



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 31, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-24

v.

Borough of Fair Haven (Monmouth)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council 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 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 2, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
October 31, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-24

v.

**Borough of Fair Haven (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 Fair Haven (“Borough”), including property pictures.

Custodian of Record: Allyson M. Cinquegrana
Request Received by Custodian: December 24, 2013
Response Made by Custodian: December 31, 2013
GRC Complaint Received: January 16, 2014

Background

September 26, 2017 Council Meeting:

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 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 fully comply with the Council’s July 25, 2017 Interim Order. Specifically, the Custodian responded in the prescribed time frame by disclosing CAMA data to the Complainant. However, the Custodian failed to seek an extension of time to obtain and disclose the photographs, which resulted in her not timely submitting certified confirmation of compliance to the Executive Director.
2. The Custodian, along with Mr. Walters, unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. However, the Custodian began the disclosure process on August 3, 2017. She ultimately provided the responsive records to the Complainant on August 7, 2017, and completely fulfilled the Complainant’s OPRA

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

² Represented by Salvatore Alfieri, Esq., of Clearly, Giacobbe, Alfieri, & Jacobs, LLC (Matawan, NJ).

request on August 22, 2017. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Walters' violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Mr. Walters' actions 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 July 25, 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 CAMA data and photographs to the Complainant in accordance with the Interim 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 September 28, 2017, the Council distributed its Interim Order to all parties. On October 3, 2017, Complainant's Counsel confirmed to the Government Records Council ("GRC") via e-mail, copying Custodian's Counsel, that the parties settled the fee issue. Further, Complainant's Counsel advised that the complaint was therefore moot.

Analysis

Prevailing Party Attorney's Fees

At its September 26, 2017 meeting, the Council determined that the Complainant was a prevailing party, who is 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 September 28, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on October 27, 2017. On October 3, 2017, Complainant's Counsel e-mailed the GRC, copying Custodian's Counsel, advising that the parties settled the fee issue and that the complaint was moot.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council 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

October 24, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO BOX 819
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 26, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-24

v.

Borough of Fair Haven (Monmouth)
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 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 fully comply with the Council’s July 25, 2017 Interim Order. Specifically, the Custodian responded in the prescribed time frame by disclosing CAMA data to the Complainant. However, the Custodian failed to seek an extension of time to obtain and disclose the photographs, which resulted in her not timely submitting certified confirmation of compliance to the Executive Director.
2. The Custodian, along with Mr. Walters, unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. However, the Custodian began the disclosure process on August 3, 2017. She ultimately provided the responsive records to the Complainant on August 7, 2017, and completely fulfilled the Complainant’s OPRA request on August 22, 2017. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Walters’ violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Mr. Walters’ actions 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 July 25, 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 CAMA data and photographs to the Complainant in accordance with the Interim 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 26th Day of September, 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: September 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-24

v.

**Borough of Fair Haven (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 Fair Haven (“Borough”), including property pictures.

Custodian of Record: Allyson M. Cinquegrana
Request Received by Custodian: December 24, 2013
Response Made by Custodian: December 31, 2013
GRC Complaint Received: January 16, 2014

Background

July 25, 2017 Council Meeting:

At its July 25, 2017 public meeting, the Council considered the July 18, 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. The Custodian and Mr. Walters did not bear their burden of proving that they lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the County maintained the data on behalf of the Borough, based on a shared services agreement. The Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. 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). Thus, the Custodian must disclose the responsive CAMA data.

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,**

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

² Represented by Salvatore Alfieri, Esq., of Clearly, Giacobbe, Alfieri, & Jacobs, LLC (Matawan, NJ).

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 the Custodian and/or Mr. Walters 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 July 27, 2017, the Council distributed its Interim Order to all parties. On August 3, 2017, the Custodian forwarded to the Complainant CAMA data retrieved by Tax Assessor Gregory Hutchinson with no redactions. On the same day, the Complainant responded, advising that the directions he supplied in the subject OPRA request no longer produced the requested CAMA data. The Complainant noted that this was due to a Microsystems-NJ.com, L.L.C., software change in 2014. The Complainant requested that the current Custodian contact the County or Microsystems for updated instructions and that he could also assist her if all else failed. Thereafter, the parties briefly discussed providing the correct CAMA data that the Complainant sought in his request.

On August 7, 2017, the Custodian sent new CAMA data files to the Complainant. Further, the Custodian included an e-mail from Mr. Hutchinson, explaining that he needed to reach out to Monmouth County ("County") to obtain responsive photographs. On August 17, 2017, the Custodian e-mailed the Complainant, stating that on August 11, 2017, the County agreed to provide to the Borough a compact disc ("CD") containing the responsive photographs. The Custodian noted that she followed up with County again on this date and that they agreed to send the CD to the Borough by week's end.

On August 21, 2017, the Custodian e-mailed the Government Records Council ("GRC"), advising that current Tax Assessor Greg Hutchinson sent CAMA data to the Complainant on August 3, 2017. The Custodian stated that the Complainant was not satisfied with the disclosure. The Custodian stated that she responded to the Complainant with additional records on August 7, 2017. The Custodian also noted that she stayed in contact with the Complainant while the Borough attempted to obtain the responsive photographs from the County. The Custodian stated that the Borough had not yet received the photographs.

