



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

INTERIM ORDER

June 28, 2022 Government Records Council Meeting

Kathleen Ma
Complainant

Complaint No. 2019-212

v.

Port Authority of NY and NJ
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 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. The Custodian has not complied with the Council’s April 27, 2021 Interim Order. Specifically, the Custodian, Counsel, Port Authority of New York and New Jersey employees asserted that Sustainable Terminal Services, Inc. would not provide access to the data but did not include a statement as to an actual basis for denying access. Additionally, the Custodian has not simultaneously provided certified confirmation of compliance to the Executive Director.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s April 27, 2021 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian unlawfully denied access to the responsive Registry data. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council’s April 27, 2021 Interim Order. Thus, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Pursuant to the Council’s April 27, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v.

City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Council ordered the Port Authority of New York and New Jersey to obtain the responsive records from Sustainable Terminal Services, Inc. and provide same to the Complainant. 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. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June 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: June 29, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Kathleen Ma¹
Complainant**

GRC Complaint No. 2019-212

v.

**Port Authority of NY and NJ²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of a list of drayage trucks registered in the “Drayage Truck Registry” (“Registry”) inclusive of twelve (12) individual pieces of information for each registered truck.

Custodian of Record: William Shalewitz
Request Received by Custodian: July 18, 2019
Response Made by Custodian: July 25, 2019
GRC Complaint Received: October 16, 2019

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the April 20, 2021 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 may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Specifically, the Port Authority of New York & New Jersey shared control over the Registry through its partnership with the Sustainable Terminal Services, Inc. and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it the Complainant; or 2) deny access and provide a specific lawful basis for said denial.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

¹ Represented by George Faraday, Esq. (Washington D.C.). Previously represented by Emma Rebhorn, Esq. (New York, NY).

² Represented by Caitlin Sullivan, Esq. (New York, NY).

including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵

3. 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.
4. 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 April 28, 2021, the Council distributed its Interim Order to all parties. On May 4, 2021, Assistant General Counsel Stephen Marinko e-mailed the Government Records Council ("GRC") seeking a ten (10) business day extension of time to determine how to address the Council's Order. Mr. Marinko noted that this extension request is predicated on the fact that the Port Authority of New York and New Jersey ("PANYNJ") does not possess the responsive Registry data and Sustainable Terminal Services, Inc. ("STS") has declined attempts to obtain the data therefrom. On May 6, 2021, the GRC responded granting an extension of time through May 19, 2021 to respond to the Council's Order.

On May 19, 2021, Mr. Marinko responded to the Council's Interim Order on behalf of the Custodian. Therein, Mr. Marinko reiterated PANYNJ's position that it could not produce the Registry data because it did not possess said information and was thus not legally obligated to disclose same. Mr. Marinko stated that while the Council's decision did not alter this argument, it nonetheless attempted to follow the Order by contacting STS to obtain and disclose the responsive records: STS has declined and as a result PANYNJ cannot comply. Mr. Marinko stated that because STS was not a party to the complaint, "it does not appear to have shared its views . . . about the subject [OPRA] request." Mr. Marinko thus stated that PANYNJ "move[d] for reconsideration" to allow STS "the chance to be heard." Mr. Marinko also provided contact information for STS's attorney.

On June 3, 2022, Complainant's Counsel objected to the request for reconsideration arguing that it was untimely, did not include any of the analysis required to be considered, and is predicated on PANYNJ's position that the Council already rejected in its Interim Order. Complainant's Counsel reiterated all prior arguments from the Denial of Access Complaint as to

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.

why the responsive data was disclosable under OPRA. Counsel then argued each point above, beginning with PANYNJ's failure properly file a request for reconsideration "on the appropriate form" See Council's Interim Order Letter to the Parties dated April 28, 2021. Counsel next argued that the filing was untimely because it was outside of the ten (10) business days provided for in N.J.A.C. 5:105-2.10(d). Counsel argued that even if PANYNJ argued that the extension allowed them to exceed the regulatory time frame, such an argument should be rejected because they failed to follow the stay process outlined in the Council's Interim Order letter. The Council also argued that none of the correspondence presents any new arguments or evidence warranting reconsideration.

