



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2017-169

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The Council finds that 16.25 hours at \$400.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant’s Counsel in the adjusted amount of \$6,500.00, representing 16.25 hours of service at \$400.00 per hour, or a decrease of 8.7 hours and \$3,480.00 from the originally filed fee application.**

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 25th Day of January 2022

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: January 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2017-169

v.

**Buena Vista Township (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of³

1. The most recent spreadsheet of all GoFundMe donation activity (as described on the GoFundMe website).
2. A computer screen snapshot of the most recent, entire GoFundMe activity dashboard (also as described on the GoFundMe website).

Custodian of Record: Lisa Tilton
Request Received by Custodian: July 7, 2017
Response Made by Custodian: July 18, 2017
GRC Complaint Received: August 17, 2017

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 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, found that:

1. The Custodian complied with the Council's November 12, 2019 Interim Order because she disclosed records to the Complainant that she obtained from GoFundMe within the extended time frame. The Custodian also certified to her reasons for not being able to obtain records, as well as her subsequent actions in obtaining the records directly from GoFundMe. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. Finally, the Township could not reasonably

¹ Represented by Richard M. Gutman, Esq. (Montclair, NJ). Mr. Gutman entered his appearance on December 2, 2019.

² Represented by Eric M. Bernstein, Esq. and Dominic P. DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

obtain a certification from Mayor Chiarello, who was hospitalized in dire condition during the compliance time frame.

2. The Custodian and Mayor Chiarello unlawfully denied access to the requested GoFundMe account records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Mayor Chiarello's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mayor Chiarello's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Custodian's actions after receiving Complainant Counsel's December 2, 2019 e-mail, 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, Complainant Counsel's involvement in this complaint resulted in the relief sought. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On February 28, 2020, the Council distributed its Interim Order to all parties. On April 7, 2020, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application.

On April 17, 2020, the Complainant's Counsel submitted a fee application. The fee application and Certification of Services ("Certification") set forth the following:

1. The complaint name and number: Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169.
2. Complainant Counsel's law firm affiliation: Counsel is a sole practitioner.
3. A statement of client representation: Counsel certified to his services, including communicating with the Complainant, GRC, and Custodian's Counsel; discussing

submissions with the Complainant; reviewing of e-mail correspondence to and/or from the parties; and participating in the prevailing party fee settlement/application process.

4. The hourly rate of all attorneys and support staff involved in the complaint: Counsel affirmed that his hourly rate is \$400.00.
5. Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheet reflecting work from November 14, 2019 through April 15, 2020 (the “Fee Period”). During the fee period, Counsel billed a total of 24.95 hours for a fee of \$9,980.00.
6. Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charged \$400.00 per hour based on forty-six (46) years of experience practicing law in New Jersey, as well as his reputation as “a leading attorney in OPRA litigations.” See C.J. Griffin Cert. ¶ 6 (citing O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009)). Counsel noted that he has represented the Complainant in various OPRA matters since 2016, including the instant complaint. Counsel noted that judges in his last four (4) law division award cases agreed to \$400.00 per hour as a reasonable rate. See Kennedy v. Montclair Ctr. Corp. Business Improvement Dist., Docket No. ESX-L-924-13 (June 28, 2018); Paff v. Cnty. of Passaic, Docket No. PAS-L-4042-15 (June 13, 2016) (rev’d on other grounds); N.J. Second Amendment Soc. v. Div. of State Police, Docket No. MER-L-1143-11 (December 18, 2015); Paff v. Cape May Cnty., Docket No. CPM-L-265-14 (July 10, 2015) (rev’d on other grounds). Counsel also noted that the requested rate is fair given other fee awards in OPRA cases ranging from \$450.00 to \$775.00.
7. Detailed documentation of expenses: Counsel did not seek reimbursements for expenses.

On April 30, 2020, Custodian’s Counsel submitted objections to the fee application. Counsel stated that he opposed the proposed fee amount when considering the Council’s Order connecting the fee issue “with Complainant’s Counsel assistance in obtaining the responsive records.” Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated February 26, 2019) at 8. Counsel argued that Complainant’s Counsel entered his appearance in this matter at the end of November 2019 and sent a single electronic communication to the GRC. Counsel stated that the Township disclosed responsive records on December 5, 2019 thus concluding any further action in this matter.

Counsel argued that notwithstanding the forgoing, Complainant’s Counsel submitted an “outrageous, extraordinary and absurd [fee] application” seeking \$9,980.00 for nearly twenty-five (25) hours of work at \$400.00 per hour. Counsel argued that 85% of the billable hours that were either irrelevant, connected to “additional OPRA request(s),” and negotiating a resolution on the fee issue. Counsel argued that instead, the fee award should be limited to the time frame between November 29, and December 5, 2019.

Counsel argued that the Courts have recognized that the reduction of a lodestar where a prevailing party achieves limited success. Szczepanski v. Newcomb Med. Ctr. 141 N.J. 346, 355,

(1995); N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 572 (1999). Counsel argued that the facts here support that the GRC should not consider thirty-five (35) individual time entries representing 21.05 hours. Counsel noted that each of these entries, including a combined thirteen (13) hours to draft the fee application, represent irrelevant and unnecessary time spent to achieve relief here. Counsel argued that accepting these entries for work over and beyond this complaint would be unjust and in no way would achieve the purpose of OPRA. Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 160 (App. Div. 2011) (quoting Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011)). Counsel thus requested that the GRC limit the fee award to “no more than \$1,440.00” representing the entirety of time spent between notice of representation and disclosure of the responsive records.

