



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-146

v.

Rockaway Township (Morris)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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 dismiss the complaint because the parties settled the matter via agreement and submitted same to the Office of Administrative Law on February 25, 2020. 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 30th Day of June 2020

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 2, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-146

v.

**Rockaway Township (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Township of Rockaway (“Township”) including property photographs.

Custodian of Record: Susan Best³

Request Received by Custodian: January 24, 2014

Response Made by Custodian: February 3, 2014; February 10, 2014; February 14, 2014

GRC Complaint Received: March 25, 2014

Background

June 25, 2019 Council Meeting:

At its June 25, 2019 public meeting, the Council considered the June 18, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Council should amend conclusion No. 2 of the Council’s April 30, 2019 Interim Order, which only considered whether the Custodian knowingly and willingly violated OPRA, based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should reanalyze its knowing and willful issue to also consider whether Assessor Mark Burek knowingly and willfully violated OPRA.
2. The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council’s March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of

¹ Represented by Richard Gutman, Esq. (Montclair, N.J.).

² Represented by John M. Iacofano, Esq., of Iacofano & Perrone, Esqs. (Morristown, N.J.).

³ The current Custodian of Record is Christina Clipperton.

a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the evidence of record indicates that Assessor Burek, who was also involved with the request, unlawfully denied access to the CAMA data. Therefore, this complaint should be referred to the Office of Administrative Law (“OAL”) for a fact finding hearing and determination of whether Assessor Burek knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. The imposition of conclusion No. 3 of the Council’s April 30, 2019 Interim Order is deferred pending the outcome of the OAL’s determination on whether a knowing and willful violation occurred.

Procedural History:

On June 27, 2019, the Council distributed its June 25, 2019 Interim Order to all parties. On September 4, 2019, the complaint was transmitted to the Office of Administrative Law (“OAL”). On February 25, 2020, the Custodian’s Counsel submitted a letter via electronic and regular mail to the OAL providing copies of a Stipulation of Settlement signed by both parties. On May 26, 2020, the OAL returned the complaint back to the Government Records Council marked “SETTLEMENT RETURN.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the parties settled the matter via agreement and submitted same to the Office of Administrative Law on February 25, 2020. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

June 23, 2020



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 25, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-146

v.

Rockaway Township (Morris)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should amend conclusion No. 2 of the Council’s April 30, 2019 Interim Order, which only considered whether the Custodian knowingly and willingly violated OPRA, based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should reanalyze its knowing and willful issue to also consider whether Assessor Mark Burek knowingly and willfully violated OPRA.
2. The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council’s March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the evidence of record indicates that Assessor Burek, who was also involved with the request, unlawfully denied access to the CAMA data. Therefore, this complaint should be referred to the Office of Administrative Law (“OAL”) for a fact finding hearing and determination of whether Assessor Burek knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
3. The imposition of conclusion No. 3 of the Council’s April 30, 2019 Interim Order is deferred pending the outcome of the OAL’s determination on whether a knowing and willful violation occurred.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June 2019

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: June 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-146

v.

**Rockaway Township (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Township of Rockaway (“Township”) including property photographs.

Custodian of Record: Susan Best³

Request Received by Custodian: January 24, 2014

Response Made by Custodian: February 3, 2014; February 10, 2014; February 14, 2014

GRC Complaint Received: March 25, 2014

Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Council considered the April 23, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s March 26, 2019 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council’s March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of

¹ Represented by Richard Gutman (Montclair, NJ).

² Represented by John M. Iacofano, Esq. (Morristown, NJ).

³ The current Custodian of Record is Christina Clipperton, as of July 25, 2018.

a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's March 26, 2019 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On May 2, 2019, the Council distributed its Interim Order to all parties. On May 7, 2019, the Complainant, through Counsel, filed a request for reconsideration of the Council's April 30, 2019 Interim Order based on a mistake.

On May 14, 2019, the Custodian, through Counsel, submitted objections to the request for reconsideration.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Complainant's Counsel filed the request for reconsideration of the Council's Order dated April 30, 2019 on May 7, 2019 three (3) days from the issuance of the Council's Order.