Counsel thus argued that the GRC should not accept PANYNJ's attempt to file a reconsideration. Counsel further requested that the GRC grant the Complainant's request for prevailing party attorney's fees and find that the PANYNJ knowingly and willfully violated OPRA.

On July 12, 2021, the GRC e-mailed the parties acknowledging receipt of multiple communications in this complaint. The GRC first stated that PANYNJ's request for reconsideration was not properly filed because it did not include the appropriate form. The GRC next stated that PANYNJ's utilization of the reconsideration to allow for an intervenor was improper; that process is controlled by N.J.A.C. 1:1-16.3(a). See Gill v. N.J. Dep't of Banking and Ins., 404 N.J. Super. 1, 10-11 (App. Div. 2008). The GRC noted that to the extent the forgoing was correct, the request for reconsideration must also be rejected on procedural grounds as it was not appropriate process for intervenors. The GRC stated that it was providing a final deadline until July 19, 2021 to: 1) allow the Custodian to respond to the Council's Order and 2) allow STS to seek intervenor status through the proper process.

On July 19, 2021, Mr. Marinko e-mailed the GRC stating that he was providing a certification of compliance from Deputy Director Bethann Rooney, who certified that PANYNJ does not "own, operate, or maintain" the Registry and further does not "have the ability to compel [STS]" to disclose same. Mr. Marinko asserted that the facts in Director Rooney's certification "underscore the reasons why" PANYNJ disagrees with the Council's decision; they do not have the requested records "in custody or control."

Director Rooney certified that PANYNJ did not own, operate, or maintain the Registry; rather, it was owned by STS and Advent Intermodel Solutions operates and maintains the system on their behalf. Director Rooney averred that the contract between PANYNJ and STS only provided for periodic reports containing some data and individual database queries. Director Rooney affirmed that upon receipt of the subject OPRA request, the PANYNJ Freedom of Information ("FOI") Group forwarded same to her Department. Director Rooney affirmed that the Department performed a search and did not locate the responsive Registry information; she informed the FOI Group of this fact and noted that the requested information could not be obtained from STS due to their agreement.

Director Rooney certified that following receipt of the Interim Order, PANYNJ contacted STS on multiple occasions and was rejected the ability to obtain and disclose the responsive records. Director Rooney averred that she is not aware of any contractual right to the Registry data

and it is not available in any other place besides STS. Director Rooney certified that PANYNJ has thus complied with the Council's Order because it made unsuccessful attempts to compel disclosure without success.⁶

Analysis

Compliance

At its April 27, 2021 meeting, the Council ordered the Custodian to either obtain and disclose the requested Registry data or provide a specific lawful basis for denying access to it. The Custodian was also required to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 28, 2021, 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 May 5, 2021.

On May 4, 2021, the fourth (4th) business day after receipt of the Council's Order, Mr. Marinko e-mailed the GRC seeking an extension of ten (10) business days to respond to the Order, which the GRC granted through May 19, 2021. On May 19, 2021, Mr. Marinko advised the GRC that STS would not provide the requested data and that PANYNJ was seeking reconsideration to allow STS to intervene. Absent from this submission was the Custodian's certified confirmation of compliance. On June 3, 2021, Complainant's Counsel submitted objections. Thereafter, July 12, 2021, the GRC advised the parties that the request for reconsideration was not appropriately filed and would not be accepted. The GRC also advised that it would set a deadline of July 19, 2021 for the Custodian to provide certified confirmation of compliance and to allow STS to file a motion to intervene. On July 19, 2021, Mr. Marinko submitted a certification from Director Rooney indicating the steps taken to try to comply with the Council's Order and a rehashing of the arguments as to why those efforts were unsuccessful. Also absent from this submission was the Custodian's certified confirmation of compliance.

The above does not support that the Custodian has complied with the Council's Order in this instance for several reasons. First and foremost, the Custodian failed to obtain and disclose the responsive Registry data. Instead, PANYNJ has relied on the arguments already rejected by the Council: it does not maintain or control the Registry and is thus not able to obtain and provide the information. Further, PANYNJ has tacitly placed its failure to comply at the feet of STS, notwithstanding that it has not provided any written statement by that group on the specific lawful basis for nondisclosure. See FMC NO. 201210 at Article VIII(E). Instead, PANYNJ simply asserted that STS, rejected their requests and was not given a chance to intervene. PANYNJ then provided contact information as if to inexplicably shift the onus to the GRC to engage STS as intervenors absent a filed motion. Ultimately, PANYNJ has not given a valid lawful basis beyond their already rejected arguments. Additionally, the Custodian failed to file certified confirmation of compliance, which was explicitly required by the Council's Order.

