



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data and Research Institute and Baffi Simmons)
Complainant

Complaint No. 2018-283

v.
Borough of Alpha (Warren)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council ("Council") considered the October 26, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian has established that the complaint should be reconsidered based on mistake. The Custodian has also shown that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, the Council mistakenly asserted that the Custodian failed to provide the certified confirmation of compliance to the Executive Director as required in the August 25, 2020 Interim Order. Thus, the Council should grant the Custodian's request for reconsideration based on a mistake. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind its August 24, 2021 Interim Order conclusion No. 1 and find that the Custodian complied with the August 25, 2020 Interim Order.
3. The Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 9th Day of November 2021

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 15, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration & Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of ¹
African American Data and Research Institute
and Baffi Simmons)
Complainant**

GRC Complaint No. 2018-283

v.

**Borough of Alpha (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints and summonses prepared by the Police Department from January 2017 through present.
2. Drug possession complaints and summonses prepared by the Police Department from January 2017 through present.
3. Police Department’s “Arrest Listings” from January 2017 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Donna L. Messina

Request Received by Custodian: October 15, 2018

Response Made by Custodian: October 15, 2018

GRC Complaint Received: November 21, 2018

Background

August 24, 2021 Council Meeting:

At its August 24, 2021 public meeting, the Council considered the August 17, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council’s August 25, 2020 Interim Order. Specifically, although the Custodian timely provided the Complainant with the

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Christopher Troxell, Esq., of Troxell Law (Phillipsburg, N.J.).

responsive records, she failed to provide a certified confirmation of compliance to the Executive Director.

2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's August 25, 2020 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's August 25, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (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, 76 (2008). Specifically, the Custodian was ordered to obtain the responsive records from the Town of Phillipsburg. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On August 25, 2021, the Council distributed its Interim Order to all parties. On September 7, 2021, the Custodian filed a request for reconsideration of the Council's August 24, 2021 Interim Order based on a mistake.

The Custodian asserted that she timely provided certified confirmation of compliance to the Executive Director along with the responsive records on August 28, 2020. The Custodian provided the records attached to the e-mail to demonstrate what was provided to the parties that day. The Custodian therefore requested the Council reconsider the Interim Order in the interest of fairness and justice.

On September 14, 2021, the Government Records Council ("GRC") informed the parties that the deadline to notify the GRC of a settlement agreement expires on September 23, 2021. The GRC stated that any decision by the Council regarding the Custodian's reconsideration request would likely not influence the issue of an attorney fee award. The GRC stated that it was formally inquiring whether an extension of time was necessary to allow the parties to discuss a settlement.

That same day, Custodian's Counsel requested an extension until October 15, 2021 to resolve the attorney fee issue. On September 15, 2021, the GRC granted Counsel's extension request.

On September 27, 2021, the Complainant notified the GRC that the parties have resolved the matter to include counsel fees. On October 1, 2021, the GRC responded to the Complainant inquiring as to whether the settlement had been formally approved by the Borough of Alpha ("Borough"). That same day, Counsel responded to the GRC stating that the Borough had authorized the fee settlement and requested the Complainant to contact the Borough's finance office to provide information and effectuate payment.

Analysis

Reconsideration

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

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order dated August 24, 2021 on September 7, 2021, eight (8) business days from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

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

In the instant matter, the Council's August 25, 2020 Interim Order required the Custodian to disclose to the Complainant the responsive records and simultaneously provide certified

confirmation of compliance to the Executive Director. The Custodian responded to the Interim Order on August 28, 2020 via e-mail, providing the responsive records via attachment. Upon review of the attachment, the Custodian included a certification dated August 27, 2020. Therein, the Custodian certified that responsive records were provided to the Complainant in accordance with the Order. However, the Council held that the Custodian did not comply with the Interim Order because she failed to submit a certification.