Applicable case law holds that:

A party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather,

reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Complainant’s Counsel asserted that the Council overlooked an e-mail dated February 1, 2014 between Rockaway Township Tax Assessor Mark Burek (“Assessor Burek”) and various other Tax Assessors in Morris County. Complainant’s Counsel noted that within the e-mail Assessor Burek stated that he believed the requested CAMA data was a public record but would still deny access to the data unless otherwise instructed. Complainant’s Counsel argued that Assessor Burek’s statement amounted to an admission of a knowing and willful violation. Complainant’s Counsel asserted that the Council nevertheless failed to weigh the probative value of the e-mail in assessing whether a knowing and willful violation occurred, thus warranting reconsideration.

Conversely, Custodian’s Counsel argued that Complainant’s Counsel failed to demonstrate that the Council failed to consider or to properly weigh all the evidence presented by the parties. Custodian’s Counsel also argued that Complainant’s Counsel instead took portions of prior submissions out of context to in order to find that the Council improperly concluded that no knowing and willful violation occurred. Custodian’s Counsel also noted that the examples of alleged misconduct do not concern the current or former Custodian, but Assessor Burek. Custodian’s Counsel contended that no basis was provided to allow the imputation of Assessor Burek’s conduct to the former or current Custodian throughout the OPRA process.

Custodian’s Counsel also noted that the Complainant was aware that Assessor Burek and other Tax Assessors had taken the position that the responsive records were exempt from disclosure claiming they constituted proprietary commercial information. Custodian’s Counsel asserted that the Complainant’s Counsel informed the GRC that the privilege was waived via e-mail on July 6, 2016, well after the complainant was filed.

Custodian’s Counsel contended that Complainant’s Counsel failed to demonstrate a basis for reconsideration and therefore should be rejected.

For the following reasons, the GRC will reconsider conclusion No. 2 in order to amend the Council’s April 30, 2019 Interim Order.

It should be addressed first that a finding of a knowing and willful violation of OPRA is not limited to Custodians of Record, as OPRA states that “[a] *public official, officer, employee* or custodian who knowingly and willfully violates [OPRA] . . . shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a) (emphasis added). The evidence is clear that Assessor Burek qualifies as a public official in this instance.

The e-mail provided by the Complainant suggests that Assessor Burek had direct access to and control of, the requested CAMA data. Within the e-mail, Assessor Burek acknowledged that the data was a public record, yet was prepared to deny access nonetheless. Moreover, Assessor Burek stated in the e-mail that in response to a similar request made with another township, he intended to impose a special service charge. Taken in totality, the GRC agrees with the Complainant that Assessor Burek’s conduct should have been considered in a knowing and willful analysis.

Accordingly, the Council should amend conclusion No. 2 of the Council’s April 30, 2019 Interim Order, which only considered whether the Custodian knowingly and willingly violated OPRA based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should address whether Assessor Burek’s conduct relating to the disclosure of CAMA data constitutes a knowing and willful violation of OPRA.

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)).

The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council’s March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of

OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the evidence of record indicates that Assessor Burek, who was also involved with the request, unlawfully denied access to the CAMA data. Therefore, this complaint should be referred to the Office of Administrative Law ("OAL") for a fact-finding hearing and determination of whether Assessor Burek knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prevailing Party Attorney's Fees

The imposition of conclusion No. 3 of the Council's April 30, 2019 Interim Order is deferred pending the outcome of the OAL's determination on whether a knowing and willful violation occurred.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Council should amend conclusion No. 2 of the Council's April 30, 2019 Interim Order, which only considered whether the Custodian knowingly and willingly violated OPRA, based on a mistake. N.J.A.C. 5:105-2.10(a). The Council should reanalyze its knowing and willful issue to also consider whether Assessor Mark Burek knowingly and willfully violated OPRA.
2. The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council's March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the evidence of record indicates that Assessor Burek, who was also involved with the request, unlawfully denied access to the CAMA data. Therefore, this complaint should be referred to the Office of Administrative Law ("OAL") for a fact finding hearing and determination of whether Assessor Burek knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
3. The imposition of conclusion No. 3 of the Council's April 30, 2019 Interim Order is deferred pending the outcome of the OAL's determination on whether a knowing and willful violation occurred.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2019



State of New Jersey
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 30, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-146

v.

