



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

May 21, 2024 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Delores Simmons and
Obafemi Simmons)
Complainant

Complaint No. 2021-102

v.

Township of Howell (Monmouth)
Custodian of Record

At the May 21, 2024 public meeting, the Government Records Council (“Council”) considered the May 14, 2024 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 performed an insufficient search for records responsive to item Nos. 7 and 13 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure because the Custodian certified she disclosed same to the Complainant via separate cover at the time she submitted her Statement of Information.
2. The Custodian has borne her burden of proof that the proposed special service charge of \$5,000.00 comprised of 171 hours at an hourly rate of \$34.00 to locate and review 1,417 records responsive to the Complainant’s OPRA request item Nos. 1-4 is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg’l High Sch., 360 N.J. Super. 191, 204 (Law Div. 2002); Owoh, Esq. (on Behalf of AADARI) v. Elizabeth Police Dep’t (Union), GRC Complaint No. 2020-39 (Interim Order dated June 29, 2021); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of this Order by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant’s failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment,**



the Custodian shall provide access to the responsive records within ten (10) business days following receipt of said payment.

4. Notwithstanding the Custodian's insufficient search, she has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 8-12 seeking various records pertaining to the Township and its police department. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian located responsive records after the instant complaint was filed upon conducting an additional search. 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(c).**

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 21st Day of May 2024

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: May 23, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 21, 2024 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Delores Simmons
and Obafemi Simmons)¹
Complainant**

GRC Complaint No. 2021-102

v.

**Township of Howell (Monmouth)²
Custodial Agency**

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

1. “[A]rrest listings” or “arrest summaries” or “booking records” showing the name, sex, and race of the individuals who were charged with drug paraphernalia by your police department from January 2020 to present.
2. “[A]rrest listings” or “arrest summaries” or “booking records” showing the name, sex, and race of the individuals who were charged with jaywalking by your police department from January 2020 to present.
3. [C]omplaints and summonses prepared by your police department relating to individuals who were charged with drug possession and or drug paraphernalia by your police department from January 2020 to present.
4. DWI/DUI summonses and complaints prepared and or issued by your police department from January 2020 to present.
.....
7. [S]ettlement agreements entered by your police department and or municipality to resolve complaints and allegations of any misconduct(s), harassment, hostile work environment, use of force, discrimination from 2014 to present.
8. [S]ettlement agreements entered between your police department or municipality with any one of your current and former police officers from 2014 to present.
9. [S]ettlement agreements your municipality entered with any one of your police officers who challenged his or her termination in court or through arbitration from 2014 to present.
10. [A]ny agreement your municipality entered into with any of your present or former officers promising the officer(s) that your police department will give positive employment reference of “good standing” to future employers despite taking adverse employment action against the officer(s) such as termination or asking the officer(s) to resign or retire.
11. PDNA issue by your police department from 2014 to present.
12. [C]ancelled checks and invoices your police department and or municipality used to settle sexual harassment allegations within your police department from 2014 to present.

¹ The Complainant represents Delores and Obafemi Simmons.

² Represented by Caitlin Harney, Esq., of Gluck Walrath, LLP (Freehold, NJ).

Rotimi Owoh, Esq. (on Behalf of Delores Simmons and Obafemi Simmons) v. Township of Howell (Monmouth), 2021-102 – Findings and Recommendations of the Executive Director

13. Names, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2002 to 2017. N.J.S.A. 47:1A-10. This request also includes any agreement entered with each one of the separated police officer(s).³

Custodian of Record: Donna Belton

Request Received by Custodian: April 13, 2021

Response Made by Custodian: May 10, 2021

GRC Complaint Received: May 19, 2021

Background⁴

Request and Response:

On April 13, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded to the Complainant seeking a three (3) week extension of time to respond. On May 10, 2021, the Custodian responded in writing stating that processing request item Nos. 1-4 required a special service charge in excess of \$5,000.00, charging the lowest hourly rate. The Custodian also stated that completing the task would require more than two (2) weeks to complete. For request item Nos. 7-13, the Custodian stated that the Township of Howell Police Department (“HPD”) did not possess responsive records within the Township of Howell (“Township”).

On May 11, 2021, the Complainant responded to the Custodian via e-mail, requesting an individual response for each request item Nos. 7-13. The Complainant also stated that the \$5,000.00 special service charge to process item Nos. 1-4 was excessive.

On May 12, 2021, the Custodian forwarded to the Complainant an e-mail from Capt. Thomas Rizzo. Capt. Rizzo stating that HPD did not possess responsive records for item Nos. 7-13. Capt. Rizzo stated he did not imply the Township did or did not possess responsive records, and it was not his obligation under OPRA to conduct research to produce records that may exist elsewhere, or guide requestors to where they could locate said records. Capt. Rizzo next stated that for item Nos. 1-4, the requested information totaled 1,471 incidents and required individual review for redactions and eventual production. Capt. Rizzo stated that HPD’s Administrative Assistant was the lowest paid employee able to perform the work at \$34.00/hour and estimated it would take a minimum of seven (7) minutes to review each incident. Capt. Rizzo stated it would take approximately 171 hours to review, for a total of \$5,834.96. Capt. Rizzo thus stated the allotted \$5,000.00 was a discount and not an excessive charge.