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.

On August 22, 2017, the Custodian sent the CD containing the photographs to the Complainant under separate cover via certified mail.

On August 23, 2017, the Custodian responded to the Council's Interim Order. The Custodian initially certified to her statements contained in the August 21, 2017 e-mail. The Custodian also affirmed that she contacted the Complainant on several occasions to provide status updates on the Borough's compliance. The Custodian further certified that the Borough received the responsive photographs from the County on August 22, 2017. The Custodian affirmed that, upon receipt, she mailed those photographs to the Complainant.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to disclose to the Complainant the responsive CAMA data and photographs and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 27, 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 August 3, 2017.

On August 3, 2017, the last business day to comply with the Council's Order, the Custodian started the compliance process by disclosing responsive CAMA data to the Complainant. On August 7, 2017, after the Complainant asserted that the CAMA data provided was not responsive, the Custodian provided a new set of data. However, the Custodian was unable to comply fully because the Borough needed to obtain the responsive photographs from the County. On August 21, 2017, twelve (12) business days after receipt of the Interim Order, the Custodian sent an e-mail to the GRC, advising of the status of her compliance. On August 22, 2017, the Custodian sent the CD containing the photographs to the Complainant via certified mail. On August 23, 2017, fourteen (14) business days after receipt of the Order, the Custodian provided certified confirmation of compliance to the Executive Director that she provided the remaining all records to the Complainant.

Therefore, the Custodian unlawfully denied access to the responsive records and did not fully comply with the Council's July 25, 2017 Interim Order. Specifically, the Custodian responded in the prescribed time frame by disclosing CAMA data to the Complainant. However, the Custodian failed to seek an extension of time to obtain and disclose the photographs, which resulted in her not timely submitting certified confirmation of compliance to the Executive Director.

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)).

Here, the Custodian, along with Mr. Walters, unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. However, the Custodian began the disclosure process on August 3, 2017. She ultimately provided the responsive records to the Complainant on August 7, 2017 and completely fulfilled the Complainant’s OPRA request on August 22, 2017. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Walters’ violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Mr. Walters’ actions 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. The Supreme Court also 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 original Custodian argued in the Statement of Information that she responded that no records existed based on the Tax Assessor’s guidance. In its July 25, 2017 Interim Order, the Council ordered the Custodian to disclose to the Complainant the responsive CAMA data and photographs, if they existed. On August 3, 7, and 21, 2017, in partial compliance with the Interim Order, the Custodian provided the responsive CAMA data and photographs to the Complainant. Thus, the evidence of record supports that the Complainant is a prevailing party, who is entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s July 25, 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 CAMA data and photographs to the Complainant in accordance with the Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. Specifically, the Custodian responded in the prescribed time frame by disclosing CAMA data to the Complainant. However, the Custodian failed to seek an extension of time to obtain and disclose the photographs, which resulted in her not timely submitting certified confirmation of compliance to the Executive Director.
2. The Custodian, along with Mr. Walters, unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. However, the Custodian began the disclosure process on August 3, 2017. She ultimately provided the responsive records to the

Complainant on August 7, 2017, and completely fulfilled the Complainant's OPRA request on August 22, 2017. Additionally, the evidence of record does not indicate that either the Custodian or Mr. Walters' violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Mr. Walters' actions 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 July 25, 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 CAMA data and photographs to the Complainant in accordance with the Interim 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

September 19, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

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INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-24

v.

Borough of Fair Haven
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 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. The Custodian and Mr. Walters did not bear their burden of proving that they lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the County maintained the data on behalf of the Borough, based on a shared services agreement. The Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. 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). Thus, the Custodian must disclose the responsive CAMA data.
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**
3. The Council defers analysis of whether the Custodian and/or Mr. Walters 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.

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.



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 25th Day of July, 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: July 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-24

v.

**Borough of Fair Haven (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 Fair Haven (“Borough”), including property pictures.

Custodian of Record: Allyson M. Cinquegrana
Request Received by Custodian: December 24, 2013
Response Made by Custodian: December 31, 2013
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 December 24, 2013, the Custodian e-mailed the Complainant, advising that she forwarded the request to Tax Assessor J. Stephen Walters. However, it was noted that he would not be in the office until December 31, 2013.

On December 31, 2013, the Custodian responded in writing, stating that an extension until January 9, 2014, was necessary based on the request of Mr. Walters. On the same day, the Complainant e-mailed the Custodian, stating that he would not allow for an extension because the responsive file takes minutes to produce. The Custodian immediately e-mailed the Complainant, reminding him that Mr. Walters just returned to the Borough. Further, the Custodian stated that the Borough’s last day to respond was January 3, 2014.

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

² Represented by Salvatore Alfieri, Esq., of Clearly, Giacobbe, Alfieri, & Jacobs, LLC (Matawan, 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.

