



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

FINAL DECISION

September 26, 2017 Government Records Council Meeting

Shawn Hopkins
Complainant

Complaint No. 2014-06

v.

Borough of Atlantic Highlands (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 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 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 29, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

Shawn G. Hopkins¹
Complainant

GRC Complaint No. 2014-06

v.

Borough of Atlantic Highlands (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 Atlantic Highlands ("Borough"), including property pictures.

Custodian of Record: Dwayne M. Harris³
Request Received by Custodian: December 23, 2013
Response Made by Custodian: December 26, 2013
GRC Complaint Received: January 9, 2014

Background

August 29, 2017 Council Meeting:

At its August 29, 2017 public meeting, the Council considered the August 22, 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 current Custodian did not fully comply with the Council's July 25, 2017 Interim Order. Specifically, Mr. Hubeny responded in the extended time frame by disclosing the responsive CAMA data to the Complainant. However, the current Custodian (either through Mr. Hubeny or otherwise) failed to provide certified confirmation of compliance simultaneously to the Executive Director.
2. The original Custodian unlawfully denied access to the Complainant's OPRA request as invalid and therefore unlawfully denied access to the responsive CAMA data. Additionally, the current Custodian did not fully comply with the Council's July 25, 2017 Interim Order. However, the original Custodian lawfully denied access to the

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

² Represented by Bernard M. Reilly, Esq., of Bernard M. Reilly, LLC (Red Bank, NJ).

³ The current Custodian of Record is Michelle Clark.

requested photographs because no records existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, the Mr. Hubeny disclosed the responsive records to the Complainant via e-mail within the extended compliance time frame. Additionally, the evidence of record does not indicate that the Custodians' violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodians' 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 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 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, Mr. Hubeny disclosed responsive CAMA data 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 August 30, 2017, the Council distributed its Interim Order to all parties. On September 7, 2017, Mr. Hubeny submitted a letter to the Government Records Council ("GRC") from Custodian Counsel. Therein, Custodian's Counsel confirmed that the parties reached a fee agreement and that he presumed the matter concluded. On the same day, the GRC sought confirmation of the agreement from Complainant's Counsel. He responded, stating that he would advise the GRC at the time that he received payment. On September 17, 2017, Complainant's Counsel confirmed that he received payment and that this complaint may be dismissed.

Analysis

Prevailing Party Attorney's Fees

At its August 29, 2017 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 August 30, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian’s response was due by close of business on September 28, 2017. On September 7, 2017, Mr. Hubeny submitted a letter to the GRC from Custodian’s Counsel, advising that the parties reached a fee agreement. On September 17, 2017, Complainant’s Counsel confirmed that payment was received and that this complaint may be dismissed.

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 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

September 19, 2017



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CHRIS CHRISTIE
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INTERIM ORDER

August 29, 2017 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-06

v.

Borough of Atlantic Highlands (Monmouth)
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 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 current Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. Specifically, Mr. Hubeny responded in the extended time frame by disclosing the responsive CAMA data to the Complainant. However, the current Custodian (either through Mr. Hubeny or otherwise) failed to provide certified confirmation of compliance simultaneously to the Executive Director.
2. The original Custodian unlawfully denied access to the Complainant’s OPRA request as invalid and therefore unlawfully denied access to the responsive CAMA data. Additionally, the current Custodian did not fully comply with the Council’s July 25, 2017 Interim Order. However, the original Custodian lawfully denied access to the requested photographs because no records existed. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Further, the Mr. Hubeny disclosed the responsive records to the Complainant via e-mail within the extended compliance time frame. Additionally, the evidence of record does not indicate that the Custodians’ violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodians’ 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 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 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, Mr. Hubeny disclosed responsive CAMA data 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 29th Day of August, 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: August 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 29, 2017 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-06

v.

**Borough of Atlantic Highlands (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 Atlantic Highlands (“Borough”), including property pictures.

Custodian of Record: Dwayne M. Harris³
Request Received by Custodian: December 23, 2013
Response Made by Custodian: December 26, 2013
GRC Complaint Received: January 9, 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 unlawfully denied access to the Complainant’s OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). For that reason, the Complainant’s OPRA request seeking CAMA data is valid.

2. The Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record

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

² Represented by Bernard M. Reilly, Esq., of Bernard M. Reilly, LLC (Red Bank, NJ).

³ The current Custodian of Record is Michelle Clark.

supports that a third party maintained the data on behalf of the Borough, whether the County or Microsystems. 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.

