



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

March 27, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-23

v.

Borough of Englishtown (Monmouth)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Supplemental Findings and Recommendations of the Council Staff 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 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.

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 March, 2018

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: March 29, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

Shawn G. Hopkins¹
Complainant

GRC Complaint No. 2014-23

v.

Borough of Englishtown (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Borough of Englishtown (“Borough”), including property pictures.

Custodian of Record: Peter Gorbatuk

Request Received by Custodian: December 23, 2013

Response Made by Custodian: January 6, 2014

GRC Complaint Received: January 16, 2014

Background

January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Council considered the January 23, 2018 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, found that:

1. The Custodian did not comply fully with the Council’s October 31, 2017 Interim Order. Specifically, although the Custodian ultimately provided all responsive records to the Complainant, he failed to provide certified confirmation of compliance to the Executive Director within the extended time frame.
2. Mr. Fitzpatrick unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6; Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* Further, the Custodian did not comply fully with the Council’s October 31, 2017 Interim Order. However, the Custodian ultimately provided all responsive records to the Complainant, which Complainant’s Counsel confirmed on January 8, 2018. Additionally, the evidence of record does not indicate

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Joseph Youssouf, Esq. (Manalapan, NJ).

that either Mr. Fitzpatrick's or the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Fitzpatrick's and the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (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 (2008). Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council's Order. 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.**

Procedural History:

On February 1, 2018, the Council distributed its Interim Order to all parties. On March 5, 2018, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that Complainant's Counsel had twenty (20) business days to submit a fee application.

On the same day, Custodian's Counsel e-mailed the GRC advising that a fee settlement was approved by the Borough on February 27, 2018. Custodian's Counsel further stated that he advised Complainant's Counsel of this approval and that the Borough would be issuing a check shortly. Custodian's Counsel thus suggested that the fee application was no longer necessary. The GRC responded providing the parties until March 16, 2018 to advise on the finality of the fee agreement. Thereafter, Custodian's Counsel sought a second (2nd) extension, which the GRC granted until March 23, 2018. On March 13, 2018, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the parties had fully settled.

Analysis

Prevailing Party Attorney's Fees

At its January 30, 2018 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 February 1, 2018, the Council distributed its Interim Order to all parties; thus, the parties’ response was due by close of business on March 2, 2018. On March 5, 2018, the GRC advised the parties that the fee agreement time frame expired without receiving a response from the parties. The GRC thus stated that Complainant’s Counsel was required to submit a fee application within twenty (20) business days in accordance with N.J.A.C. 5:105-2.13. On the same day, Custodian’s Counsel advised that an agreement was approved by the Borough and that a check would be cut shortly. Counsel suggested that a fee application was unnecessary in the wake of the fee agreement. The GRC agreed, allowing the parties until March 16, 2018 (and later March 23, 2018) to advise on the finality of the fee agreement. Thereafter, on March 13, 2018, Complainant’s Counsel confirmed that the parties had fully settled.

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 Council Staff respectfully recommends the Council find that 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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

March 20, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO BOX 819
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-23

v.

Borough of Englishtown (Monmouth)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not comply fully with the Council’s October 31, 2017 Interim Order. Specifically, although the Custodian ultimately provided all responsive records to the Complainant, he failed to provide certified confirmation of compliance to the Executive Director within the extended time frame.
2. Mr. Fitzpatrick unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6; Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* Further, the Custodian did not comply fully with the Council’s October 31, 2017 Interim Order. However, the Custodian ultimately provided all responsive records to the Complainant, which Complainant’s Counsel confirmed on January 8, 2018. Additionally, the evidence of record does not indicate that either Mr. Fitzpatrick’s or the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Fitzpatrick’s and the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s October 31, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (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 (2008). Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council’s Order. 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.**

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-23

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Borough of Englishtown (“Borough”), including property pictures.

