



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

May 22, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-27

v.

Freehold Township (Monmouth)
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that 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 22nd Day of May, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 25, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-27

v.

**Freehold Township (Monmouth)²
Custodial Agency**

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

Custodian of Record: Teresa A. Warner

Request Received by Custodian: December 24, 2013

Response Made by Custodian: January 2, 2014

GRC Complaint Received: January 16, 2014

Background

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Mr. Imbriaco complied with the Council’s March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing the responsive records to the Complainant. Further, Mr. Imbriaco simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although Mr. Imbriaco unlawfully denied access to the responsive CAMA data and property photographs, he timely complied with the Council’s March 27, 2018 Interim Order to disclose those records. Additionally, the evidence of record does not indicate that Mr. Imbriaco’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Imbriaco’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.

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

² Represented by Duane Davison, Esq., of Davison, Eastman, & Munoz, P.A. (Freehold, NJ).

3. Pursuant to the Council's March 27, 2018 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. Imbriaco 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 April 25, 2018, the Council distributed its Interim Order to all parties. On April 26, 2018, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

Analysis

Prevailing Party Attorney's Fees

At its April 24, 2018 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On April 25, 2018, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on May 24, 2018. On April 26, 2018, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

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

Conclusions and Recommendations

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

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

May 15, 2018



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

April 24, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-27

v.

Freehold Township (Monmouth)
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Mr. Imbriaco complied with the Council’s March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing the responsive records to the Complainant. Further, Mr. Imbriaco simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although Mr. Imbriaco unlawfully denied access to the responsive CAMA data and property photographs, he timely complied with the Council’s March 27, 2018 Interim Order to disclose those records. Additionally, the evidence of record does not indicate that Mr. Imbriaco’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Imbriaco’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 27, 2018 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. Imbriaco 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 24th Day of April, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 24, 2018 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-27

v.

**Freehold Township (Monmouth)²
Custodial Agency**

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

Custodian of Record: Teresa A. Warner

Request Received by Custodian: December 24, 2013

Response Made by Custodian: January 2, 2014

GRC Complaint Received: January 16, 2014

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 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. Mr. Imbriaco unlawfully denied access to the Complainant’s OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Imbriaco unlawfully denied access to the Complainant’s OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge’s Final Decision supports that Mr. Imbriaco was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian and/or Mr. Imbriaco must disclose the responsive CAMA data to the Complainant.
2. The Custodian and/or Mr. Imbriaco may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either

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

² Represented by Duane Davison, Esq., of Davison, Eastman, & Munoz, P.A. (Freehold, NJ).

disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.

3. **The Custodian shall comply with conclusion Nos. 1 and 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 Rules, R. 1:4-4,³ to the Council Staff.⁴**
4. The Council defers analysis of whether the Custodian and/or Mr. Imbriaco 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 27, 2018, Complainant's Counsel e-mailed Custodian's Counsel advising that the Council ordered disclosure of the responsive CAMA data and photographs. Complainant's Counsel attached instructions on how to obtain the responsive CAMA data noting that the 2014 instructions were obsolete.

On March 28, 2018, the Council distributed its Interim Order to all parties. On April 3, 2018, Custodian's Counsel e-mailed the responsive CAMA data to Complainant's Counsel. Custodian's Counsel noted that the property photographs were voluminous and maintained by Monmouth County ("County"). He noted that they are complying and a response would be forthcoming. On April 4, 2018, Complainant's Counsel e-mailed Custodian's Counsel advising that the photographs should be sent directly to the Complainant.

On April 4, 2018, Mr. Imbriaco responded to the Council's Order on behalf of the Custodian. Therein, Mr. Imbriaco certified that he prepared the CAMA data and forwarded same to Custodian's Counsel for disclosure. Mr. Imbriaco affirmed that Custodian's Counsel disclosed the data to Complainant's Counsel via e-mail on April 3, 2018. Regarding the property photographs, Mr. Imbriaco certified that the County maintained approximately 42,000 records. Mr. Imbriaco noted that the total file size prohibited the Township from disclosing them via e-mail. Mr. Imbriaco certified that the photographs were instead loaded to a flash drive and send via overnight mail to the Complainant on April 4, 2018.

