



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 27, 2021 Government Records Council Meeting

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

Complaint No. 2020-10

v.

Montgomery Township (Somerset)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 provide the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Notwithstanding, the Custodian has borne her burden of proof that the proposed special service charge of \$773.20 comprising forty (40) hours at a rate of \$19.33 per hour to locate, retrieve, and copy records responsive to the Complainant’s OPRA request is warranted and reasonable here. 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. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, since the Complainant has already received the responsive records, the GRC declines to order disclosure once payment has been remitted. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. The Custodian violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant with the opportunity to review and object to the imposed special service charge. However, the Custodian’s special service charge was ultimately warranted and reasonable. Additionally, the Custodian provided the responsive records to the Complainant on January 17, 2020. 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 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, 432 (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 Complainant was in possession of the responsive records prior to the complaint filing, and the special service charge was warranted and reasonable, notwithstanding the Custodian's violation of N.J.S.A. 47:1A-5(c). 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 27th Day of April 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

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

GRC Complaint No. 2020-10

v.

**Montgomery Township (Somerset)²
Custodial Agency**

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

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 of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed 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 by the Police Department from January 2019 through present.
6. Police Department’s “Arrest Listings” from January 2019 to present.

Custodian of Record: Donna Kukla

Request Received by Custodian: December 26, 2019

Response Made by Custodian: January 17, 2020

GRC Complaint Received: January 21, 2020

Background³

Request and Response:

On December 26, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 31, 2019,

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

² Represented by Kevin A. Van Hise, Esq., of Mason Griffin & Pierson, P.C. (Princeton, 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Montgomery Township (Somerset), 2020-10 – Findings and Recommendations of the Executive Director

the Custodian responded in writing advising that an extension of time until January 17, 2020 was needed to complete the request. The Complainant granted the time extension that same day.

On January 17, 2020, the Custodian responded in writing, providing responsive records with redactions. The Custodian also stated that she assessed a special service charge of \$773.20 representing forty (40) hours of staff time at \$19.33 per hour, which was the rate of the Montgomery Township Police Department's ("MTPD") records clerk, the lowest paid hourly rate.

Denial of Access Complaint:

On January 21, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian imposed an excessive special service charge without giving prior notice that a fee would be assessed. The Complainant argued that he was denied an opportunity to object to the special service charge as required under N.J.S.A. 47:1A-5(c).

The Complainant therefore requested that the GRC declare the special service charge was unlawfully imposed for violating due process under OPRA. The Complainant also requested the GRC award counsel fees.

Statement of Information:

On February 10, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 26, 2019. The Custodian certified that MTPD records were searched to provide a response, with some of the files available through eCDR and eTickets. The Custodian certified that the arrest files were only available on paper and could only be identified by hand searching through files. The Custodian certified that on December 31, 2019, she sought an extension of time to respond until January 17, 2020. The Custodian certified that on January 17, 2020, she responded to the Complainant in writing through eleven (11) e-mails containing twenty-three (23) attachments comprising responsive records.

The Custodian asserted that in addition to the request items, the Complainant's OPRA request itself stated that "[w]e are willing to pay a reasonable fee for the requested records. Feel free to redact any confidential information from the requested records." The Custodian therefore argued that in accordance with the Complainant's statement, she indicated there would be a special service charge imposed for \$773.20. The Custodian asserted that the forty (40) hours expended could not be estimated in advance, nor the total pages of records.

Regarding the charge itself, the Custodian asserted that the arrest records were only in hard copy format and had to be physically located and retrieved from individual case files. The Custodian noted that most of the records required redactions for personal information, as well as juvenile information. The Custodian argued that because processing the request involved retrieving, copying, and manually redacting over 1,300 pages, four (4) staff were utilized to process the request, comprising two (2) police officers, a police records clerk, and a clerical assistant. The Custodian asserted that the clerical assistant's hourly rate of \$19.33 was the lowest

rate among the police department personnel and was therefore used to calculate the time expended by all four (4) staff. The Custodian asserted that she did not include the time she or her staff spent to process the request into the total charge.

The Custodian also asserted that the Complainant did not express an objection to the special service charge while acknowledging receipt of the responsive records. The Custodian asserted that she did not hear from the Complainant until the filing of the instant complainant. The Custodian contended that the complaint was inappropriate because the records were provided within the extended period, receipt was acknowledged, and the requestor agreed to pay a reasonable fee for the records.

Additional Submissions:

On February 11, 2020, the Complainant filed a letter brief in response to the SOI. Therein, the Complainant maintained that the Custodian violated OPRA by not providing him an opportunity to review and object to the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c).

