



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 13, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Grace Woko)
Complainant

Complaint No. 2021-49

v.

Borough of Riverton Police Department (Burlington)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 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 13th Day of December 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: December 15, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Grace Woko)¹
Complainant**

GRC Complaint No. 2021-49

v.

**Borough of Riverton Police Department (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the “[n]ames, date of hire, date of separation and reason for separation and salary of individuals who either resigned or were terminated in the last 5 years from your police department.”³

Custodian of Record: Michelle Hack

Request Received by Custodian: December 17, 2020

Response Made by Custodian: January 15, 2021

GRC Complaint Received: February 23, 2021

Background

November 9, 2022 Council Meeting:

At its November 9, 2022 public meeting, the Council considered the October 27, 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, found that:

1. The Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6 Specifically, the evidence of record does not support six (6) hours by three (3) employees represents an “extraordinary amount of time and effort” to prepare and disclose the requested records. See 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). However, the Council declines to order disclosure of the records since the evidence of record demonstrates that the Custodian provided same to the Complainant on March 9, 2021.

¹ The Complainant represents Grace Woko.

² Represented by Thomas J. Coleman, III, Esq., of Raymond Coleman Heinold, LLP (Moorestown, NJ).

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

2. The Custodian's proposed special service charge was unwarranted. N.J.S.A. 47:1A-5(c). However, the Custodian ultimately disclosed responsive records after the instant complaint was filed and provided the requested records without charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. D.Y.F.S., 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 Custodian provided the responsive records without charge after the instant complaint was filed. 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 November 10, 2022, the Council distributed its Interim Order to all parties. On November 30, 2022, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

Analysis

Prevailing Party Attorney's Fees

At its November 9, 2022 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 November 10, 2022, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on December 12, 2022. On November 30, 2022,

the Complainant e-mailed the GRC notifying that the parties have resolved the matter regarding counsel 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

December 6, 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

November 9, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Grace Woko)
Complainant

Complaint No. 2021-49

v.

Borough of Riverton Police Department (Burlington)
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 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 has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6 Specifically, the evidence of record does not support six (6) hours by three (3) employees represents an “extraordinary amount of time and effort” to prepare and disclose the requested records. See 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). However, the Council declines to order disclosure of the records since the evidence of record demonstrates that the Custodian provided same to the Complainant on March 9, 2021.
2. The Custodian’s proposed special service charge was unwarranted. N.J.S.A. 47:1A-5(c). However, the Custodian ultimately disclosed responsive records after the instant complaint was filed and provided the requested records without charge. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. D.Y.F.S., 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 Custodian provided the responsive records without charge after the instant complaint was filed. 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 9th Day of November 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: November 10, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Grace Woko)¹
Complainant**

GRC Complaint No. 2021-49

v.

**Borough of Riverton Police Department (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the “[n]ames, date of hire, date of separation and reason for separation and salary of individuals who either resigned or were terminated in the last 5 years from your police department.”³

Custodian of Record: Michelle Hack

Request Received by Custodian: December 17, 2020

Response Made by Custodian: January 15, 2021

GRC Complaint Received: February 23, 2021

Background⁴

Request and Response:

On December 17, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian requested an extension of time until January 15, 2021 to respond. On January 15, 2021, the Custodian responded in writing providing that a special service charge would be imposed to complete the request. The Custodian stated that herself and two (2) other employees would process the request, and provided the respective hourly rates and the number of estimated hours expended:

1. Police Chief Shaw - \$56.25/hr – 2.5 hours
2. Michelle Hack - \$34.60/hr – 1.5 hours
3. Nicole Shively - \$22.07/hr – 2.0 hours

The Custodian stated that processing the request would expend six (6) hours for an estimated total of \$236.67.

¹ The Complainant represents Grace Woko.

² Represented by Thomas J. Coleman, III, Esq., of Raymond Coleman Heinold, LLP (Moorestown, 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.

Rotimi Owoh, Esq. (on Behalf of Grace Woko) v. Borough of Riverton Police Department (Burlington), 2021-49 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On February 13, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the estimated charge was excessive for the request. The Complainant requested that the GRC find that the charge was excessive and to award counsel fees.

Supplemental Responses:

On February 26, 2021, Custodian’s Counsel e-mailed the Complainant stating while he maintained that the special service charge was reasonable and warranted, he advised the Borough of Riverton (“Borough”) to provide the responsive records without charge to settle the matter. Counsel also stated the Borough needed an extension until March 12, 2021 to provide the records. On March 5, 2021, Counsel sent an e-mail to the GRC, providing a copy of the February 26, 2021 correspondence, and inquired whether submitting a Statement of Information (“SOI”) remained necessary.