Counsel finally argued that the GRC should consider the Township’s “good faith” attempts to obtain the responsive records prior to Complainant Counsel’s December 2, 2019 e-mail. Counsel argued that the Township would have “inevitably” contacted “GoFundMe” once the Mayor’s condition became dire. Counsel thus contended that Complainant Counsel’s appearance here combined with the Township’s attempts to disclose records set forth the perception that his appearance was the catalyst for disclosure. Counsel asserted that instead of disputing the forgoing, the Township attempted to settle the fee issue only to be met with a rejection and no counterproposal.

On May 6, 2020, Complainant’s Counsel replied to Custodian Counsel’s objections. Therein, Counsel argued that Custodian’s Counsel failed to cite to any New Jersey Court or GRC precedent for limiting a fee award to support his arguments because no such precedent exists. Counsel argued that instead, the Courts have supported that an attorney assisting his client in “vindicating plaintiff’s rights . . . should recover *all* hours reasonably expended on the litigation” Singer v. Singer, 95 N.J. 487, 500 (1984) (emphasis added). Counsel noted that although there is support for a reduced fee where limited success is achieved, the Complainant here achieved complete success in obtaining all records sought.

Counsel asserted that the fee shifting provision is not meant to award a prevailing attorney or punish a defendant; rather, it is to ensure a plaintiff can obtain attorney representation. Counsel argued that any work performed by an attorney in furtherance of achieving the desired result is compensable. Counsel asserted that by example, it is common for plaintiffs facing a potentially large fee award to hire an additional attorney to litigate that issue at the cost of an additional award. See Thompson v. Gomez, 45 F.Supp 1365, 1366 (9th Cir., 1995).

Counsel also suggested that the GRC’s Order excluding fees retroactive to the November 12, 2019 Interim Order may be in error and that its reference to Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2012-34 (May 2013) was erroneous. Counsel instead suggested that, contrary to the Township’s objection, fees should be awarded based on both the Interim Order and December 5, 2019 disclosure. Counsel further argued that the Township’s limitation of the applicable fee period insinuates their belief that the Complainant was required to accept the Council’s February 26, 2020 Interim Order in total. Counsel argued that this position is incorrect because it conflicts with established standards for determining the prevailing party fee issue. Counsel asserted that the litigation did not end on December 5, 2019; rather, it ended with the February 26, 2020 Interim Order dispensing of all remaining issues.

Counsel further contended that contrary to the Township’s position, precedential case law supports that an attorney may charge for “prefiling work,” communications with the client, and fee negotiations. Regarding the “prefiling issue,” Counsel stated that the Rules of Professional Conduct (“RPC”) requires an attorney to perform reasonable work prior to entering appearance in a matter, which is compensable. R.P.C. 3.1; N.J. Court Rules, R. 1:4-8(a)(2), (3); Webb v. Bd. of Educ. of Dyer Cnty., Tenn., 471 U.S. 234, 242-43 (1985). Regarding the communications issue, Counsel argued that the RPCs required him to regularly communicate with the Complainant as “reasonably” necessary. R.P.C. 1.4. Regarding the negotiations issue, Counsel asserted that the Courts have supported negotiation costs as compensable in a prevailing party case. Council Enterprises, Inc. v. The City of Atlantic City, 200 N.J. Super. 431, 443 (November 13, 1984).

Counsel additionally contended that Custodian Counsel’s request that the GRC eliminate multiple entries did not include a reasonable factual basis for such action. Counsel argued that the time billed was reasonable to litigate this complaint and contrary to Custodian Counsel’s argument that he acted in bad faith to inflate his fee amount. Counsel argued that, by way of example, he assisted the Complainant in submitting an OPRA request to find additional evidence that the Custodian may have falsely certified that she could not obtain records from GoFundMe without a court order. Counsel noted that although no such evidence was discovered, he charged 0.5 hours to review the Statement of Information (“SOI”) on December 6, 2019 and 0.45 hours to craft an OPRA request for the Complainant because these actions related to the undecided “knowing and willful” issue. Counsel also argued that he billed a total of 0.75 to engage in settlement negotiations, which included two (2) e-mails, an hourly breakdown, a verbal conversation with Custodian’s Counsel, and discussion with the Complainant. Counsel further argued that the 13.9 hours spent drafting the fee application were justified given the amount of time and effort spent to engage in the process.

Counsel also argued that the Township’s “good faith” argument in responding to the November 12, 2019 Interim Order is irrelevant when addressing the lodestar quantum in a prevailing party fee situation. Counsel contended that fee reductions based on a “good faith” argument would undermine OPRA’s fee shifting provision. See Hunter v. Trenton Hous. Auth., 304 N.J. Super. 70, 75 (App. Div. 1997). Counsel contended that notwithstanding, the Township did not act in “good faith” to comply with the Council’s Order

Analysis

Compliance

At its February 26, 2020 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On February 28, 2020, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by March 27, 2020.

On April 7, 2020, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant's Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On April 17, 2020, eight (8) business days after notification of the fee application filing period, the Complainant's Counsel submitted his fee application.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.

Prevailing Party Attorney Fee Award

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrections, ("NJMDP") 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 ("By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian's conduct." Teeters, 387 N.J. Super. at 432. Further, the Council found 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. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney's fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties' ability to reach an agreement, the Council provided the Complainant's Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a)).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$9,980.00, representing 24.95 hours at \$400.00 per hour. In support of this hourly rate, Counsel certified to his extensive OPRA experience dating back to its inception in 2002 and provided a certification acknowledging his status as “a leading attorney in OPRA litigations.” See C.J. Griffin Cert. ¶ 6. Counsel also noted that in four (4) law division decisions since 2016, the courts have routinely awarded him an hourly rate of \$400.00. See *e.g.* Kennedy, Docket No. ESX-L-924-13. Counsel also certified that the requested hourly rate is significantly less than others awarded to similarly experienced attorneys in recent OPRA litigation. See *e.g.* Gannett Satellite Info. Network, LLC v. Twp. of Neptune, Docket No. L.-2616-17 (May 13, 2019).³ It should be noted that although Custodian’s Counsel filed objections to the fee application, he did not dispute the requested hourly rate.