3. **The Custodian shall comply with conclusion No. 2 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 1:4-4,⁴ to the Executive Director.⁵**
4. The Custodian has borne his burden of proof that he lawfully denied access to the requested property photographs because he certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Council defers analysis of whether 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.
6. 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 current Custodian requested an extension of ten (10) days to comply as he was working with Monmouth County to secure the responsive CAMA data. On the same day, the Government Records Council ("GRC") granted an extension until August 14, 2017.

On August 7, 2017, Business Administrator Adam Hubeny sent the responsive CAMA data to the Complainant via e-mail. Further, Mr. Hubeny stated that the Borough Tax Assessor advised that no photographs exist. On August 11, 2017, Mr. Hubeny e-mailed the Complainant to seek confirmation that he had received the responsive CAMA data, which the Complainant did acknowledge.

⁴ "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."

⁵ 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.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to disclose to the Complainant the responsive CAMA data 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 same business day after receipt of the Council's Order, Mr. Hubeny sought an extension of ten (10) days to comply. On the same day, the GRC granted said extension. On August 7, 2017, Mr. Hubeny sent the responsive CAMA data to the Complainant via e-mail. On August 11, 2017, the Complainant confirmed receipt of the records. However, neither Mr. Hubeny nor the current Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian did not fully comply with the Council's July 25, 2017 Interim Order. Specifically, Mr. Hubeny responded in the extended time frame by disclosing the responsive CAMA data to the Complainant. However, the current Custodian (either through Mr. Hubeny or otherwise) failed to provide certified confirmation of compliance simultaneously 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 original Custodian unlawfully denied access to the Complainant's OPRA request as invalid and therefore unlawfully denied access to the responsive CAMA data. Additionally, the current Custodian did not fully comply with the Council's July 25, 2017 Interim Order. However, the original Custodian lawfully denied access to the requested photographs because no records existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, Mr. Hubeny disclosed the responsive records to the Complainant via e-mail within the extended compliance time frame. Additionally, the evidence of record does not indicate that the Custodians' violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodians' 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 original Custodian argued in the Statement of Information that the Complainant’s OPRA request was invalid and that the Complainant should have contacted Monmouth County. In its July 25, 2017 Interim Order, the Council disagreed and ordered the original Custodian to disclose to the Complainant the responsive CAMA data. On August 7, 2017, in partial compliance with the Interim Order, the current Custodian provided the

responsive CAMA data to the Complainant via e-mail. 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 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, Mr. Hubeny disclosed responsive CAMA data 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.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council's July 25, 2017 Interim Order. Specifically, Mr. Hubeny responded in the extended time frame by disclosing the responsive CAMA data to the Complainant. However, the current Custodian (either through Mr. Hubeny or otherwise) failed to provide certified confirmation of compliance simultaneously to the Executive Director.
2. The original Custodian unlawfully denied access to the Complainant's OPRA request as invalid and therefore unlawfully denied access to the responsive CAMA data. Additionally, the current Custodian did not fully comply with the Council's July 25, 2017 Interim Order. However, the original Custodian lawfully denied access to the requested photographs because no records existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, the Mr. Hubeny disclosed the responsive records to the Complainant via e-mail within the extended compliance time frame. Additionally, the evidence of record does not indicate that the Custodians' violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodians' 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 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 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, Mr. Hubeny disclosed responsive CAMA data 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

August 22, 2017



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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CHRIS CHRISTIE
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INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Shawn G. Hopkins
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v.

Borough of Atlantic Highlands (Monmouth)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 20, 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 unlawfully denied access to the Complainant’s OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). For that reason, the Complainant’s OPRA request seeking CAMA data is valid.
2. The Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that a third party maintained the data on behalf of the Borough, whether the County or Microsystems. 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.
3. **The Custodian shall comply with conclusion No. 2 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

4. The Custodian has borne his burden of proof that he lawfully denied access to the requested property photographs because he certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Council defers analysis of whether 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.
6. 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

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.

**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. 2014-06

v.

**Borough of Atlantic Highlands (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 Atlantic Highlands (“Borough”), including property pictures.