Rockaway Township (Morris)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s March 26, 2019 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council’s March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s March 26, 2019 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council’s Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 30th Day of April 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-146

v.

**Rockaway Township (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Township of Rockaway (“Township”) including property photographs.

Custodian of Record: Susan Best³

Request Received by Custodian: January 24, 2014

Response Made by Custodian: February 3, 2014; February 10, 2014; February 14, 2014

GRC Complaint Received: March 25, 2014

Background

March 26, 2019 Council Meeting:

At its March 26, 2019 public meeting, the Council considered the Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, 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. Hopkins v. City of Long Branch (Monmouth), GRC Complaint No. 2014-44 (Interim Order dated February 26, 2019). For that reason, the Complainant’s OPRA request seeking CAMA data is valid. See also Paff v. Twp. of Galloway, 229 N.J. 340 (2017). Further, the portion of the OPRA request seeking photographs reasonably identified a type of responsive record associated with the CAMA data. Such an action would not require an open-ended search of all City files.

¹ Represented by Richard Gutman (Montclair, NJ).

² Represented by John M. Iacofano, Esq. (Morristown, NJ).

³ The current Custodian of Record is Christina Clipperton, as of July 25, 2018.

2. The Custodian may have unlawfully denied access to the responsive CAMA data and photographs. N.J.S.A. 47:1A-6; Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (Interim Order dated July 26, 2016). Thus, the Custodian must obtain and disclose the responsive CAMA data and photographs that existed at the time of the Complainant's OPRA request. Should no photographs exist for that time frame, the Custodian must certify to this fact.
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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
4. 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.
5. 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 March 28, 2019, the Council distributed its Interim Order to all parties. On March 29, 2019, Custodian's Counsel requested an extension of time to the respond to the Interim Order. On April 1, 2019, the Government Records Council ("GRC") granted Counsel's request to extend the time to respond to until the end of business on April 15, 2019.

On April 11, 2019, the current Custodian responded to the Council's Interim Order. The current Custodian certified that on April 8, 2019, she personally mailed a thumb drive containing the requested photographs to the Complainant. The current Custodian then certified that on April 10, 2019, she e-mailed the Complainant a compressed file containing the requested CAMA data.

Analysis

Compliance

At its March 26, 2019 meeting, the Council ordered the Custodian to provide the Complainant with the responsive records and to submit certified confirmation of compliance, in

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ 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.

accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On March 28, 2019, 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 April 4, 2019.

On March 29, 2019 the first (1st) business day after receipt of the Council's Order, Custodian's Counsel requested an extension of time to respond, which was granted to until the of business on April 15, 2019. On April 11, 2019, the current Custodian responded to the Council's Order, certifying that she mailed the requested photographs on April 8, 2019, and e-mailed the requested CAMA data on April 10, 2019.

Therefore, the current Custodian complied with the Council's March 26, 2019 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.

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)).

The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council's March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (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 arguing that the Custodian unlawfully denied access to the responsive CAMA data and property photographs. In the Statement of Information, the Custodian argued the request was overly broad and invalid. In its March 26, 2019 Interim Order, the Council disagreed; holding that the Custodian unlawfully denied access to the CAMA data and the responsive property photographs. The Council thus ordered the Custodian to disclose the responsive records. On April 11, 2019, the GRC received the current Custodian’s compliance package, wherein she disclosed all responsive records to the Complainant. 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 March 26, 2019 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council’s Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian complied with the Council's March 26, 2019 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the photographs and CAMA data. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council's March 26, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's March 26, 2019 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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April 23, 2019