Custodian of Record: Peter Gorbatuk
Request Received by Custodian: December 23, 2013
Response Made by Custodian: January 6, 2014
GRC Complaint Received: January 16, 2014

Background

October 31, 2017 Council Meeting:

At its October 31, 2017 public meeting, the Council considered the October 24, 2017 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. Mr. Fitzpatrick unlawfully denied access the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge’s Final Decision supports that the Borough was required to disclose the responsive CAMA data. Moreover, the Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, neither Mr. Fitzpatrick nor the Custodian provided a lawful basis for denying access to the responsive property photographs. Hopkins v. Monmouth Cnty.

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Joseph Youssouf, Esq. (Manalapan, NJ).

Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* The Custodian must thus disclose all responsive records to the Complainant.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
3. The Council defers analysis of whether Mr. Fitzpatrick or the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 1, 2017, the Council distributed its Interim Order to all parties. On November 9, 2017, the Government Records Council ("GRC") provided the Custodian an extension of time until November 17, 2017 to comply with the Council's Order. The GRC noted that the extension was due to Custodian Counsel's unavailability⁵ during the initial compliance time frame.

On November 16, 2017, the Custodian responded to the Council's Interim Order, attaching responsive CAMA data. The Custodian certified that, in response to the Complainant's OPRA request, he contacted Tax Assessor Mark Fitzpatrick. The Custodian certified that he was advised that the records were the subject of on-going litigation and thus "privileged." The Custodian affirmed that following receipt of the Council's Order, he electronically provided "the requested records" to the Complainant. On November 17, 2017, the GRC e-mailed the Custodian stating that he had not yet fully complied with the Council's Order. Specifically, the GRC stated that the Custodian did not copy either the Complainant or Complainant's Counsel on his response to the Order. Further, the GRC stated that the Custodian's response did not address the existence of responsive photographs and whether they were provided, if applicable. The GRC stated that the Custodian needed to rectify these issues in order to comply with the Council's Order fully.

On November 21, 2017, after the expiration of the extended time frame to comply, the Custodian e-mailed the GRC advising that he "sent . . . the CAMA photographs as requested." On November 22, 2017, the GRC received a compact disc ("CD") containing photographs, which

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁵ Prior to the October 31, 2017 meeting, Custodian's Counsel advised the GRC that he would be unavailable until November 6, 2017.

prompted it to e-mail the Custodian seeking further information. Therein, the GRC stated that it was unclear whether the Custodian sent a copy of the CD to the Complainant. The GRC also noted that it had not yet received a supplemental certification addressing the issues it broached in its November 17, 2017 e-mail. The GRC provided the Custodian until November 29, 2017 to submit a supplemental certification.

On November 22, 2017, Custodian's Counsel e-mailed the GRC advising that the Custodian would provide responsive records to the Complainant and a supplemental certification to the GRC within the appropriate time frame. On November 28, 2017, the Custodian provided a supplemental certification to the GRC. Therein, the Custodian certified that he provided all CAMA data and photographs to the Complainant and Complainant's Counsel. However, Complainant's Counsel subsequently e-mailed the GRC advising that the Custodian had not sent the correct records to the Complainant. Counsel suggested that the Custodian and/or Mr. Fitzpatrick contact the Complainant regarding this issue. On January 8, 2018, Complainant's Counsel e-mailed the GRC advising that the Complainant was satisfied with the records the Borough provided to him.

Analysis

Compliance

At its October 31, 2017 meeting, the Council ordered the Custodian to disclose responsive CAMA data to the Complainant. Further, the Council ordered the Custodian to either disclose responsive photographs or certify that no such records existed. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 1, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 9, 2017.

On November 9, 2017, the GRC extended the time frame to comply until November 17, 2017, citing an issue with Custodian Counsel's availability. On November 16, 2017, one (1) business day before the expiration of the extended time frame, the Custodian responded to the Order certifying that he had provided "the requested records" to the Complainant. However, the GRC e-mailed the Custodian on November 17, 2017 stating that the Custodian had not complied fully and stating the reasons. Following the expiration of the extended time frame, the Custodian disclosed records, but Complainant's Counsel disagreed that the Custodian provided the correct responsive records. Finally, on January 8, 2018, Complainant's Counsel confirmed that the Complainant was satisfied with the Custodian's disclosure.