Custodian of Record: Dwayne M. Harris
Request Received by Custodian: December 23, 2013
Response Made by Custodian: December 26, 2013
GRC Complaint Received: January 9, 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 26, 2013, the Custodian responded in writing. The Custodian indicated that the Borough did not maintain a responsive record and that the data or information does not fall under OPRA. The Custodian went on to state that Tax Assessor Eldo Magnani advised him that the company performing Borough revaluations maintained the responsive information. The Custodian stated that it would take between fifteen (15) and thirty (30) days to obtain the records from the company. Further, the Custodian stated that the company might charge for production. The Custodian stated that he would obtain an estimated cost and give the Complainant a chance to accept or reject it. Additionally, the Custodian stated that no pictures are associated with the properties.

On December 26, 2013, the Complainant e-mailed the Custodian, stating that municipalities own the responsive information and gave explicit instructions on how to obtain it

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

² Represented by Bernard M. Reilly, Esq., of Bernard M. Reilly, LLC (Red Bank, 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.

without cost. The Complainant noted that the Monmouth County (“the County”) Tax Board agreed to provide the responsive data with the Borough’s written permission.

On the same day, the Custodian replied, clarifying that the Borough did not maintain the information; rather, it is maintained by a third party. Further, the Custodian averred that the Complainant required the Borough to create a compressed file with specific information on it, contending that OPRA does not require custodians to conduct research or create a new record. The Custodian therefore deemed the OPRA request invalid. NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian noted that Mr. Magnani was willing to obtain and provide the responsive information but stressed that a charge might apply. N.J.S.A. 47:1A-5(c). The Custodian also noted that the Complainant could obtain the information from the County, although he believed they probably should have denied access to it.

Denial of Access Complaint:

On January 9, 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 the 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 his belief 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. (Microsystems) 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”).

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.

- Revaluation contracts require firms to deliver PRCs to the municipality, which utilize 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 May 28, 2014,⁶ the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on December 23, 2013. The Custodian certified that he responded in writing on December 26, 2013, advising the Complainant that the Borough did not maintain responsive records but could obtain it from a third party vendor. Further, the Custodian stated that he advised the Complainant that the request was invalid and that the Borough did not directly maintain responsive information.

The Custodian contended that the Complainant's OPRA request failed to identify a specific government record. Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian noted that Mr. Magnani contacted the County and confirmed that they would provide the responsive CAMA data to the Complainant; thus, the Borough did not need to act any further on the request.

The Custodian certified that no pictures were taken during the last revaluation in 2004. The Custodian noted that pictures would likely be included in the next revaluation, scheduled to occur in 2016.

Additional Submissions:

On July 29, 2014, the Custodian's Counsel submitted a letter brief to dispute the Borough's positions. Counsel first contended that the Borough failed to provide any evidence proving that the County would provide the responsive CAMA data to the Complainant. Counsel further argued that the Borough never produced evidence that they gave permission to the County to provide said records.

Counsel next 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).

Counsel stated that the Appellate Division has held that a custodian was not required to perform research, compile information, or create a new file. Burnett, 415 N.J. Super. at 511-12. Counsel argued that the facts here are contrary to Burnett because the Complainant identified an existing data folder that did not require the Borough to perform any of the above actions. Counsel noted that the Complainant provided the Custodian with specific instructions to locate

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.

the compressed data folder. Counsel noted that, contrary to the Borough's contention, eighty-three (83) other municipalities were easily able to identify responsive records. Further, 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 argued that producing a copy of a database folder or file amounts to searching for and not creating records. Counsel also compared disclosure of the record to "manipulation or programming of information technology." N.J.S.A. 47:1A-5(d).

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;⁷ NJ Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

⁷ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

Most recently, in Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017), the Supreme Court determined that an agency's electronically stored information is a "government record" under OPRA, unless otherwise exempt. 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 had 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 Supreme 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 Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (quoting [Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

Id. at 24, 28.

Moreover, Fang v. Dep't of Transp., GRC Complaint No. 2006-93 (May 2007), the complainant sought disciplinary action records and specified the particular information that the records might contain. The custodian certified that no records existed that contained a compilation of the information specified by the complainant in the request. The Council, relying upon the Court's decision in MAG, 375 N.J. Super. 534, held that "[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See [MAG]." Id. at 11.

Conversely, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record in order to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive

record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

The Council first noted that the definition of a “government record” included “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

The Morgano decision refers to compiling certain disclosable information from a paper record and listing or creating another paper record responsive to a request. However, in terms of certain electronic filing systems, *general querying of information cannot be viewed as equal to creating a new paper record*. While information stored electronically may include additional pieces of information/fields, many programs have the capability to extract requested information/fields for disclosure . . . Further, querying electronic file systems for responsive information is not unlike searching an e-mail account for e-mails responsive to an OPRA request.