Based on the foregoing, the rate of \$400.00 per hour is reasonable for a practitioner with Counsel’s experience and skill level in this geographical area.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from November 14, 2019 through April 15, 2020, Counsel billed a total of 24.95 hours for work on the file. This included reading and exchanging e-mails with the parties, reviewing submissions, attempting to settle the fee issue, and composing the fee application.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s time sheet provided basic descriptions of the work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The entries identify generic actions such as “write e-mail to MD,” “talk with MD,” and

³ The Appellate Division recently reversed the trial court’s award of fees because plaintiff prevailed only under the common law right of access. Gannett Satellite Info. Network, LLC v. Tp. of Neptune, 467 N.J. Super. 385, 412 (App. Div. 2021)

“read e-mail from GRC.” However, Counsel also included a more detailed description of most of the work conducted in his fee application and subsequent May 6, 2020 letter brief.

Custodian’s Counsel submitted objections vehemently challenging Counsel’s fee application. Counsel took issue with all but 3.6 hours of the application, arguing that a calculated cost of \$1,440.00 for what amounted to one (1) e-mail communication and certification sent to the GRC on December 2, 2019. Counsel argued that all remaining hours, including those associated with the fee negotiation and application process, should be omitted because they predated the December 2, 2019 e-mail, post-dated disclosure, or “incentivize[d] counsel to keep communications going in not good faith.” Counsel also argued that the Township’s attempts to obtain responsive records would have led to contacting GoFundMe regardless of Complainant Counsel’s notice of representation; thus, the GRC should consider the Township’s “good faith” effort to comply as part of its fee deliberations.

The Complainant responded to these objections providing additional commentary in defense of his fee application, including questioning whether the Council’s February 26, 2020 Interim Order could reasonably limit the fee period. These points will all be addressed below.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis.

The GRC finds that the accounting of charges is novel for multiple reasons. First, Counsel’s December 2, 2019 notice of representation postdated the Council’s November 12, 2019 Interim Order holding that an unlawful denial of access occurred; the Complainant was *pro se* prior to that point. Next, Counsel included six (6) entries that postdate the Council’s Order but predate Complainant Counsel’s December 2, 2019 notification of representation to the GRC. Counsel also included other entries wherein he detailed 0.95 hours of work with the Complainant to submit an OPRA request for purposes of arguing that a knowing and willful violation occurred. Counsel also included in his calculation fees associated with the parties’ attempt to settle the instant complaint. In each instance, Custodian’s Counsel objected to these entries as excessive and argued that the awarded fee should only reflect the costs associated with assisting the Complainant in obtaining responsive records. Complainant’s Counsel conversely argued that all existing case law allowed for him to “. . . recover *all* hours reasonably expended on the litigation” Singer, 95 N.J. at 500 (emphasis added).

Initially, the GRC notes that an review of the requested fee total compared to the amount of actual product (the December 2, 2019 e-mail/certification and fee application) appears overly excessive. This is because the GRC had no knowledge of Complainant Counsel’s involvement in this complaint until December 2, 2019, the Complainant clearly contacted GoFundMe himself to investigate the ability to retrieve records therefrom, and no further substantive written communications occurred between the December 2, 2019 e-mail and filing of the fee application. Thus, it is now incumbent on the GRC to determine the reasonable of awarding \$9,980.00 for what amounts to two (2) submissions where Complainant’s Counsel filed representation only after the Council had found in favor of the Complainant.

However, a deeper analysis beyond measuring the requested fee amount against the physical submission output is required. To this end, the GRC rejects Custodian Counsel's arguments that all entries following disclosure of the records on December 5, 2019 should be omitted from the fee award simply because of the disclosure. No such limitation exists in any prior case law regarding fee awards; thus, there is no support for eliminating fee entries following a disclosure of records in accordance with a Council Order. The GRC also rejects Custodian Counsel's arguments that a party cannot charge for the fee negotiation/application process associated with a denial of access complaint. In fact, the Council has already held in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328, *et seq.* (Interim Order dated November 15, 2016) that a prevailing party may include in its fee application costs associated therewith. While Carter only addresses the fee application process, it seems logical to include fee negotiations as part of the award discussion. Further, Custodian Counsel's "bad faith" argument here is contradicted by the fact that Complainant's Counsel charged significantly less for negotiations compared to composition of the fee application. Finally, the GRC does not agree that the Township's "good faith" attempt to comply with the Order should be considered as part of the "fee award" deliberations. Factually, OPRA's prevailing party provision and interpreting case law does not speak to the impact of "good faith" actions on the total lodestar amount of a fee award.

Notwithstanding, the GRC does agree that certain entries should be excised or reduced for reasonableness. First, Complainant Counsel's discussion of "pre-filing" work appears to relate to the six (6) entries between November 14, 2019 and his December 2, 2019 e-mail. While the GRC understands Counsel's requirements under N.J. Court Rules, R. 1:4-8(a) and RPC 3.1, it cannot agree that "pre-filing" work was required here because 1) the Complainant already filed an active complaint; and 2) the Council already found in his favor. Thus, Complainant Counsel's involvement after the fact could not have been considered "frivolous." Id. In fact, Complainant's Counsel was already aware of the Council's decision and familiar with the Complainant's issues from past litigation wherein he represented the Complainant. Additionally, the Complainant's December 2, 2019 certification clearly evidences that he, and not Counsel, undertook the task of contacting GoFundMe. For these reasons, the GRC considers these six (6) entries amounting to 3.35 hours and predating his notice of representation to the GRC to be excessive and should be omitted from the total calculation.