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

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

Analysis

Compliance

At its March 27, 2018 meeting, the Council ordered the Custodian to disclose to the Complainant responsive CAMA data and property photographs, if in existence. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Council Staff. On March 28, 2018, 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 5, 2018.

On April 4, 2018, the fourth (4th) business day after receipt of the Council's Order, Mr. Imbriaco responded to the Order on the Custodian's behalf. Therein, Mr. Imbriaco certified that Custodian's Counsel disclosed the responsive CAMA data to Complainant's Counsel via e-mail on April 3, 2018. Further, Mr. Imbriaco further certified that a flash drive containing all responsive photographs was sent to the Complainant via overnight mail on April 4, 2018.

Therefore, Mr. Imbriaco complied with the Council's March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing the responsive records to the Complainant. Further, Mr. Imbriaco 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)).

Here, although Mr. Imbriaco unlawfully denied access to the responsive CAMA data and property photographs, he timely complied with the Council's March 27, 2018 Interim Order to disclose those records. Additionally, the evidence of record does not indicate that Mr. Imbriaco's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Imbriaco'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 requesting that the Government Records Council (“GRC”) order disclosure of the requested CAMA data and photographs. As part of the Statement of Information, the Custodian noted that Mr. Imbriaco advised the Complainant that the Township would await the GRC’s adjudication of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Additionally, Mr. Imbriaco argued that the responsive data were exempt as “work files” subject to change. In its March 27, 2018 Interim Order, the Council disagreed and ordered the Custodian to disclose to the Complainant the responsive CAMA data and responsive photographs, if they existed. Thereafter, on April 3 and 4, 2018, Mr. Imbriaco disclosed responsive records, including photographs, to the Complainant and Complainant’s Counsel. 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 27, 2018 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. Imbriaco 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. Mr. Imbriaco complied with the Council's March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing the responsive records to the Complainant. Further, Mr. Imbriaco simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although Mr. Imbriaco unlawfully denied access to the responsive CAMA data and property photographs, he timely complied with the Council's March 27, 2018 Interim Order to disclose those records. Additionally, the evidence of record does not indicate that Mr. Imbriaco's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Imbriaco'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 27, 2018 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. Imbriaco disclosed responsive records to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

April 17, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

March 27, 2018 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-27

v.

Freehold Township (Monmouth)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council ("Council") considered the March 20, 2018 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. Mr. Imbriaco unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Imbriaco unlawfully denied access to the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge's Final Decision supports that Mr. Imbriaco was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian and/or Mr. Imbriaco must disclose the responsive CAMA data to the Complainant.
2. The Custodian and/or Mr. Imbriaco may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
3. **The Custodian shall comply with conclusion Nos. 1 and 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 Rules, R. 1:4-4,¹ to the Council Staff.²**

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the



4. The Council defers analysis of whether the Custodian and/or Mr. Imbriaco 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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 28, 2018

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 Council Staff
March 27, 2018 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-27

v.

**Freehold Township (Monmouth)²
Custodial Agency**

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

Custodian of Record: Teresa A. Warner

Request Received by Custodian: December 24, 2013

Response Made by Custodian: January 2, 2014

GRC Complaint Received: January 16, 2014

Background³

Request and Response:

On December 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 2, 2014, Tax Assessor Michael Imbriaco responded in writing on behalf of the Custodian advising the Complainant that he was awaiting advice from the Township attorney on whether the responsive records were subject to OPRA. Mr. Imbriaco stated that he would “be in touch.”

On January 7, 2014, Mr. Imbriaco e-mailed the Complainant stating that he attempted to obtain the records based on the Complainant’s instructions, but was unable to do so. On the same day, the Complainant e-mailed Mr. Imbriaco and offered to walk him through the process verbally. The Complainant also espoused alternatives: provide written authorization of disclosure to Monmouth County (“County”) and they will disclose the records or contact Microsystems-NJ.com, LLC. (“Microsystems”) for assistance.