Upon receipt of the reconsideration request, the GRC reexamined the Custodian's compliance response and was able to locate the certification. The GRC determined that it initially failed to locate the Custodian's certification because its heading was formatted similarly to the Council's decisions and orders. Further, the certification was intermingled with previous decisions and orders in the instant matter. Based on this oversight, the GRC should reconsider its August 24, 2021 Interim Order for the limited purpose of correcting conclusion No. 1 to reflect that the Custodian complied with the Council's August 25, 2020 Interim Order.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian has established that the complaint should be reconsidered based on a mistake. The Custodian has also shown that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council mistakenly asserted that the Custodian failed to provide the certified confirmation of compliance to the Executive Director as required in the August 25, 2020 Interim Order. Thus, the Council should grant the Custodian's request for reconsideration based on a mistake. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Based on the foregoing, the Council should rescind its August 24, 2021 Interim Order conclusion No. 1 and find that the Custodian complied with the August 25, 2020 Interim Order by providing certified confirmation to the Executive Director within the allotted period.

Since the remainder of the Council's August 24, 2021 remained in full force, the GRC next addresses the outstanding issue of prevailing party attorney's fees.

Prevailing Party Attorney's Fees

At its August 24, 2021 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On August 25, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant's response was due by close of business on September 23, 2021. On September 14,

2021, the GRC informed the parties that notwithstanding the request for reconsideration, the deadline to notify the GRC of a fee settlement remained in effect. That same day, Custodian's Counsel requested an extension until October 15, 2021. The GRC approved the request on September 15, 2021.

On September 27, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter. On October 1, 2021, the GRC requested confirmation as to whether the Borough formally approved the settlement. That same day, Counsel notified the GRC that the Borough authorized the settlement and requested the Complainant contact the Borough's finance department to help effectuate payment.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian has established that the complaint should be reconsidered based on mistake. The Custodian has also shown that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, the Council mistakenly asserted that the Custodian failed to provide the certified confirmation of compliance to the Executive Director as required in the August 25, 2020 Interim Order. Thus, the Council should grant the Custodian's request for reconsideration based on a mistake. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind its August 24, 2021 Interim Order conclusion No. 1 and find that the Custodian complied with the August 25, 2020 Interim Order.
3. The Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

October 26, 2021



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

August 24, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data and Research Institute and Baffi Simmons)
Complainant

Complaint No. 2018-283

v.

Borough of Alpha (Warren)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council’s August 25, 2020 Interim Order. Specifically, although the Custodian timely provided the Complainant with the responsive records, she failed to provide a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council’s August 25, 2020 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s August 25, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (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, 76 (2008). Specifically, the Custodian was ordered to obtain the responsive records from the Town of Phillipsburg. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on**

the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of¹
African American Data and Research Institute
and Baffi Simmons)
Complainant**

GRC Complaint No. 2018-283

v.

**Borough of Alpha (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints and summonses prepared by the Police Department from January 2017 through present.
2. Drug possession complaints and summonses prepared by the Police Department from January 2017 through present.
3. Police Department’s “Arrest Listings” from January 2017 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Donna L. Messina
Request Received by Custodian: October 15, 2018
Response Made by Custodian: October 15, 2018
GRC Complaint Received: November 21, 2018

Background

August 25, 2020 Council Meeting:

At its August 25, 2020 public meeting, the Council considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the requested records on the basis that the Town of Phillipsburg (“Town”), with which the Borough of Alpha had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Christopher Troxell, Esq., of Troxell Law (Phillipsburg, N.J.).

Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Town and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the Town and provide same to the Complainant. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,³ to the Executive Director.⁴**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁵ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁵ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 26, 2020, the Council distributed its Interim Order to all parties. On August 28, 2020, the Custodian responded to the Council's Interim Order providing responsive records as attached.

Analysis

Compliance

At its August 25, 2020 meeting, the Council ordered the Custodian to locate and provide access to the requested records or to provide an estimated special service charge. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On August 26, 2020, 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 September 2, 2020.