A review of the forgoing indicates that the Custodian did not comply fully with the Council's Order. Specifically, the Custodian was required to disclose all responsive records and provide certified confirmation of compliance to the Executive Director within the specified time frame. However, the Custodian did not complete compliance until after the expiration of the extended time frame.

Therefore, the Custodian did not comply fully with the Council's October 31, 2017 Interim Order. Specifically, although the Custodian ultimately provided all responsive records to the

Complainant, he failed to provide certified confirmation of compliance to the Executive Director within the extended time frame.

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, Mr. Fitzpatrick unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6; Hopkins, GRC 2014-01. Further, the Custodian did not comply fully with the Council’s October 31, 2017 Interim Order. However, the Custodian ultimately provided all responsive records to the Complainant, which Complainant’s Counsel confirmed on January 8, 2018. Additionally, the evidence of record does not indicate that either Mr. Fitzpatrick’s or the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Fitzpatrick’s and 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 (App. Div. 2006), the Court 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 (2008), the Supreme 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.” Mason, 196 N.J. at 71, (*quoting* Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (*quoting* Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Mason at 73-76 (2008).

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* (1984).

Id. at 76.

The Complainant filed the instant complaint to request that the GRC order disclosure of the requested CAMA data and photographs. The Custodian argued in the Statement of Information that he never received the OPRA request because it went directly to Mr. Fitzpatrick. Further, the Custodian contended that he could not disclose records he did not possess. In its October 31, 2017 Interim Order, the Council disagreed and ordered the Custodian to disclose to the Complainant the responsive CAMA data and photographs, if they existed. Thereafter, between November 16, 2017 and January 8, 2018, the Custodian disclosed responsive records, including photographs, to the Complainant’s satisfaction. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s October 31, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 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. 51. Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council’s Order. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not comply fully with the Council’s October 31, 2017 Interim Order. Specifically, although the Custodian ultimately provided all responsive records to the Complainant, he failed to provide certified confirmation of compliance to the Executive Director within the extended time frame.

2. Mr. Fitzpatrick unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6; Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* Further, the Custodian did not comply fully with the Council's October 31, 2017 Interim Order. However, the Custodian ultimately provided all responsive records to the Complainant, which Complainant's Counsel confirmed on January 8, 2018. Additionally, the evidence of record does not indicate that either Mr. Fitzpatrick's or the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Fitzpatrick's and the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (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 (2008). Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council's Order. 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.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 23, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 31, 2017 Government Records Council Meeting

Shawn Hopkins
Complainant

Complaint No. 2014-23

v.

Borough of Englishtown (Monmouth)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 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. Mr. Fitzpatrick unlawfully denied access the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge’s Final Decision supports that the Borough was required to disclose the responsive CAMA data. Moreover, the Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, neither Mr. Fitzpatrick nor the Custodian provided a lawful basis for denying access to the responsive property photographs. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* The Custodian must thus disclose all responsive records to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



3. The Council defers analysis of whether Mr. Fitzpatrick or the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of October, 2017

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 1, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-23

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Borough of Englishtown (“Borough”), including property pictures.

Custodian of Record: Peter Gorbatuk
Request Received by Custodian: December 23, 2013
Response Made by Custodian: January 6, 2014
GRC Complaint Received: January 16, 2014

Background³

Request and Response:

On December 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 6, 2014, Tax Assessor Mark Fitzpatrick responded in writing on behalf of the Custodian, denying the Complainant’s OPRA request until the Council ruled on a similar request in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.*

On January 7, 2014, the Complainant disputed the denial of access and asserted that Hopkins has no impact on the Borough’s obligation to disclose the responsive CAMA data. The Complainant thus requested a lawful basis for denial.

Denial of Access Complaint:

On January 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he previously requested

¹ Represented by Richard Gutman, Esq. (Montclair, NJ).

² Represented by Joseph Youssouf, Esq. (Manalapan, 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.