On January 15, 2014, Mr. Imbriaco e-mailed the Complainant advising that he spoke with the County and other tax assessors in the County. Mr. Imbriaco acknowledged that he knew that

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

² Represented by Duane Davison, Esq., of Davison, Eastman, & Munoz, P.A. (Freehold, 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.

the Complainant submitted the same OPRA request to the County and other County municipalities. Further, Mr. Imbriaco acknowledged that the Complainant filed a Denial of Access Complaint⁴ regarding the County's denial of one of the OPRA requests. Mr. Imbriaco stated that the Township was not denying access to any records, but would await the GRC's decision in that Denial of Access Complaint before disclosing any records.

Denial of Access Complaint:

On January 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that he previously requested CAMA data from the County on December 18, 2013.⁵ 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 the County has paid for and maintained since 1996. The Complainant asserted that the software program utilized for the data helps maintain and calculate assessments. The Complainant asserted that he believed that the Township unlawfully denied access to the requested data because:

- Six (6) municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems as their 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," requires⁶ all municipalities within the County to utilize the MODIV/CAMA program and there is a retention schedule for property record cards ("PRC").
- Revaluation contracts require firms to deliver PRCs to the municipality, which 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 January 31, 2014, the Custodian filed a Statement of Information ("SOI") attaching a statement from Mr Imbriaco. The Custodian certified that she received the Complainant's OPRA request on December 24, 2013. The Custodian certified that Mr. Imbriaco ran a report from

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

⁵ Ibid.

⁶ 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.

Microsystems' software. The Custodian affirmed that Mr. Imbriaco was able to run a report on January 2, 2014; however, he attempted to run the report again on January 7, 2014 and the software prompted that it was disabled. The Custodian certified that Mr. Imbriaco responded in writing on January 7, 2014 advising the Complainant of his inability to run the report. The Custodian affirmed that Mr. Imbriaco contacted the County and other colleagues, who advised that the Complainant filed multiple identical requests and a complaint against the County with the GRC. The Custodian certified that Mr. Imbriaco e-mailed the Complainant on January 15, 2014 stating that the Township would wait for the GRC to adjudicate the complaint against the County before disclosing any records.

As part of the SOI, Mr. Imbriaco submitted an addendum stating that the report generated eight (8) spreadsheets that included the most recent assessments, residential codes table, commercial file, land codes tables, MODIV file, residential information, sales data, and SR1As. Mr. Imbriaco noted that most of the information was available through the County Tax Board website. However, Mr. Imbriaco stated that he would not disclose the spreadsheets because they are "work files" that change throughout the year until they are submitted to the MODIV in November. Mr. Imbriaco contended that the CAMA data is not a public record until it is certified.

Additional Submissions:

On July 27, 2014, the Complainant's Counsel submitted a letter brief disputing the Township's position. Counsel contended that a record being available in another location is not a lawful basis for denying access to records under OPRA.

Further, Counsel asserted that the Township conflated disclosure of the responsive CAMA data with a "tax list." Counsel noted that the Complainant did not request a tax list, which is a listing of assessed values for each property within the municipality certified each year. N.J.S.A. 54:4-35. Counsel further noted that CAMA data is not certified; rather, it is an appraisal software tool assessors use to aid them on appraisals. Counsel averred that CAMA data is an electronic version of property records cards, which also change over time and are still public records. Counsel thus argued that the requested data does not constitute "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") material because it is factual.

On July 8, 2016, the Complainant's Counsel requested that the GRC proceed with the adjudication of this complaint because, in Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.*, Microsystems waived its claim of confidentiality. Further, Counsel noted that Microsystems agreed to provide responsive CAMA data for all municipalities in the County.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise

exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

CAMA Data

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence) and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Regarding the existence of parallel litigation in Hopkins, GRC 2014-01 *et seq.*, in Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014), the custodian denied access to the subject OPRA request, arguing that it was the subject of Paff v. City of Union City (Union), GRC Complaint No. 2012-262 (August 2013). The Council initially noted that pending litigation was not a lawful basis to deny access to a record (citing Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011)). The Council then took judicial notice of the facts in Paff, GRC 2012-262, and determined that the custodian unlawfully denied access to the responsive record. Paff, GRC 2013-195 at 3-4.