The GRC also strongly questions the fees associated with assisting the Complainant in submitting an OPRA request for evidence of a potential knowing and willful violation. Counsel ultimately charged 0.95 hours (0.5 to review the SOI and 0.45 to compose an OPRA request) to "investigate" a potential knowing and willful violation. Curiously, the total time billed here is more than the total time billed to engage in settlement negotiations (0.75). Given the collective OPRA experience of the parties here, it seems unlikely reviewing a 15 page SOI and preparing a simplistic OPRA request described in Complainant Counsel's May 6, 2020 letter brief as seeking ". . . communications between the Custodian and GoFundMe" would require almost an entire billable hour. Id. at 11. For these reasons, the GRC believes a reduction to both entries of 0.2 and 0.25 respectively for a total of 0.5 for both actions is reasonable.

Finally, the GRC believes that the total time billed of 13.3 hours to compose the fee application is clearly excessive and requires reduction. The GRC does not agree that Counsel needed over 13 hours (representing over 50% of the total billing hours) to compose a fee

application. In fact, the total submission comprises of a six (6) page certification, seventeen (17) page brief, and sixty-two (62) pages of exhibits. For the certification, Counsel charged a collective 0.4. However, Counsel then proceeded to bill 1.9, 1.8, 2.65, 3.0, and 3.55 hours over five (5) days to produce the seventeen (17) briefs, which contained several sections of boilerplate language and exhibits, for a total of 12.9 hours. Such a charge, which represents 2.58 hours per day, can hardly be considered necessary or reasonable given Counsel's experience litigating OPRA cases and engaging in the prevailing party fee process. For comparison, Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-134 (December 2021) spans multiple years and adjudications, including a referral to the Office of Administrative Law and resulting Initial Decision. Notwithstanding, complainant's co-counsel there, one of whom also has extensive litigation experience with OPRA, charged a total of 3 hours to submit a combined fee application comprising of twenty-three (23) pages of certifications and time sheets. Thus, the GRC reduces the total fee application charge from 12.9 hours to 8 hours, which represents the reduction of 4.9 billing hours charged within the five (5) day period.

Accordingly, the Council finds that 16.25 hours at \$400.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$6,500.00, representing 16.25 hours of service at \$400.00 per hour, or a decrease of 8.7 hours and \$3,480.00 from the originally filed fee application.**

2. Enhancement Analysis

Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The Council finds that 16.25 hours at \$400.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$6,500.00, representing 16.25 hours of service at \$400.00 per hour, or a decrease of 8.7 hours and \$3,480.00 from the originally filed fee application.**

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022



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

February 26, 2020 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2017-169

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 Custodian complied with the Council’s November 12, 2019 Interim Order because she disclosed records to the Complainant that she obtained from GoFundMe within the extended time frame. The Custodian also certified to her reasons for not being able to obtain records, as well as her subsequent actions in obtaining the records directly from GoFundMe. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. Finally, the Township could not reasonably obtain a certification from Mayor Chiarello, who was hospitalized in dire condition during the compliance time frame.
2. The Custodian and Mayor Chiarello unlawfully denied access to the requested GoFundMe account records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Mayor Chiarello’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian’s nor Mayor Chiarello’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Custodian’s actions after receiving Complainant Counsel’s December 2, 2019 e-mail, 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, Complainant Counsel’s involvement in this complaint resulted in the relief sought. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable

attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 26th Day of February 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: February 28, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2017-169

v.

**Buena Vista Township (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of”

1. The most recent spreadsheet of all GoFundMe donation activity (as described on the GoFundMe website).
2. A computer screen snapshot of the most recent, entire GoFundMe activity dashboard (also as described on the GoFundMe website).

Custodian of Record: Lisa Tilton

Request Received by Custodian: July 7, 2017

Response Made by Custodian: July 18, 2017

GRC Complaint Received: August 17, 2017

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, found that:

1. A plain reading of OPRA supports that social media records are “government records” subject to disclosure to the extent that they are “made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide

¹ Represented by Richard M. Gutman, Esq. (Montclair, NJ). Mr. Gutman entered his appearance on December 2, 2019.

² Represented by Eric M. Bernstein, Esq. and Dominic P. DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

for unmitigated access to all of a public agency, employee, or official's social media posts.

2. The Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant's July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello's support of a Township project through a GoFundMe campaign is inextricably considered "official business" and the associated records are thus "government records" for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.
3. **The Custodian and Mayor Chiarello 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, if applicable. Further, the Custodian and Mayor Chiarello shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian and/or Mayor Chiarello 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.

Procedural History:

On November 14, 2019, the Council distributed its Interim Order to all parties. On November 15, 2019, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking an extension of time until November 27, 2019 to submit compliance. On November 18, 2019, the GRC granted the requested extension of time.

On November 27, 2019, the Custodian responded to the Council's Interim Order. The Custodian certified that, per the Statement of Information ("SOI"), that she previously attempted

³ 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.

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.

to obtain access to Mayor Chiarello's GoFundMe account, but was denied. The Custodian certified that since the Interim Order, Mayor Chiarello was admitted to the hospital and remains there. The Custodian affirmed that she could not speak with Mayor Chiarello due to his condition and had no way of obtaining either access to the GoFundMe or a legal certification from him. The Custodian thus certified that she could only certify that she had no ability to ascertain whether the account still existed or whether responsive records could be obtained and disclosed.