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. However, a custodian must provide a requestor with "the opportunity to review and object to the charge prior to it being occurred." Id.

In the instant matter, the GRC first addresses the Complainant's claim that he was not given prior notice of the charge, nor the opportunity to review and reject same in violation of N.J.S.A. 47:1A-5(c). The Custodian asserted that she was unable to calculate the charge in advance since she could not estimate the number of records nor the time it would take to make the required redactions. The Custodian also asserted that the Complainant specifically agreed that he would pay a reasonable fee for the records.

Upon review, the GRC finds that the Custodian failed to adhere to OPRA's requirement that a requestor be given an opportunity to review and reject a special service charge prior to its imposition. The Custodian's reliance on the Complainant's statement on his willingness to pay a reasonable fee does not absolve the Custodian's obligation, as the plain language of the statute grants the Complainant the ability decide whether or not to accept a proposed charge. See N.J.S.A. 47:1A-5(c).

Furthermore, the Custodian's claim that the charge could not be estimated due to the inability to calculate the number of potentially responsive records and the time taken to redact same runs afoul of the framework outlined in Courier Post, 360 N.J. Super. at 199. Because five (5) of the identified factors require providing the number of records involved or the time taken to process the request at various stages, it is incumbent upon the Custodian to determine these factors and calculate a charge "prior to it being incurred." N.J.S.A. 47:1A-5(c).

The GRC shall now address whether the special service charge was warranted and reasonable. When special services charges are at issue, the GRC will typically require a custodian to complete a 14-point analysis questionnaire prior to deciding on the charge issue. However, the facts of this complaint as presented to the GRC do not require the submission of such a questionnaire.

A review of the forgoing supports that the MTPD's expenditure of 40 hours represents an extraordinary amount of time and effort to produce responsive records given the number of records and that most were not electronically stored and had to be physically retrieved. See Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). The GRC is further persuaded by the fact that most of the records had to be manually redacted for personal information as well as juvenile information. An additional factor includes the contention that four (4) employees were utilized to complete the task, but their labor was charge at the lowest hourly rate rather than their actual rates. Furthermore, the Custodian contended that she did not include the time expended by herself or her office to process the records.

Accordingly, the Custodian failed to provide the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Notwithstanding, the Custodian has borne her burden of proof that the proposed special service charge of \$773.20 comprising fort (40) hours at a rate of \$19.33 per hour to locate, retrieve, and copy records responsive to the Complainant's OPRA request is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-311. However, since the Complainant has already received the responsive records, the GRC declines to order disclosure once payment has been remitted. See 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 the matter before the Council, the Custodian violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant with the opportunity to review and object to the imposed special service

charge. However, the Custodian's special service charge was ultimately warranted and reasonable. Additionally, the Custodian provided the responsive records to the Complainant on January 17, 2020. 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. 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.]

The Complainant filed the instant complaint requesting that the GRC determine that the Custodian violated N.J.S.A. 47:1A-5(c) by imposing a special service charge before being given the opportunity to review and object to same. Additionally, the Complainant asserted that the charge itself was “excessive”. However, while it was determined that the Custodian failed to provide the Complainant with an opportunity to review and reject the charge before its imposition, the charge itself was warranted and reasonable. Furthermore, the Complainant received the responsive records prior to the filing of the instant complaint. Therefore, the complaint did not bring about a change in the Custodian’s conduct since the Complainant was already in possession of the responsive records, and the charge itself was warranted and reasonable.

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. 423. 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 Complainant was in possession of the responsive records prior to the complaint filing, and the special service charge was warranted and reasonable, notwithstanding the Custodian’s violation of N.J.S.A. 47:1A-5(c). 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. The Custodian failed to provide the Complainant with the opportunity to review and reject the special service charge prior to being incurred. N.J.S.A. 47:1A-5(c). Notwithstanding, the Custodian has borne her burden of proof that the proposed special service charge of \$773.20 comprising forty (40) hours at a rate of \$19.33 per hour to locate, retrieve, and copy records responsive to the Complainant's OPRA request is warranted and reasonable here. 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. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, since the Complainant has already received the responsive records, the GRC declines to order disclosure once payment has been remitted. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. The Custodian violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant with the opportunity to review and object to the imposed special service charge. However, the Custodian's special service charge was ultimately warranted and reasonable. Additionally, the Custodian provided the responsive records to the Complainant on January 17, 2020. 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 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, 432 (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 Complainant was in possession of the responsive records prior to the complaint filing, and the special service charge was warranted and reasonable, notwithstanding the Custodian's violation of N.J.S.A. 47:1A-5(c). 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.

Prepared By: Samuel A. Rosado
Staff Attorney

April 20, 2021