CAMA data from the Monmouth County (“County”) Tax Board on December 18, 2013.⁴ The Complainant stated that the County advised him to request the data individually from each municipality. The Complainant asserted that the Borough failed to respond to his OPRA request.

The Complainant argued that the requested CAMA data has been stored in a database that has been paid for and maintained by the County since 1996. The Complainant asserted that the software program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that the Borough unlawfully denied access to the requested data because:

- Six municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C., as their MODIV/CAMA vendor.
- The software program is funded, maintained, and operated by the County under a 1996 shared services agreement.
- The County accesses various information from the database.
- S-2234, entitled “Monmouth Assessment Demonstration Program,” requires⁵ all municipalities within the County to utilize the MODIV/CAMA program, and there is a retention schedule for property record cards (“PRC”).
- Revaluation contracts require firms to deliver PRCs to the municipality, which utilizes them to make the data files.
- The Tax Assessor’s handbook refers to permanent PRCs and information that should be contained within an assessor’s files.

Statement of Information:

On March 28, 2014,⁶ the Custodian filed a Statement of Information (“SOI”). The Custodian certified that Mr. Fitzpatrick allegedly received the Complainant’s OPRA request on December 23, 2013. The Custodian certified that Mr. Fitzpatrick is the part-time Tax Assessor and has never been designated as the Custodian of Record for the Borough.

The Custodian certified that he never received any correspondence or OPRA requests from the Complainant. However, the Custodian certified that he searched the Borough’s files with the help of the Deputy Clerk and was unable to locate any records responsive to the Complainant’s OPRA request. The Custodian contended that he could not provide the Complainant access to a record not in his possession.

⁴ This request was the subject of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.*

⁵ On January 10, 2011, the Senate passed S-2234 (Sca) 1R by a vote of 39-0. On that same date, the bill was received in the Assembly and referred to the Assembly Housing and Local Government Committee. Neither S-2234 nor its Assembly counterpart, A-3227, saw any further action in the Assembly during the 2010-2011 legislative session. The Complainant might instead be referring to S-1213, which Governor Christie signed into law as L. 2013, c. 15, on January 25, 2013.

⁶ The GRC sent a request for the SOI to Mr. Fitzpatrick on January 24, 2014. After not receiving an SOI, the GRC sent a letter of no defense to the Custodian on March 24, 2014.

Additional Submissions:

On July 25, 2014, the Complainant's Counsel submitted a letter brief, disputing the Borough's position. First, Counsel alleged that the Custodian falsely certified that the Complainant submitted his OPRA request directly to Mr. Fitzpatrick. In support of the allegation, Counsel included the original OPRA request e-mail to the Custodian's e-mail address as reflected on the Borough's website. Counsel also contended that the Borough violated OPRA by having Mr. Fitzpatrick respond on the Custodian's behalf. N.J.S.A. 47:1A-5(g).

Counsel next argued that the Borough maintained CAMA data through the Monmouth Assessment Demonstration program based on a shared services agreement with the County. Counsel contended that, when applying Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012), the Custodian was obligated to obtain and disclose the responsive information. *See also* Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010).

Analysis

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.

Initially, the Supreme Court's recent decision in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017) is binding on requests for electronic data. There, the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The GRC notes that Paff effectively negates any argument that disclosure of CAMA data would require the Custodian to create a record (although the Custodian here did not make such an argument).

In Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014), the custodian denied access to the subject OPRA request, arguing that it was the subject of Paff v. City of Union City (Union), GRC Complaint No. 2012-262 (August 2013). The Council initially noted that pending litigation was not a lawful basis to deny access to a record (*citing* Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011)). The Council then took judicial notice of the facts in Paff, GRC 2012-262, and determined that the custodian unlawfully denied access to the responsive record. Paff, GRC 2013-195 at 3-4.