Additional Submissions:

On December 2, 2019, Complainant's Counsel e-mailed the GRC entering his appearance and attaching a legal certification from the Complainant. Complainant's Counsel contended that Buena Vista Township's ("Township") compliance was lacking due to Mayor Chiarello's "apparent[] . . . medical condition" and the Custodian's certification was inadequate. Complainant's Counsel noted that the Custodian did not indicate whether she contacted GoFundMe (through its parent company WePay) directly to determine whether responsive records existed. Complainant's Counsel stated that WePay retained records for a minimum of five (5) years and that it would share account information pursuant to a court order, warrant, subpoena, or similar legal proceeding. Demitroff Cert. ¶ 3-4. Complainant's Counsel thus argued that the Custodian's certification was incomplete because she failed to contact WePay.

On December 3, 2019, Custodian's Counsel e-mailed the GRC advising that the Township contacted GoFundMe directly to try and obtain responsive records. Counsel stated that GoFundMe responded and were reviewing the Township's request. Counsel noted that the time frame to comply expired, but that the Township would continue to "pursue the records" through GoFundMe and would provide a supplemental certification if possible.

On December 5, 2019, the Custodian responded to the Council's Order providing a supplemental certification. Therein, the Custodian responded that subsequent to her last certification, she contacted GoFundMe directly. The Custodian certified that GoFundMe produced multiple records to her, which she was disclosing to the Complainant (with redactions) in accordance with the Council's Order. The Custodian noted that she understood the time frame for compliance expired, but that she was required to perform an alternate search given the circumstances regarding Mayor Chiarello.⁶

On December 27, 2019, the GRC e-mailed the parties advising that it would accept the Custodian's supplemental certification as within time based on its contemplation of a five (5) business day extension from the November 27, 2019 extended deadline. The GRC noted that the its decision rested on the extraordinary circumstances surrounding this complaint, the novel nature of the issues presented therein, as well as the its contemplation of an extension concurrent with the parties' additional submissions.

⁶ Mayor Chiarello passed away on December 5, 2019 at the age of 64.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian and Mayor Chiarello to attempt to locate responsive records. The Council further ordered the Custodian and Mayor Chiarello to either disclose responsive records or certify to their non-existence. The Council also ordered both the Custodian and Mayor Chiarello to submit certifications regarding their search for responsive records regardless of whether any existed. Finally, the Council ordered both the Custodian and Mayor Chiarello to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 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 November 21, 2019.

On November 15, 2019, the first (1st) business day after receipt of the Council's Order, Custodian's Counsel sought an extension of time through November 27, 2019 to respond to the Council's Order, which the GRC granted. On November 27, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was unable to gain access to the account or communicate with Mayor Chiarello because he was hospitalized. The Custodian thus certified that she was only able to certify that she could not determine whether any records existed based on her inability to access the account.

Thereafter, on December 2, 2019, Complainant's Counsel argued that the Custodian failed to comply with the Council's Order. Of note, Complainant's Counsel asserted that the Custodian failed to contact WePay, who would have been able to advise if records existed and could disclose them in certain circumstances. On December 4, 2019, Custodian's Counsel advised that the Custodian attempted the route suggested by Complainant's Counsel and would provide a supplemental certification, if possible. On December 5, 2019, the Custodian submitted a supplemental certification disclosing to the Complainant records obtained from GoFundMe.

Concurrent with the forgoing, the GRC was contemplating an extension to allow the Custodian additional time to work with WePay/GoFundMe. However, the Custodian was able to submit her supplemental certification prior to the GRC's notification of an extension. Thus, on December 27, 2019, the GRC advised the parties that it would accept the Custodian's supplemental certification as within time for several reasons.

In review of the facts and submissions of this complaint, the GRC is satisfied that the Custodian complied with the Council's Order. The facts of this complaint indicate that the Custodian was unable to communicate with Mayor Chiarello due to his hospitalization, which subsequently concluded with his passing. Thus, it is obvious that extraordinary circumstances prohibited the Township from obtaining a certification from Mayor Chiarello. Further, due to the novel nature of the social media records question, the Council's Order did not contemplate that the Custodian may have needed to reach out to GoFundMe or WePay directly to obtain responsive records. Additionally, the Custodian was able to utilize the method suggested by Complainant's

Counsel to fulfill the Complainant's OPRA request within the allowable extended time frames. Finally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's November 12, 2019 Interim Order because she disclosed records to the Complainant that she obtained from GoFundMe within the extended time frame. The Custodian also certified to her reasons for not being able to obtain records, as well as her subsequent actions in obtaining the records directly from GoFundMe. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. Finally, the Township could not reasonably obtain a certification from Mayor Chiarello, who was hospitalized in dire condition during the compliance time frame.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant complaint, the Custodian and Mayor Chiarello unlawfully denied access to the requested GoFundMe account records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Mayor Chiarello's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mayor Chiarello's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. 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.]

In the matter before the Council, the Complainant filed his complaint *pro se*, therein arguing that the Custodian unlawfully denied him access to the requested GoFundMe records. In the SOI, the Custodian argued that she could not access the subject GoFundMe account because it was private, and that the account was subsequently closed. Upon review of this novel issue, the Council held that social media records could fall within the definition of a "government record," and that the records sought by the Complainant fell within the definition. The Council thus ordered the Custodian and Mayor Chiarello to attempt to obtain and disclose records, as well provide certifications regarding their search.

On November 27, 2019, the Custodian responded to the Council's Order stating that she could not ascertain the existence of records due to Mayor Chiarello's hospitalization. On December 2, 2019, Complainant's Counsel entered his appearance via e-mail and asserted that the Custodian failed to try and obtain records directly from GoFundMe via WePay, its parent company. Based on Complainant Counsel's e-mail, the Custodian contacted GoFundMe and was able to obtain responsive records. The Custodian disclosed said records to the Complainant under cover of certification on December 5, 2019.