In the instant matter, the Council’s decision must take into account Administrative Law Judge (“ALJ”) Kimberly A. Moss’ Final Decision in Hopkins, GRC 2014-01, *et seq.*, because the ALJ held on whether CAMA data is a “government record” subject to access under OPRA.⁷ Therein, the ALJ found that “CAMA data are government records that are used in the ordinary course of business and none of the exceptions in N.J.S.A. 47:1A-1.1 apply in this matter.” Id. at 18. The Counties also argued that the ACD exemption applied to the responsive CAMA data because it is never finalized and some of the data ultimately made up the MODIV program. In reaching the conclusion that no exemptions applied, the ALJ noted that:

There was no testimony that CAMA data was used in the formulation of policy. CAMA data is facts about properties. The CAMA documents do not contain opinions, recommendations, or advice about agency policy as expressed in [In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)]. There was no testimony that the CAMA data contained opinions, recommendations, or [advice]. The CAMA data contains facts. . . . Some of the CAMA data, the [MODIV], and SR1A data, is on the [I]nternet.

[Id. at 16.]

As part of the SOI submitted in this matter, Mr. Imbriaco contended that the responsive data constituted ACD material because it was subject to change until submitted for certification in November of the current tax year. Counsel contended that the responsive data was constantly changing until that time and that it squarely fell within the two prongs of the ACD test. Educ. Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274, 284 (2009).

⁷ The ALJ’s Initial Decision became final by operation of law on April 4, 2016.

Initially, Mr. Imbriaco violated OPRA when he chose to not provide responsive records based on the Council's pending adjudication of Hopkins. See Paff, GRC 2013-195. Additionally, the ALJ's decision in Hopkins supports a finding that the responsive CAMA data is disclosable under OPRA. Specifically, the ALJ considered the responsive CAMA data a "government record" not otherwise exempt under OPRA. The GRC finds the ALJ's reasoning in Hopkins, as instructive here. Specifically, Mr. Imbriaco believed that the CAMA data was exempt as ACD material. Similar to the ACD argument in Hopkins, Mr. Imbriaco asserted that the data was a "work-in-progress" and not finalized. As was the case in Hopkins, the GRC does not find this argument compelling for the reasons contemplated by the ALJ.

Accordingly, Mr. Imbriaco unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Imbriaco unlawfully denied access to the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff, GRC 2013-195. Additionally, the ALJ's Final Decision supports that Mr. Imbriaco was required to disclose the responsive CAMA data. Hopkins, GRC 2014-01, *et seq.* Thus, the Custodian and/or Mr. Imbriaco must disclose the responsive CAMA data to the Complainant.

Property Photographs

Regarding the property photographs, neither the Custodian nor Mr. Imbriaco clearly identified whether any records existed either in the initial response or in the SOI. Based on this, it is currently unclear whether any responsive photographs exist. Thus, it is possible that the Custodian and/or Mr. Imbriaco unlawfully denied access to copies of any responsive photographs.

Accordingly, the Custodian and/or Mr. Imbriaco may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Mr. Imbriaco 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 Council Staff respectfully recommends the Council find that:

1. Mr. Imbriaco unlawfully denied access to the Complainant's OPRA request seeking CAMA data. N.J.S.A. 47:1A-6. Specifically, Mr. Imbriaco unlawfully denied access to the Complainant's OPRA request because pending litigation is not a lawful basis for withholding records. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). Additionally, the Administrative Law Judge's Final Decision supports that Mr. Imbriaco was required to disclose the responsive CAMA data. Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* Thus, the Custodian and/or Mr. Imbriaco must disclose the responsive CAMA data to the Complainant.
2. The Custodian and/or Mr. Imbriaco may have unlawfully denied access to any responsive property photographs. N.J.S.A. 47:1A-6. Specifically, it is unclear whether any photographs, exempt or otherwise, actually exist. Thus, the Custodian must either disclose the responsive photographs to the Complainant (identifying if any were withheld and the specific lawful basis for denial) or certify that no records exist, if applicable.
3. **The Custodian shall comply with conclusion Nos. 1 and 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 Rules, R. 1:4-4,⁸ to the Council Staff.⁹**
4. The Council defers analysis of whether the Custodian and/or Mr. Imbriaco 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.

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

March 20, 2018

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

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