Moreover, in Burnett, 415 N.J. Super. 506, the Appellate Division determined that defendant was required to obtain settlement agreements from its insurance broker. The Court's decision largely fell on the fact that there was no question that the broker was working on behalf of defendants to execute settlement agreements. The Court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, "they nonetheless bind the county as principal, and the agreements are made on its behalf." Id. at 513. In determining that defendants had an obligation to obtain responsive records from the insurance broker, the Court noted that the facts there differed from those in Bent, 381 N.J. Super. 30, 38-39 (App. Div. 2005)(holding that plaintiff made no showing that the defendant was required to obtain records located outside its agency). The Council later applied the Court's holding to a complaint involving disclosure of records held by another public agency as part of a shared services agreement. See Michalak, GRC 2010-220 (holding that an agency had an obligation to obtain records from another agency maintaining same in accordance with a shared services agreement).

Here, Mr. Fitzpatrick initially responded to the Complainant on the Custodian's behalf, denying his OPRA request until the GRC ruled on Hopkins, GRC 2014-01, *et seq.* In the SOI, the Custodian certified that he never saw the request and that he was unable to locate any responsive records. The Custodian also argued that he could not provide records that were not in his possession. The GRC thus looks to Paff, GRC 2013-195, and Michalak, GRC 2010-220, as a reasonable approach to the instant complaint.

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974). The Council's decision here must take into account the Honorable Kimberly A. Moss, Administrative Law Judge ("ALJ"), Final Decision in Hopkins, GRC 2014-01, *et seq.*, because the ALJ held on whether CAMA data is a "government record" subject to access under OPRA.⁷ Therein, the ALJ found that "CAMA data are government records that are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter." Id. at 18.

As a threshold issue, the Mr. Fitzpatrick violated OPRA when he denied access to responsive records based on the Council's pending adjudication of Hopkins. Additionally, having received a decision in Hopkins, the GRC finds that Mr. Fitzpatrick unlawfully denied access to the responsive records. Specifically, the ALJ considered the responsive CAMA data a "government record" not otherwise exempt under OPRA.

Further, and contrary to the Custodian's position on not possessing responsive records, the evidence of record indicates that the Borough contracted with an outside agency to maintain CAMA data. Based on all of the foregoing, the GRC concludes that the facts of this complaint mirror those in Burnett, and Michalak. Specifically, the "outside source" (whether the County or

⁷ The ALJ's Initial Decision became final by operation of law on April 4, 2016, because the parties would not unanimously consent to a third (3rd) extension of time to accept, reject, or modify the ALJ's Decision.

Microsystems) made and/or maintained the responsive CAMA data on the Borough's behalf. Further, the responsive CAMA data was maintained by those sources through a shared services agreement. The GRC therefore finds that the Custodian and/or Mr. Fitzpatrick had an affirmative obligation to contact that source and obtain the responsive data for disclosure. However, such an action did not occur here.

Regarding the requested property photographs, the Custodian did not address those in the SOI. The GRC finds that Mr. Fitzpatrick and/or the Custodian may have unlawfully denied access to these records absent any arguments as to their existence or applicable exemptions.

Accordingly, Mr. Fitzpatrick unlawfully denied access the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff, GRC 2013-195. Additionally, the ALJ's Final Decision supports that the Borough was required to disclose the responsive CAMA data. Moreover, the Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law. Burnett, 381 N.J. Super. 506; Michalak, GRC 2010-220. Further, neither Mr. Fitzpatrick nor the Custodian provided a lawful basis for denying access to the responsive property photographs. Hopkins, GRC 2014-01, *et seq.* The Custodian must thus disclose all responsive records to the Complainant.

Knowing & Willful

The Council defers analysis of whether Mr. Fitzpatrick or the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Mr. Fitzpatrick unlawfully denied access the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge's Final Decision supports that the Borough was required to disclose the responsive CAMA data. Moreover, the Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-12 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, neither Mr. Fitzpatrick nor the Custodian provided a lawful basis for denying access to the responsive property photographs. Hopkins v. Monmouth

Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* The Custodian must thus disclose all responsive records to the Complainant.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.⁹**
3. The Council defers analysis of whether Mr. Fitzpatrick or the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

October 24, 2017

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.