In weighing whether the Complainant is a prevailing party entitled to attorney's fees, the Council's November 12, 2019 Order is clear that he prevailed in his complaint. However, at the point that the Council ruled in this complaint, the Complainant was not represented. Instead, the Complainant filed his Denial of Access Complaint *pro se* and continued as through the adjudication process as such until after the Council's Order. Thus, insofar as the Complainant being entitled to attorney's fees based on the Interim Order, a lack of representation does not support a fee award. See Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (May 2013) (citing New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 152-53 (2005)).

However, Complainant Counsel's involvement following the Custodian's November 27, 2019 compliance response did bring about a change in her actions. Specifically, the Custodian

certified that she had no way of determining whether responsive GoFundMe records existed because of Mayor Chiarello's condition. Complainant's Counsel then entered his appearance and argued that the Custodian failed to contact GoFundMe/WePay directly. This led to the Custodian obtaining records and disclosing them to the Complainant on December 5, 2019. Therefore, under the unique circumstances of this complaint, the Complainant is a prevailing party entitled to fees incurred in connection with Complainant's Counsel assistance in obtaining the responsive records.

Therefore, pursuant to the Custodian's actions after receiving Complainant Counsel's December 2, 2019 e-mail, 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, Complainant Counsel's involvement in this complaint resulted in the relief sought. 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 Custodian complied with the Council's November 12, 2019 Interim Order because she disclosed records to the Complainant that she obtained from GoFundMe within the extended time frame. The Custodian also certified to her reasons for not being able to obtain records, as well as her subsequent actions in obtaining the records directly from GoFundMe. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. Finally, the Township could not reasonably obtain a certification from Mayor Chiarello, who was hospitalized in dire condition during the compliance time frame.
2. The Custodian and Mayor Chiarello unlawfully denied access to the requested GoFundMe account records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian or Mayor Chiarello's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian's nor Mayor Chiarello's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Custodian's actions after receiving Complainant Counsel's December 2, 2019 e-mail, 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, Complainant Counsel's involvement in this complaint resulted in the relief sought. 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
Executive Director

January 21, 2020⁷

⁷ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2017-169

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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. A plain reading of OPRA supports that social media records are “government records” subject to disclosure to the extent that they are “made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to all of a public agency, employee, or official’s social media posts.
2. The Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant’s July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello’s support of a Township project through a GoFundMe campaign is inextricably considered “official business” and the associated records are thus “government records” for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.
3. **The Custodian and Mayor Chiarello 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, if applicable. Further, the Custodian and Mayor**

Chiarello shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. The Council defers analysis of whether the Custodian and/or Mayor Chiarello 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.

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 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: November 14, 2019

¹ 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.

² "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."

³ 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 Council Staff
November 12, 2019 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2017-169

v.

**Buena Vista Township (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of”

1. The most recent spreadsheet of all GoFundMe donation activity (as described on the GoFundMe website).
2. A computer screen snapshot of the most recent, entire GoFundMe activity dashboard (also as described on the GoFundMe website).

Custodian of Record: Lisa Tilton

Request Received by Custodian: July 7, 2017

Response Made by Custodian: July 18, 2017

GRC Complaint Received: August 17, 2017

Background³

Request and Response:

On July 7, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 18, 2019, the Custodian responded in writing denying access to the requested records. The Custodian stated that the request related to a private GoFundMe page held by Mayor Chuck Chiarello and not Buena Vista Township (“Township”). The Custodian thus stated that there are no responsive “government records” that exist, noting that she was denied access to the private GoFundMe page. The Custodian finally noted that she could not locate the GoFundMe campaign from the link the Complainant provided in his OPRA request; thus, she could not determine if it was a “government record.”

¹ No legal representation listed on record.

² Represented by Eric M. Bernstein, Esq., of Eric M. Bernstein & Associates, LLC (Warren, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On August 17, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that in fall of 2016, Mayor Chiarello initiated a GoFundMe campaign via his private Facebook page to solicit funds for a tree-carving project at Saw Mill Park. The Complainant stated that the project goal was to turn a 135-year-old deceased oak tree in the park into a historical monument.

The Complainant stated that several individuals, including himself, made donations that were dispersed to Mayor Chiarello via WePay checks. The Complainant stated that he attempted to obtain GoFundMe records regarding this project on three (3) occasions but was denied each time. The Complainant noted that when he submitted his third OPRA request, which is the subject of this complaint, the GoFundMe page was abruptly shuttered. The Complainant asserted that the shutdown effectively destroyed the records sought. The Complainant contended that the requested records were nonetheless considered “government records” under OPRA based on three (3) points. N.J.S.A. 47:1A-1.1.

The Complainant first argued that Mayor Chiarello used the image of the oak tree as his logo on his personal Facebook page, which overtly endorsed his candidate choices in a recent election. The Complainant noted that Mayor Chiarello’s profile picture was utilized in the GoFundMe campaign page. The Complainant also argued that Mayor Chiarello received a \$100 donation from IBEW and in turn posted support for them and their backed candidate on his Facebook page.⁴ The Complainant thus argued that the requested records were subject to OPRA because the GoFundMe campaign was tied to Mayor Chiarello’s Facebook page and that they shared the same profile picture.

The Complainant next argued that Mayor Chiarello used the GoFundMe page to conduct municipal business. The Complainant pointed to an excerpt on the page, which directed individuals to contact his office in the Township for more information about purchasing pavers for a walkway around the oak tree monument.

The Complainant finally contended that the checks were made out to Mayor Chiarello from WePay and addressed to the Township building. The Complainant further noted that Mayor Chiarello signed the checks over to the Township for deposit.

Statement of Information:

On September 8, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 7, 2017. The Custodian noted that she was familiar with the GoFundMe campaign because the Complainant previously requested records in connection with same. The Custodian noted that she denied those requests for various reasons including that records sought were not “government records” under OPRA.