On August 28, 2020, the second (2nd) business day after receipt of the Council's Order, the Custodian e-mailed the Complainant providing copies of the responsive records as an attachment. However, the Custodian did not provide a certified confirmation of compliance to the Executive Director.

Therefore, the Custodian did not fully comply with the Council's August 25, 2020 Interim Order. Specifically, although the Custodian timely provided the Complainant with the responsive records, she failed to provide a certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his

actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's August 25, 2020 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (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. 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 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 also 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, [certif. denied] (1984).

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by the Borough of Alpha Police Department (“APD”) pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Custodian asserted that the records were maintained by another municipality due to a shared services agreement. The Complainant then filed the instant complaint asserting that the Borough had an established obligation to obtain the responsive records from the municipality pursuant to Burnett, 415 N.J. Super. 506 and Michalak, GRC 2010-220.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's August 25, 2020 Interim Order, the Custodian was ordered to produce the responsive records that were maintained by the Town, which was the Complainant's desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁶

Therefore, pursuant to the Council's August 25, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 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. at 76. Specifically, the Custodian was ordered to obtain the responsive records from the Town. 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 did not fully comply with the Council's August 25, 2020 Interim Order. Specifically, although the Custodian timely provided the Complainant with the responsive records, she failed to provide a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's August 25, 2020 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

⁶ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant's status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep't (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

3. Pursuant to the Council’s August 25, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (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, 76 (2008). Specifically, the Custodian was ordered to obtain the responsive records from the Town of Phillipsburg. 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: Samuel A. Rosado
Staff Attorney

August 17, 2021



State of New Jersey
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 25, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. o/b/o African American
Data and Research Institute and Baffi Simmons)
Complainant

Complaint No. 2018-283

v.
Borough of Alpha (Warren)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the requested records on the basis that the Town of Phillipsburg (“Town”), with which the Borough of Alpha had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Town and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the Town and provide same to the Complainant. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Executive Director.²**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis³ and calculate the**

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

³ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of August 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: August 26, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of¹
African American Data and Research Institute
and Baffi Simmons)
Complainant**

GRC Complaint No. 2018-283

v.

**Borough of Alpha (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints and summonses prepared by the Police Department from January 2017 through present.
2. Drug possession complaints and summonses prepared by the Police Department from January 2017 through present.
3. Police Department’s “Arrest Listings” from January 2017 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Donna L. Messina
Request Received by Custodian: October 15, 2018
Response Made by Custodian: October 15, 2018
GRC Complaint Received: November 21, 2018

Background³

Request and Response:

On October 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 15, 2018, the Custodian responded in writing stating that Alpha Borough (“Borough”) did not have a police force and was under a shared services agreement with the Town of Phillipsburg (“Town”). The Custodian stated that the Complainant should forward the request to them.

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Christopher Troxell, Esq., of Troxell Law (Phillipsburg, N.J.).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute and Baffi Simmons) v. Borough of Alpha (Warren), 2018-283 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On November 21, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian has not provided any records or requested an extension of time to respond within the allotted period. The Custodian also argued that under Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), summonses were subject to disclosure under OPRA, and other police departments have provided access to same via OPRA requests submitted by the Complainant.

The Complainant requested that the Council find that the Custodian violated OPRA in accordance with Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant also requested that the Council award him counsel fees.

Statement of Information:

On December 14, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 15, 2018. The Custodian certified that no search was undertaken since the records were owned by another municipality. The Custodian certified that she responded to the Complainant’s request that same day, directing the Complainant to the Town.

The Custodian asserted that the requested records were never made, maintained, or kept on file by the Borough, and she was not obligated to create a record in response to an OPRA request. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). The Custodian maintained that the Borough did not have its own police force and that the Town covers for them. The Custodian asserted that she satisfied her duties under OPRA, and attached correspondence indicated that the Town responded to the Complainant regarding the request at issue.