On March 9, 2021, the GRC responded to Counsel stating the Custodian still needed to provide an SOI. That same day, Counsel e-mailed the parties notifying that the Custodian will submit an SOI out of an abundance of caution. Counsel also attached the responsive records, consisting of fifteen (15) pages of records, and attached a letter received from the Custodian dated March 8, 2021, which stated the actual hours spent to locate and produce the responsive records:

1. Chief Shaw - \$56.25/hr – 1.5 hours
2. Michelle Hack - \$34.60/hr – 2.5 hours
3. Nicole Shively - \$22.07/hr – 1.5 hours

The letter also stated that the actual total cost was \$203.98.

Statement of Information:

On March 12, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 17, 2020. The Custodian certified that the Borough’s search included herself and two (2) additional employees researching resolutions from 2015-2020 wherein police officers were appointed and searching payroll files to locate each officer’s employment status. The Custodian certified that she responded in writing on January 15, 2021, stating that a special service charge was required to fulfil the request.

The Custodian maintained that while the Borough was legally obligated to provide records and documents ordinarily maintained and kept on file, the Borough was not required to conduct research, compile, and create documents to satisfy the Complainant’s OPRA request. The Custodian argued that the Borough was fully justified in charging a reasonable hourly rate needed to research each Borough resolution and accompanying documents to satisfy the request. The Custodian nonetheless asserted that to settle the matter, the Borough provided the requested records and information and absorbed the actual cost to produce the records.

Additional Submissions:

On March 19, 2021, the Complainant e-mailed the GRC, stating that same was entitled to a counsel fee award. The Complainant argued that but for the complaint filing, the Custodian would not have abandoned the excessive special service charge. See Teeters v. D.Y.F.S., 387 N.J. Super. 423 (App. Div. 2006). The Complainant therefore argued that the matter should not be dismissed until the GRC resolved the counsel fee issue.

On March 23, 2021, Custodian's Counsel e-mailed the GRC in response to the Complainant's March 19, 2021 correspondence. Counsel asserted that the Borough expended an extraordinary amount of time and effort researching several years of records to locate responsive records. Counsel argued that the Borough elected to waive the special service charge to save public funds, and that OPRA should not be "turned into a game" where the goal was not to obtain records but to obtain attorney's fees. Counsel argued that the GRC could not determine the prevailing party issue without determining whether the special service charge was warranted.

As part of the response, Counsel included answers to the GRC's 14-point questionnaire:

1. What records are requested?

Response: Names, date of hire, date of separation and reason for separation and salary of individuals who either resigned or were terminated in the last five (5) years from your department.

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

Response: See response that was provided in an effort to settle this matter, as attached PDF. Fifteen (15) pages with handwritten notes were ultimately provided but required review of five (5) years of documents.

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

Response: Five (5) years.

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

Response: No.

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

Response: The Borough employs eleven (11) full-time and nine (9) part-time employees.

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

Response: Three (3) employees total. The response required these employees as follows:

1. Police Chief Shaw, to create and provide a list of officers he has in his department from 2015-2020.
2. Michelle Hack (Custodian), to search the resolutions for the named officers and their rate of pay; and
3. Nicole Shively in the Finance Office to search for named officers in payroll files to identify their resignation date, which Ms. Hack made a written note on their resolution.

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

Response: Reviewed for redactions, but no redactions made.

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?

Response: The estimate with the breakdown of this information was provided to the Complainant as part of the January 15, 2021 response at page 2, for a total estimated cost of \$236.67.

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.

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, or at least not separated out from overall time estimate. This time is not seen as a significant factor in overall time needed to review five (5) years of records to generate this response.

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

Response: All personnel are administrative, and the Borough is a fairly small municipality. These are the only employees available to address the request.

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

Response: See response to item 6 and 8 above.

1. Chief Shaw: \$56.25/hour (2.5 hours)
2. Michelle Hack (Custodian): \$34.60/hour (1.5 hours)
3. Nicole Shively: \$44.14/hour (2.0 hours)

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

Response: The Borough could not use any technology “search” herein. The search needed to be conducted by Borough employees. The Borough has hard files, saved systems files, a scanner, and e-mail.

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

Response: The primary time herein was with regard to reviewing five (5) years of files and identifying the documents that would be responsive. Those documents were then scanned to be provided by e-mail as requested by the Complainant. There were no hard photocopies produced. There was no outside inspection/monitored inspection herein.

Counsel argued that the record established that a special service charge was warranted. Counsel further asserted that the Borough made every attempt to communicate with the Complainant and made no objection to the fee until filing the instant complaint. Counsel argued that the law of communication and straight-forward dealing was not conducive to the fair administration of OPRA, and the Complainant should not be rewarded for his lack of communication.

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.