⁴ The Complainant argued that the payment evoked a sense of *quid pro quo* to the Facebook post. The GRC does not address this issue because it has no authority over such. N.J.S.A. 47:1A-7(b).

The Custodian affirmed that notwithstanding the prior denials, she tried to obtain records from the GoFundMe page in connection with the subject OPRA request. The Custodian averred that she was denied the ability to access the GoFundMe page and had no authority to demand access to same because the Township did not make, maintain, or receive it. The Custodian certified that she responded in writing on July 18, 2017 denying access to the request because it did not seek “government records.” The Custodian noted that the GoFundMe page was taken down by Mayor Chiarello; thus, it is likely that any records responsive to this request was destroyed. The Custodian noted that there is no retention schedule for the records at issue here.

The Custodian argued that she lawfully denied access to the Complainant’s OPRA request. The Custodian asserted that Mayor Chiarello’s private GoFundMe page did not constitute a “government record” under OPRA.

Analysis

Definition of a Government Record

OPRA defines a “government record” as:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, *information stored or maintained electronically* or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file . . . or that has been received* in the course of his or its official business by any officer[.]

[N.J.S.A. 47:1A-1.1. (emphasis added).]

The GRC has not previously reviewed the issue of whether records created on social media platforms fall within the definition of a “government record” under OPRA. New Jersey Courts have had some limited experience in this realm. *See e.g. Larkin v. Borough of Glen Rock*, Docket No. BER-L-2573-18 (June 15, 2018). Thus, this matter is one of first impression for the Council.

New Jersey Courts have provided that “[t]he purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The broad definition of a “government record” strongly supports OPRA’s purpose by casting a wide net to capture as many records as possible. Inclusive of the definition is “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1; Paff v. Twp. of Galloway, 227 N.J. 340, 353 (2017). *See also Zahler v. Ocean Cnty. Coll.*, GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). Thus, a plain reading of OPRA provides that the definition of a “government record” encompasses electronic records “made, maintained or kept on file . . . or that [have] been received in the course of . . . official business.” To that end, the GRC has held that the location of a defined “government record” did not abrogate a custodian’s responsibility to obtain and disclose same in response to an OPRA request. *See*

Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107 (Interim Order dated July 25, 2007) (citing Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006)).

Here, and prior to determining whether the Custodian lawfully denied access to the records at issue, the GRC must address the threshold issue of whether social media posts in general can fall within the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1.

Social media usage, whether through Facebook, Twitter, or other platforms, has become more commonplace in the daily life of many citizens. In fact, 72% of citizens nation-wide are now using social media for several purposes.⁵ Government agencies and elected officials have followed suit by establishing social media accounts to disseminate information to and interact with those citizens. With governmental use of social media comes uncertainty in the difference between “private” and “public” social media accounts. This is especially true where elected officials or government employees are utilizing their social media accounts for multiple purposes, both in their official capacity and as private citizens.

However, a plain reading of OPRA supports that “information stored or maintained electronically. . . that has been made, maintained or kept on file . . . or . . . received in the course of . . . official business” is considered a “government record” under OPRA. N.J.S.A. 47:1A-1.1. It is thus clear that OPRA firmly places social media posts regarding official business within the definition of a “government record.” Further, public officials or employees conducting “official business” on social media, whether through an account they deem “public” or “private,” does not disqualify those posts from disclosure. This was the essence of the argument in Meyers, GRC 2005-27; to wit, a mayor conducting official business on his personal e-mail account did not shield those e-mails from disclosure under OPRA. Such a ruling is also consistent with the GRC’s first impression ruling on text messages and their general classification as a “government record.” Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015).

Therefore, a plain reading of OPRA supports that social media records are “government records” subject to disclosure to the extent that they are “made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to all of a public agency, employee, or official’s social media posts.

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.

⁵ <https://www.pewinternet.org/fact-sheet/social-media/> (accessed October 22, 2019).

Having generally found that social media records may fall within the definition of a “government record” to the extent that they pertain to “official business,” the GRC now turns to whether the Custodian and/or Mayor Chiarello unlawfully denied access to the record sought. The GRC reiterates that the issue presently before the Council is a matter of first impression.

Initially, the trial court’s decision in Larkin, Docket No. BER-L-2573-18, although unpublished, contains a well-reasoned analysis of the social media issue that is instructive here. There, the court held that block lists from the Mayor and Councils’ individual Facebook pages were subject to disclosure under OPRA. Of significant note, the Larkin court defined “official business” as “those duties which are imposed by law as well as those which are clearly inherent in and naturally arise from the nature of the office.” Slip. Op. at 16 (citing State v. Schenkolewski, 30 N.J. Super. 115, 143 (App. Div. 2007)). Further, the court stressed that:

[P]rivate formulation of the Facebook accounts does not preclude the conclusion that they are government accounts. Because the Mayor and council members use the Facebook accounts for government functions, the control they exercise over the accounts is accordingly governmental in nature.

[Slip Op. at 17-18.]

The court also addressed decisions in both Washington State and New Mexico, ultimately holding that “[r]ather than applying a one-size-fits-all rule, this [c]ourt . . . has made a fact-sensitive review of the Facebook pages at issue.” Id. (citing West v. City of Puyallup, 410 P.3d 1197, 1200 (Wash Ct. App. 2018); Pacheco v. Hudson, 415 P.3d 505 (N.M. 2018)).