Additional Submissions:

On December 23, 2018, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant first asserted that the Borough was attempting to avoid liability by claiming they forwarded the request to the Town. The Complainant also asserted that the attached documentation from the Custodian’s SOI was from the Town’s attorney in response to a request the Complainant submitted directly to the Town, and not the request at issue. The Complainant noted that the letter made no reference to the Borough.

The Complainant also asserted that the Town imposed a special service charge to process the OPRA request they received directly from the Complainant. The Complainant asserted that the Custodian should provide a separate 14-point analysis to process complaints and summonses originating from the Borough. The Complainant argued that if the Borough was so small that they did not have its own police department, then it was likely there would not be enough complaints and summonses to warrant a special service charge.

The Complainant finally contended that based on the forgoing, the Council should: 1) compel the Borough to comply with the OPRA request; 2) compel the Borough to submit a 14-point analysis; and 3) declare him a prevailing party and award counsel fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Burnett, 415 N.J. Super. 506, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court’s decision largely rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance broker, the court distinguished Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005) from the facts before it. The court reasoned that:

In Bent, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department [(“STPD”)], the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought “discrete records of the 1992 criminal investigation conducted by the STPD,” which were fully disclosed. Id. at 38. Additionally, he sought a “[c]opy of contact memos, chain of custody for items removed or turned over to third parties of signed Grand Jury reports and recommendations.” Bent v. Stafford Twp. Police Dept., GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: “to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.” Bent, supra, 381 N.J. Super. at 38 . . . We continued by stating:

“Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency's] official business,’ as well as any document ‘received in the course of [the agency's] official business.’ N.J.S.A. 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that ‘all government records . . . be subject to public access unless exempt,’ the statute itself

neither specifies nor directs the type of record that is to be ‘made, maintained or kept on file.’ In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense. . . Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1.”

[T]he circumstances presented in Bent [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

[Id. at 516-17.]

The Council subsequently expanded the court’s holding in Burnett to agencies entered into a shared services agreement. See Michalak, GRC 2010-220. In that case, the complainant sought police dispatch logs from the Borough of Helmetta (“Helmetta”). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department (“SPD”). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta’s dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD “made, maintained, or kept on file” the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

Moreover, in Meyers, GRC 2005-127, the complainant requested e-mails sent to various individuals regarding official business but located on the mayor’s home computer. The custodian alleged that due to the records’ location, they were not government records. The Council found that the definition of a government record was not restricted its physical location. The Council further found that the requested records should be released in accordance with OPRA, to the extent they fell within the definition of a government record. Thus, the Council held that the location of a document was immaterial to its status as a government record.

Both Burnett and Michalak are directly applicable in the instant matter. In response to the Complainant’s request, the Custodian explicitly stated that the Borough was under a shared services agreement with the Town to provide law enforcement services. This is further confirmed via the Borough’s website.⁴ Thus, the requested records were created and maintained in the Town

⁴ Welcome to Alpha, NJ, https://www.alphaboronj.org/offices/emergency_services/index.php (last visited Jul. 28, 2020).

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute and Baffi Simmons) v. Borough of Alpha (Warren), 2018-283 – Findings and Recommendations of the Executive Director

on behalf of the Borough. Additionally, the Custodian was obligated to retrieve the records from the Town, as their physical location was immaterial. See Meyers, GRC 2005-127.

Accordingly, the Custodian unlawfully denied access to the requested records on the basis that the Town, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. The Custodian had an obligation to obtain the responsive records from the Town and provide same to the Complainant. See Meyers, GRC 2005-127. Thus, the Custodian shall obtain the responsive records from the Town and provide same to the Complainant. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested records on the basis that the Town of Phillipsburg ("Town"), with which the Borough of Alpha had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Town and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the Town and provide same to the Complainant. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing**

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁷ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

August 18, 2020

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁷ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute and Baffi Simmons) v. Borough of Alpha (Warren), 2018-283 – Findings and Recommendations of the Executive Director