Additionally, in Owoh, Esq. (O.B.O. AADARI) v. Borough of Fair Haven (Monmouth), GRC Complaint No. 2018-146 (Interim Order dated May 12, 2020), the Complainant requested various summonses and complaints over a two (2) year period. The custodian imposed a special service charge to process approximately 250 pages, utilizing up to two (2) clerks who worked part-time for the Fair Haven Police Department. The custodian further stated that the Borough of Fair Haven employed just nineteen (19) people. The Council held that the special service charge of \$155.00 for ten (10) hours was reasonable and warranted. The Council noted that the custodian’s 14-point analysis detailed the clerks’ regular duties, and how fulfilling the request would cause a substantial disruption to their daily responsibilities, as some of the records required retrieval from storage.

The GRC initially notes that after the instant complaint was filed, the Custodian elected to absorb the special service charge and provided the Complainant with the requested records without cost. Further, in the March 8, 2021 correspondence to Custodian’s Counsel, the Custodian stated that the actual cost to locate and produce the records was \$203.98, which differed from the initial estimate. However, the GRC shall analyze the validity of the charge based upon the initial estimate because said estimate formed the basis of the Complainant’s Denial of Access Complaint.

In the instant matter, the Custodian provided a 14-point analysis reflecting the analytical framework outlined in Courier Post, 360 N.J. Super. at 199, regarding the proper assessment of a special service charge. The Custodian argued that the proposed charge of \$236.67 comprised six (6) hours to process the request. The Custodian certified that herself (at \$34.60 per hour) and two (2) additional employees were needed to fulfill the request; Chief Shaw at \$56.25 per hour and Nicole Shively at \$44.14 per hour. The Custodian certified the Complainant’s OPRA request required Chief Shaw to compile a list of officers employed between 2015-2020, the Custodian to

research five (5) years of Borough resolutions to locate instances where law enforcement officers were hired and at what salary, and for Ms. Shively to research payroll records to determine each officer's date of separation. The Custodian also certified that the Borough employed twenty (20) people, with nine (9) working part-time.

Upon review of the evidence, the GRC is not satisfied that an expenditure of (6) hours represent an "extraordinary amount of time and effort" for three (3) employees to research, locate, and review fifteen (15) pages of records. Courier Post, 360 N.J. Super. at 199. In Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011), the agency estimated just seven (7) hours of work to review and redact 411 pages of records for personal information, utilizing three (3) employees. Here, the Custodian certified that no redactions were required. Further, the Custodian did not sufficiently explain why it was necessary for Chief Shaw himself to compile the list of officers and that it would take 2.5 hours to create said list. Additionally, while the Custodian's 14-point analysis noted the agency's small size, she did not elaborate as to what daily functions would be disrupted or were beyond the scope of the employees' regular job duties. See Owoh, GRC 2018-146.

Accordingly, the Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6 Specifically, the evidence of record does not support six (6) hours by three (3) employees represents an "extraordinary amount of time and effort" to prepare and disclose the requested records. See N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199; Rivera, GRC 2009-285. However, the Council declines to order disclosure of the records since the evidence of record demonstrates that the Custodian provided same to the Complainant on March 9, 2021.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly and 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. 1983)); the Custodian's actions must have been intentional and deliberate,

with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian’s proposed special service charge was unwarranted. N.J.S.A. 47:1A-5(c). However, the Custodian ultimately disclosed responsive records after the instant complaint was filed and provided the requested records without charge. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

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

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

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

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

The Court in Mason, further held that:

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

[Id. at 76.]

Here, the Complainant sought the names, date of hire, date of separation and reason for separation and salary of individuals who either resigned or were terminated in the last five (5) years from the Riverton Police Department. The Custodian responded to the Complainant stated that a special service charge would be imposed. The Complainant filed the instant matter, arguing that the estimated charge was excessive.

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. Although the Borough elected to absorb the estimated cost to process the request and provided the Complainant with responsive records, the reversal did not occur until after the instant complaint was filed. 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.⁵

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian provided the responsive records without charge after the instant complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not proved that a special service charge was warranted or reasonable here. N.J.S.A. 47:1A-6 Specifically, the evidence of record does not support six (6) hours by three (3) employees represents an "extraordinary amount of time and effort" to prepare and disclose the requested records. See 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). However, the Council declines to order disclosure of the records since the evidence of record demonstrates that the Custodian provided same to the Complainant on March 9, 2021.
2. The Custodian's proposed special service charge was unwarranted. N.J.S.A. 47:1A-5(c). However, the Custodian ultimately disclosed responsive records after the instant complaint was filed and provided the requested records without charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

⁵ 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).

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3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. D.Y.F.S., 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 Custodian provided the responsive records without charge after the instant complaint was filed. 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.**

Prepared By: Samuel A. Rosado
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October 27, 2022