On January 3, 2014, the Custodian e-mailed the Complainant, advising that the Borough was closed due to inclement weather and that she would respond on January 6, 2014. On the same day, Mr. Walters sent a memorandum to the Custodian, advising that he did not maintain a responsive record. Mr. Walters further suggested that the Custodian direct the Complainant to the Monmouth County (“County”) Tax Board’s open public records site to review “the extensive offerings of [the Borough’s] data.” On January 6, 2014, the Custodian forwarded Mr. Walters’ memorandum to the Complainant as a response.

On January 7, 2014, the Complainant e-mailed the Custodian, asserting that, contrary to the assertion that no record exists, Mr. Walters provided the exact type of file to the Complainant in 2010, prior to the Assessor’s Conference held on Jersey City. The Complainant noted that the County also agreed to provide responsive CAMA data with permission from the Borough. Further, the Complainant noted that Mr. Walters could contact Microsystems-NJ.com, LLC. (“Microsystems”), the Borough’s software vendor, to obtain the responsive record. The Complainant averred that other County municipalities provided CAMA data to him: Mr. Walters could contact those assessors if he needed assistance to fulfill the subject OPRA request. The Complainant thus requested that Mr. Walters reconsider his response.

On the same day, the Custodian forwarded the Complainant’s e-mail to Mr. Walters for a response. The instant complaint followed.

Denial of Access Complaint:

On January 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”), disputing the Borough’s denial of access. The Complainant stated that he previously requested CAMA data from County on December 18, 2013.⁴ The Complainant stated that the County advised him to request the data individually from each municipality.

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 as their MOD-IV/CAMA vendor.
- The software program is funded, maintained, and operated by the County under the 1996 shared services agreement.
- The County accesses various information from the database.

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

- S-2234, entitled “Monmouth Assessment Demonstration Program,” requires⁵ all municipalities within the County to utilize the MOD-IV/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 January 31, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 24, 2013. The Custodian certified that, after a short extension of time, she responded in writing on January 6, 2014, by providing the Complainant a memorandum from Mr. Walters denying access on the basis that no records exist.

Additional Submissions:

On July 23, 2014, the Complainant’s Counsel submitted a letter brief to dispute the Borough’s position. Counsel stated that the definition of a “government record” under OPRA includes “data processed” documents and “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1. Counsel contended that the Borough maintains 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.

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. *See* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant

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.

provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. *See Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

In the instance that another agency or third party creates or maintains records on behalf of the agency in receipt of an OPRA request, the Court's decision in *Burnett*, 415 N.J. Super. 506 controls. There, the Appellate Division determined that the 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).

In the matter currently before the Council, Mr. Walters, through the Custodian, denied the Complainant access to the responsive CAMA data on the basis that responsive records were not in his possession. Mr. Walters also directed the Complainant to the County's open public records website to review "the extensive offerings of [the Borough's] data."

However, the Complainant's Counsel provided evidence strongly indicating that the County was maintaining the responsive CAMA data on behalf of the Borough. Specifically, on July 23, 2014, Counsel provided to the GRC a copy of a shared services agreement between the County and Borough to utilize computer tax services as early as 1999.⁶ Additionally, Counsel provided to the GRC a 2014 shared services agreement between the Borough and County, memorializing the use of MOD-IV Property Assessment Computer Services.

Based on all of the foregoing, the GRC is satisfied that the facts of this complaint mirror those in *Burnett* and especially *Michalak*. Specifically, the County either made and/or was maintaining the responsive CAMA data as part of a shared services agreement. The GRC is thus satisfied that the Custodian had an affirmative obligation to contact that source and obtain the responsive data for disclosure. However, the Custodian failed to do so, based on Mr. Walters guidance. Thus, both persons unlawfully denied access to the responsive records.

Therefore, the Custodian and Mr. Walters did not bear their burden of proving that they lawfully denied access to the responsive CAMA data. *N.J.S.A.* 47:1A-6. Specifically, the evidence of record supports that the County maintained the data on behalf of the Borough based on a shared services agreement. The Custodian has an affirmative obligation to obtain said data

⁶ The Complainant also asserted in an e-mail to the Custodian on January 7, 2014, that Mr. Walters provided him with the exact file he sought in 2010 as part of a conference. The GRC notes that there is no supporting evidence in the record to corroborate the assertion.

and provide it to the Complainant in accordance with prevailing case law but failed to do so. Burnett, 381 N.J. Super. 506; Michalak, GRC 2010-220. Thus, the Custodian must disclose the responsive CAMA data.

Finally, 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).

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Mr. Walters 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. The Custodian and Mr. Walters did not bear their burden of proving that they lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the County maintained the data on behalf of the Borough, based on a shared services agreement. The Custodian has an affirmative obligation to obtain said data and provide it to the Complainant in accordance with prevailing case law but failed to do so. 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). Thus, the Custodian must disclose the responsive CAMA data.
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 1:4-4,⁷ to the Executive Director.⁸

3. The Council defers analysis of whether the Custodian and/or Mr. Walters 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

July 18, 2017

⁷ "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."

⁸ 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.