Id. at 12 (emphasis added).

In this matter, the Custodian initially denied the Complainant’s OPRA request seeking CAMA data because, among other reasons, the Borough was not required to create a record. In response to the Complainant’s Denial of Access Complaint, the Custodian argued that it properly denied the request because same was invalid. The Custodian contended that the Borough was not required to compile information and create a new record. Bent, 381 N.J. Super. at 37. In a July 29, 2014, letter brief, the Complainant’s Counsel refuted the Borough’s position, stating that the Custodian was merely required to retrieve a file or folder from a database.

Initially, the GRC notes that the evidence of record here supports that CAMA data exists within a database system provided to the Township as part of a shared services agreement with the County. For this reason, the GRC is satisfied that the requested CAMA data falls under the definition of a “government record” as “information stored or maintained electronically” in a database. Thus, the threshold issue before the Council is whether the Complainant’s request seeking CAMA data was invalid because it failed to identify a specific record and would have required the Borough to create a new record.

In determining whether the Complainant’s request seeking CAMA data was invalid, the Council distinguishes the instant complaint from Fang. Specifically, the requests at issue there sought general records inclusive of certain personnel information. However, the complaint here more closely fits on the square with Zahler, GRC 2013-266, notwithstanding that it was decided during the pendency of the instant complaint. The Court’s decision in Paff, 2017 N.J. LEXIS 680, although decided after the pendency of this complaint, is binding here. Specifically, the Complainant here identified a specific type of record, CAMA data, which was accessible from a database by utilizing a few simple commands. The GRC notes that the Complainant included instructions that the Custodian and/or Mr. Magnani could utilize to extract the responsive

compressed file from the database. As was the case in Zahler, the Custodian was not required to create a record; rather, she was required to extract the CAMA data from a database. A similar type of compilation was also contemplated in Paff. *See also* McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). *See also* McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014).

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler, GRC 2013-266. For that reason, the Complainant's OPRA request seeking CAMA data is valid. *See also* Paff, 2017 N.J. LEXIS 680; McBride, GRC 2014-54.

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.

CAMA data

Having determined that the Complainant's OPRA request seeking CAMA data was valid, the GRC now turns to whether the Custodian was obligated to provide the responsive records.

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, the Custodian initially advised the Complainant that "an outside source" maintained the responsive records and they may charge the Borough for production. In the absence of any further clarification, the GRC cannot determine whether the Custodian was referring to the County or Microsystems, although his assertion of a possible charge suggested

that he was referring to the latter. In either event, the Complainant's Counsel's July 29, 2014 letter brief argued that the Custodian had an obligation to obtain and disclose the responsive CAMA data.

The evidence of record indicates that: 1) the Borough contracted with an outside agency to maintain CAMA data; and 2) the Custodian acknowledged that he could obtain the responsive CAMA data and provide it to the Complainant. Based on all of the foregoing, the GRC is satisfied that the facts of this complaint mirror those in Burnett, and Michalak. Specifically, the "outside source" (whether the County or 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 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 and thus unlawfully denied access to said data.

Therefore, the Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that a third party maintained the data on behalf of the Borough, whether the County or Microsystems. 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, 381 N.J. Super. 506; Michalak, GRC 2010-220. Thus, the Custodian must disclose the responsive CAMA data.

Property photographs

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). Here, the Custodian initially responded to the Complainant advising that no photographs existed because the Borough did not take photographs as part of their 2004 revaluation. The Custodian subsequently certified to this fact in the SOI. Additionally, the Complainant failed to provide any evidence in the record to rebut the Custodian's certification.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested property photographs because he certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Knowing & Willful

The Council defers analysis of whether 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. The Custodian unlawfully denied access to the Complainant's OPRA request seeking CAMA data on the basis that same was invalid. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Twp. of Galloway, 2017 N.J. LEXIS 680 (2017); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). For that reason, the Complainant's OPRA request seeking CAMA data is valid.
2. The Custodian did not bear his burden of proving that he lawfully denied access to the responsive CAMA data. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that a third party maintained the data on behalf of the Borough, whether the County or Microsystems. 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.
3. **The Custodian shall comply with conclusion No. 2 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**
4. The Custodian has borne his burden of proof that he lawfully denied access to the requested property photographs because he certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Council defers analysis of whether 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

July 20, 2017