on which he would respond to the Complainant providing access to any responsive records. Thus, said response was insufficient and a violation of OPRA. N.J.S.A. 47:1A-5(i).

Therefore, although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez, GRC 2012-59 because he failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

Special Service Charge

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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:

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 . . .

[N.J.S.A. 47:1A-5(c).]

OPRA further provides that:

If a request is for a record . . . (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, *a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology . . . that is actually incurred by the agency or attributable to the agency* for the programming, clerical, and supervisory assistance required, or both.

[N.J.S.A. 47:1A-5(d) (emphasis added).]

In O’Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and charged the complainant for the duplication. The complainant objected to the fee, asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided a cost estimate from outside vendors. The Council did not find it was unreasonable to obtain an estimate from an outside vendor for the actual cost of duplicating the record because the custodian certified that the Board lacked the equipment necessary to otherwise fulfill the complainant’s request. N.J.S.A. 47:1A-5(c). See also Mangeri v. Monroe Twp. Bd. of Fire Comm’r of Dist. No. 1 (Middlesex), GRC Complaint No. 2010-70 (Interim Order dated January 25, 2011) (ordering the custodian to obtain a quote for reproduction of a recording or certify if same could not be reproduced).

The Council has also separately addressed the possibility of passing IT professional hourly rates onto a requester. In Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281, *et seq.* (Interim Order dated October 28, 2014), the complainant sought access to e-mails between multiple individuals over a defined time period. The custodian, utilizing its IT vendor, proposed a charge of \$120.00 an hour to retrieve the responsive records. After reviewing the 14-point questionnaire submitted by the Custodian as part of his SOI, the Council invalidated the charge, reasoning that:

The evidence here indicates that a search for records responsive to the Complainant's OPRA request could be adequately performed by the employee and/or persons identified in the request. As in both [The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002)], and [Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012)] . . . the GRC is not satisfied that utilizing Network Blade falls within an extraordinary amount of time or effort, or that no other person is capable of searching for the responsive records. Further, although utilizing Network Blade might be the most succinct way to search for all responsive e-mails, the evidence of record does not support that doing so is such a necessity that the Custodian had no other option. Also, given current programs such as Microsoft Outlook®, searching for e-mails/electronic correspondence does not take an IT professional level of expertise.

[Id. at 13-14.]

Initially, the GRC notes that there is no dispute that the requested records on “government records” subject to disclosure in their base form per Paff, 229 N.J. 340. This is contrary to Custodian Counsel's SOI assertion that the logs were not “government records” because they had to be created; the Paff Court plainly rejected this position. Id. at 353. However, the Court did open a pathway for agencies to charge “. . . a service-fee charge when the request for a record requires ‘a substantial amount of manipulation or programming of information technology’” and for potential redactions. Id. at 354 (citing N.J.S.A. 47:1A-5(d)); 358 (citing N.J.S.A. 47:1A-5(a)).

The crux of this complaint is whether the Borough lawfully passed onto the Complainant the cost of utilizing CJIS to produce the responsive e-mail logs. The Complainant argued in the negative, noting that the Borough previously disclosed e-mail logs to him in response to a prior OPRA request free of charge. Conversely, the Borough argued that it had no internal means to produce the logs and the Complainant rejected other suggested methods that would avoid the proposed fee. The Borough also argued that the earlier disclosure was not dispositive here because the Police Department's e-mail system allowed for easy production unlike the Borough's general e-mail system.

A basic test derived from the Council's prior decisions, such as Carter, GRC 2013-281, *et seq.*, on the vendor cost issue shows that a public agency cannot rely on mere convenience to pass a third-party vendor cost unto a requestor. See also Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014). Instead, the agency must bear its burden of proving that use of a third-party vendor was required or essential to fulfill an OPRA request. Further, the agency must be able to show that the associated tasks could not be performed internally without substantive assistance from the vendor.

Considering all facts and available case law here, the GRC views the proposed fee in light of N.J.S.A. 47:1A-5(d) and not as a special service charge related to an extraordinary amount of time and effort contemplated in N.J.S.A. 47:1A-5(c). In reaching this conclusion, the GRC first accepts the Borough's sufficient explanation as to why they required CJIS to obtain the responsive logs and the reasons why their actions differed from the December 2018 OPRA request. Second,

the Borough received a quote for this work and provided it to the Complainant as required in O'Shea, 2007-192. Third, the Borough's actions here are consistent with the Paff court's recognition that a charge may apply in certain circumstances as prescribed under N.J.S.A. 47:1A-5(d).

The GRC is also persuaded that this complaint can be distinguished from Carter, GRC 2013-281 in that the custodian there never advanced an express technological need to utilize the agency's IT vendor beyond convenience. That air of convenience led the Council to view that charge as similar to passing on an attorney's rate for review and redaction. Here, the facts are more like the ones explored in O'Shea because both cases required third-party vendor action to produce the responsive records: OPRA plainly supports the cost therefor to be transfer to a requestor and not borne by the tax-paying public. The GRC notes that this determine is fact-specific: an agency's inability to prove the essential need for third-party vendor participation could result in an invalidation of such a fee.

Accordingly, the proposed fee of \$360.00 for use of CJIS to produce the responsive e-mail logs is lawful and consistent with OPRA. N.J.S.A. 47:1A-5(d); Paff, 229 N.J. at 354; O'Shea, GRC 2007-192. For this reason, the Custodian has borne his burden of proof that the charge was warranted and was not required to disclose the responsive e-mail logs until the Complainant remitted payment for same. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

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 this matter, the Custodian's initial response was insufficient because he failed to include a date certain when obtaining an extension of time. N.J.S.A. 47:1A-5(i). However, the Custodian lawfully passed onto the Complainant the cost for CJIS Solutions to produce the responsive logs. N.J.S.A. 47:1A-5(d). 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (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.

[Mason 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 filed the instant complaint arguing that the Custodian unreasonably charged him \$360.00 to obtain access to the requested e-mail logs. In the SOI, the Borough argued that the cost was necessary because it could not internally produce the logs without contacting CJIS to perform the work. The Borough also argued that it attempted to accommodate the Complainant to avoid the cost without success. The Borough thus contended that it lawfully charged the \$360.00 fee to produce the responsive records. The Council agreed, holding that the \$360.00 fee was reasonably passed onto the Complainant under N.J.S.A. 47:1A-5(d). Thus, this complaint did not bring about a change in the Borough’s conduct: the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney’s fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian lawfully passed the cost of CJIS’s work onto the Complainant and was not required to disclose responsive records until receipt of the fee. Additionally, the GRC has determined that no unlawful denial of access occurred here and has not ordered disclosure of any of those records

to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013) because he failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The proposed fee of \$360.00 for use of CJIS Solutions to produce the responsive e-mail logs is lawful and consistent with OPRA. N.J.S.A. 47:1A-5(d); Paff v. Twp. of Galloway, 229 N.J. 340, 354 (2017); O'Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009). For this reason, the Custodian has borne his burden of proof that the charge was warranted and was not required to disclose the responsive e-mail logs until the Complainant remitted payment for same. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. The Custodian's initial response was insufficient because he failed to include a date certain when obtaining an extension of time. N.J.S.A. 47:1A-5(i). However, the Custodian lawfully passed onto the Complainant the cost for CJIS Solutions to produce the responsive logs. N.J.S.A. 47:1A-5(d). 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.⁵
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian lawfully passed the cost of CJIS Solutions work onto the Complainant and was not required to disclose responsive records until receipt of the fee. Additionally, the GRC has determined that no unlawful denial of access occurred here and has not ordered disclosure of any of those records

⁵ 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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to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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