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

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 Delores Simmons and Obafemi Simmons) v. Township of Howell (Monmouth), 2021-102 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On May 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the allotted time to provide records had passed. The Complainant argued that the estimated special service charge was excessive, and the Custodian did not clarify whether records responsive to item Nos. 7-13 existed within the Township or were held externally.

The Complainant argued that the Custodian violated OPRA and the GRC should declare same a prevailing party and awarded counsel fees.

Statement of Information:

On June 11, 2021, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from Capt. Rizzo. The Custodian certified that she received the Complainant’s OPRA request on April 13, 2021. The Custodian certified that she responded that same day seeking an extension of time to respond. The Custodian certified that on May 10, 2021, she responded in writing stating that item Nos. 1-4 required the imposition of a special service charge, and that no responsive records exist for item Nos. 7-13. The Custodian affirmed that on May 12, 2021, she forwarded Capt. Rizzo’s e-mail confirming the initial response.

The Custodian first reiterated that the imposition of a special service charge was reasonable and warranted based on Capt. Rizzo’s certification. Therein, Capt. Rizzo certified that he conducted an electronic search to determine how many records may be responsive, and determined there were 1,471 incidents that may be responsive to item Nos. 1-4. Capt. Rizzo certified that this number was only the number of incidents and not the total number of pages. Capt. Rizzo certified that these records are not maintained electronically at HPD but are maintained physically. Capt. Rizzo certified that each relevant file would need to be identified, located, the relevant records copied, and then returned to the file. Capt. Rizzo certified that each record would need to be reviewed for possible redactions to personal information, juvenile matters, and criminal matters. Capt. Rizzo certified that once redacted, the record would need to be scanned for final production. Capt. Rizzo thus argued that the expected expenditure of time and effort warranted a special service charge.

Capt. Rizzo certified that the lowest hourly rate employee capable of performing the task was an HPD Administrative Assistant, whose hourly rate was \$34.00. Capt. Rizzo certified that it was estimated that it would take seven (7) minutes per incident to complete the task, encompassing all steps in the process. Capt. Rizzo certified that the estimated time would total 10,297 minutes, or 171 hours. Capt. Rizzo certified that the total estimated cost was \$5,834.97, but discounted the total to \$5,000.00.

The Custodian asserted that the GRC has previously found that response times above ten (10) hours may invoke a special service charge for small agencies. See Loder v. Cnty. of Passaic, GRC Complaint No. 2005-161 (February 2016); Vessio v. Twp. of Barnegat, GRC Complaint No. 2006-70 (April 2007); Renna v. Cnty. of Union, GRC Complaint No. 2004-134 (April 2006). The Custodian therefore argued that the estimated special service charge is warranted.

Regarding item Nos. 7-13, Capt. Rizzo certified he conducted a search for responsive records, but none were located for any item at HPD. Capt. Rizzo certified that this was conveyed to the Complainant at the time of the request.

In contrast, the Custodian stated she presumed that if the HPD did not possess the records, then neither would the Township. The Custodian then stated that after receiving the instant complaint, she conducted another search for records and located two (2) settlement agreements responsive to item No. 7 held by outside counsel. The Custodian also asserted that the Township was able to conduct an electronic search to produce some of the requested personnel information responsive to item No. 13 via an Excel spreadsheet. The Custodian further asserted that information on payroll, pension, and dates of hire could not be electronically searched and therefore could not be produced based on the request as written. The Custodian certified that the spreadsheet and settlement agreements were provided to the Complainant without redactions under a separate cover.

Analysis

Insufficient Search

Item Nos. 7 and 13

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

In the instant matter, the Custodian presumed that if HPD did not possess the records then neither would the Township. However, the Custodian certified that upon receiving the instant complaint, she conducted a second search for responsive records and located two (2) settlement agreements responsive to item No. 7 and was able to create an Excel spreadsheet responsive to item No. 13. Therefore, the Custodian's initial search was insufficient since responsive records were located upon a subsequent search by the Custodian. Schneble, GRC 2007-220.

Accordingly, the Custodian performed an insufficient search for records responsive to item Nos. 7 and 13 of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. However, the GRC declines to order disclosure because the Custodian certified she disclosed same to the Complainant via separate cover at the time she submitted her SOI.

Special Service Charge

Item Nos. 1, 2, 3, 4

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., 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.

In Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012), the complainant sought in part motor vehicle recording (“MVR”) footage from the Rutgers University Police Department (“RUPD”). The custodian certified that there was one (1) out of the seventy-five (75) employees qualified to fulfill the complainant’s OPRA request. The employee certified that he expended approximately twelve (12) hours fulfilling the entire request, but RUPD charged only for the two (2) hours spent locating and copying the requested MVR footage on his work computer. The employee also certified that while creating a copy of the footage, he was unable to perform any other work on his computer. The Council held that the disruption to the employee’s regular duties, as well as the fact that RUPD did not charge the entire time expended to fulfill the request, warranted the special service charge.

Additionally, in Owoh, Esq. (on Behalf of AADARI) v. Elizabeth Police Dep’t (Union), GRC Complaint No. 2020-39 (Interim Order dated June 29, 2021), the complainant requested same records at issue here. The custodian asserted that the request involved approximately 1,300 records, or 9,100 pages to review. The custodian also stated that each record would take ten (10) minutes to review, totaling over 216 hours. The custodian further stated that the total estimated cost was \$7,740.52, which included \$455.00 in copying costs. The Council found the special service charge was reasonable and warranted given the volume of records, the method of review, and the potential redactions needed for each record.

Here, the Complainant disputed the assessed special service charge of \$5,000.00, encompassing 171 hours of work performed by an Administrative Assistant at an hourly rate of \$34.00 for item Nos. 1-4. 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 Custodian and Capt. Rizzo have presented to the GRC enough information to make a determination absent submission of the questionnaire.

A review of the forgoing supports that HPD’s estimated expenditure of 171 hours represents an extraordinary time and effort to produce responsive records given the high volume of incidents required to review. See Rivera, GRC 2009-311. In comparison with Owoh, GRC 2020-39, Capt. Rizzo certified that 1,417 incidents required review, compared to 1,300, but estimated that it would only take seven (7) minutes to review. Most importantly, unlike the custodian in Owoh, the Custodian here is not charging for copying costs, and is also charging the Complainant less than the estimated total time to review and provide the records. Further, Capt. Rizzo demonstrated that the Administrative Assistant was the lowest paid employee capable of performing the task.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$5,000.00 comprised of 171 hours at an hourly rate of \$34.00 to locate and review 1,417 records responsive to the Complainant’s OPRA request item Nos. 1-4 is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Owoh, GRC 2020-39; Rivera, GRC 2009-311. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Unlawful Denial of Access

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.

Items Nos. 8, 9, 10, 11, 12

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s OPRA request item Nos. 8-12 sought various agreements, settlement agreements, checks, invoices, and non-disclosure agreements concerning police officers and the Township. In response, Capt. Rizzo stated that no responsive records exist at HPD. The Complainant argued that it was unclear whether such records exist with the Township. However, in the SOI the Custodian certified that upon conducting a second search, no records responsive to item Nos. 8-12 were located. Additionally, the Complainant failed to present sufficient evidence that the Township possessed responsive records at the time of the request, or to refute the Custodian’s certification.

Accordingly, notwithstanding the Custodian’s insufficient search, she has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request item Nos. 8-12 seeking various records pertaining to the Township and its police department. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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 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 in part settlement agreements regarding misconduct involving HPD officers as well as disclosable personnel information of separated police officers from 2002 to 2017. The Custodian initially responded stating that no responsive records exist at HPD. The Complainant then filed the instant complaint on May 19, 2021, asserting the Custodian did not make it clear whether the Township itself possessed the records, not just HPD.

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. The Custodian conducted an insufficient search by stating no records exist at HPD. Thereafter, the Custodian conducted an additional search and located two (2) settlement agreements responsive to request item No. 7. The Custodian also discovered the Township had the ability to provide some of the personnel information requested in item No. 13. The Custodian then certified she provided the Complainant with those records alongside the SOI. 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 located responsive records after the instant complaint was filed upon conducting an additional search. 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(c).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian performed an insufficient search for records responsive to item Nos. 7 and 13 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t

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).

Rotimi Owoh, Esq. (on Behalf of Delores Simmons and Obafemi Simmons) v. Township of Howell (Monmouth), 2021-102 – Findings and Recommendations of the Executive Director

of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure because the Custodian certified she disclosed same to the Complainant via separate cover at the time she submitted her Statement of Information.

2. The Custodian has borne her burden of proof that the proposed special service charge of \$5,000.00 comprised of 171 hours at an hourly rate of \$34.00 to locate and review 1,417 records responsive to the Complainant's OPRA request item Nos. 1-4 is warranted and reasonable. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 204 (Law Div. 2002); Owoh, Esq. (on Behalf of AADARI) v. Elizabeth Police Dep't (Union), GRC Complaint No. 2020-39 (Interim Order dated June 29, 2021); Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. **The Complainant shall comply with conclusion No. 2 above within five (5) business days from receipt of this Order by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records within ten (10) business days following receipt of said payment.**
4. Notwithstanding the Custodian's insufficient search, she has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 8-12 seeking various records pertaining to the Township and its police department. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian located responsive records after the instant complaint was filed upon conducting an additional search. 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(c).

Prepared By: Samuel A. Rosado
Staff Attorney

May 14, 2024