In the instant Denial of Access Complaint, the Complainant contended that the requested records were “government records” under OPRA. First, the Complainant argued that Mayor Chiarello’s Facebook page, wherein he endorsed political candidates, shared the same oak tree logo as the GoFundMe page. The Complainant next argued that Mayor Chiarello conducted municipal business on the GoFundMe page when he referred parties interested in purchasing bricks an associated project to the Township. The Complainant finally argued that donations made to the GoFundMe campaign were deposited by the Township. The Complainant also noted that the GoFundMe campaign was terminated after the Township received the subject OPRA request; thus, it was likely no records existed as of the filing of the complaint.

Conversely, the Custodian argued in the SOI that she properly denied access to the Complainant’s OPRA request because the requested records were not considered “government records” under OPRA. The Custodian contended that Mayor Chiarello started the GoFundMe account as a private citizen and that she had no access to the requested records. The Custodian further affirmed that notwithstanding her denial, she attempted to fulfill the request to no avail. The Custodian noted that she also found that Mayor Chiarello terminated the GoFundMe campaign and that it was likely that responsive records were destroyed.

Turning to the social media platform in question here, GoFundMe is a free international fundraising platform that individuals can use to raise money for any number of causes.⁶ GoFundMe

⁶ <https://www.gofundme.com/c/about-us> (accessed October 22, 2019).

also promotes a fundraiser's ability to immediately access donated funds. A quintessential tool that GoFundMe offers is the ability reach many people by sharing a campaign via e-mail, text, and, most pertinent here, social media. When launching a GoFundMe campaign, a perspective fundraiser can sign in through Facebook or create a GoFundMe account. Thereafter, the fundraiser sets a fundraising goal, creates a campaign profile, and shares it accordingly through e-mail, text, or social media. The GRC notes that GoFundMe's "Terms of Service" do not prohibit government officials or entities from raising money for community projects.

Now, the GRC must examine whether the fundraising campaign at the center of this complaint could be construed as "official business," thus designating associated records as "government records" under OPRA. Mayor Chiarello started the GoFundMe campaign at issue here to raise funds for the tree-carving project. Notwithstanding that the Custodian argued that Mayor Chiarello started the campaign as a private citizen, the evidence of record suggests that the project, inclusive of fundraising, fell within the scope of "official business." This is because the evidence of record supports that the Township and Mayor Chiarello "exercised control" over the tree-carving project. In reaching this conclusion, the GRC points to the Complainant's Denial of Access Complaint submission proving that donations submitted to the GoFundMe campaign were made payable to the Township. Further, the Complainant provided evidence that Mayor Chiarello solicited on behalf of the Township for a corresponding brick fundraiser on the GoFundMe campaign message board.⁷

It further stands to reason that Mayor Chiarello's GoFundMe campaign was inextricably linked to his official capacity with the Township. The forgoing position is supported by at least one local news article, as well as Township press releases. For instance, the Daily Journal reported on August 31, 2016 that Mayor Chiarello was "determined to raise the necessary funds so that no tax dollars are used for the project."⁸ The Daily Journal further reported that "[t]hat's why [Mayor Chiarello] set up a GoFundMe account and is asking area businesses and residents to help." This article was followed by an October 8, 2016 Township press release soliciting donations for the tree-carving project.⁹ Also, in a May 16, 2017 Township press release announcing the May 27, 2017 memorial dedication, the Township stated that the "idea of a Tree Monument was born with the guidance of Mayor Chuck Chiarello and the . . . Committee."¹⁰

To be clear, this is not a situation where a private citizen with no ties to the Township decided to aid the tree-carving project through a GoFundMe campaign. Instead, Mayor Chiarello "exercised control" of the project and its fundraising through his capacity as a Township official. Further, the GoFundMe campaign "naturally ar[o]se from" his own work on the tree-carving project with the Township. Based on this, Mayor Chiarello cannot assert that his "private" support

⁷ The GRC notes that whether Mayor Chiarello utilized his Facebook account to support local candidates is not a factor in this analysis, as the Council has previously held that there exists a separation between campaigning and "official business" as defined in OPRA. See *Carter v. Franklin Fire Dist. No. 1 (Somerset)*, GRC Complaint No. 2011-318 (September 2016).

⁸ <https://www.thedailyjournal.com/story/home/2016/09/07/donations-sought-historic-tree-carving/89980964/> (accessed October 22, 2019).

⁹ www.buenavistanj.com/2016/10/08/tree-carving-project-on-richland-village-giant-white-oak-to-begin/ (accessed October 22, 2019).

¹⁰ www.buenavistanj.com/2017/05/16/tree-monument-dedication-is-saturday-may-27th-12-noon-saw-mill-park-richland/ (accessed October 22, 2019).

for the project through the GoFundMe campaign is somehow separate from his capacity as an elected official. Thus, in following the court's analysis in Larkin, it is clear that the records the Complainant sought fell within the definition of a "government record" and Mayor Chiarello was required to provide same to the Custodian for review and potential disclosure.

Accordingly, the Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant's July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello's support of a Township project through a GoFundMe campaign is inextricably considered "official business" and the associated records are thus "government records" for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin, Docket No. BER-L-2573-18. Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Mayor Chiarello 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. A plain reading of OPRA supports that social media records are "government records" subject to disclosure to the extent that they are "made, maintained or kept on file . . . or . . . received in the course of . . . official business . . ." N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as "government records" and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to all of a public agency, employee, or official's social media posts.
2. The Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant's July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello's support of a Township project through a GoFundMe campaign is inextricably considered "official business" and the associated records are thus "government records" for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of

records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.

3. **The Custodian and Mayor Chiarello 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, if applicable. Further, the Custodian and Mayor Chiarello shall simultaneously deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹² to the Executive Director.**¹³
4. The Council defers analysis of whether the Custodian and/or Mayor Chiarello 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.

Prepared By: Frank F. Caruso
Executive Director

October 30, 2019

¹¹ 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.

¹² "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."

¹³ 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.