Therefore, the Custodian has not complied with the Council's April 27, 2021 Interim Order. Specifically, the Custodian, Counsel, PANYNJ employees asserted that STS would not provide access to the data but did not include a statement as to an actual basis for denying access.

⁶ STS did not file a motion to intervene or otherwise contact the GRC regarding this complaint.

Additionally, the Custodian has not simultaneously provided certified confirmation of compliance to the Executive Director.

Council’s April 27, 2021 Interim Order is Enforceable

“The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s April 27, 2021 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

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 responsive Registry data. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council’s April 27, 2021 Interim Order. Thus, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied 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 Appellate Division 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, 71 (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.” (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.]

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*, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the matter before the Council, the Complainant contended that PANYNJ unlawfully denied access to the requested Registry data. In the Statement of Information, PANYNJ maintained its position that it did not make or maintain the Registry; rather, STS had sole control over same. Upon review of all available evidence on the record, the Council held that an unlawful denial of access occurred. This position was based on PANYNJ entering a partnership with STS for the Registry, as well as agreement language setting forth a process for PANYNJ to obtain certain requested records. Thus, the Complainant is a prevailing party entitled to a fee award.

Accordingly, pursuant to the Council's April 27, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered PANYNJ obtain the responsive records from STS and provide same to the Complainant. 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. For administrative ease, the OAL should determine the total amount of the award of reasonable attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied with the Council's April 27, 2021 Interim Order. Specifically, the Custodian, Counsel, Port Authority of New York and New Jersey employees asserted that Sustainable Terminal Services, Inc. would not provide access to the data but did not include a statement as to an actual basis for denying access. Additionally, the Custodian has not simultaneously provided certified confirmation of compliance to the Executive Director.

2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s April 27, 2021 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian unlawfully denied access to the responsive Registry data. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council’s April 27, 2021 Interim Order. Thus, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Pursuant to the Council’s April 27, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Council ordered the Port Authority of New York and New Jersey to obtain the responsive records from Sustainable Terminal Services, Inc. and provide same to the Complainant. 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. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney’s fees.

Prepared By: Frank F. Caruso
Executive Director

June 21, 2022



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

INTERIM ORDER

April 27, 2021 Government Records Council Meeting

Kathleen Ma
Complainant

Complaint No. 2019-212

v.

Port Authority of NY and NJ
Custodian of Record

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1. The Custodian may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Specifically, the Port Authority of New York & New Jersey shared control over the Registry through its partnership with the Sustainable Terminal Services, Inc. and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it the Complainant; or 2) deny access and provide a specific lawful basis for said denial.
2. **The Custodian shall comply with conclusion No. 1 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 shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

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.

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of April 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: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Kathleen Ma¹
Complainant**

GRC Complaint No. 2019-212

v.

**Port Authority of NY and NJ²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of a list of drayage trucks registered in the “Drayage Truck Registry” (“Registry”) inclusive of twelve (12) individual pieces of information for each registered truck.

Custodian of Record: William Shalewitz
Request Received by Custodian: July 18, 2019
Response Made by Custodian: July 25, 2019
GRC Complaint Received: October 16, 2019

Background³

Request and Response:

On July 9, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 25, 2019, the Custodian responded in writing extending the response time frame through August 22, 2019 to search for responsive records. On August 19, 2019, the Custodian responded in writing denying the Complainant’s OPRA request because no responsive records exist. The Custodian noted that the Registry was migrated to the newly created Radio Frequency Identification (“RFI”) tracking system created and maintained by a “consortium of terminal operators.”

On September 9, 2019, Complainant’s Counsel sent a letter to the Custodian stating that she is aware that the Custodian was referring to the “Port Truck Pass” (“PTP”) system. Counsel asserted that although the Port Authority of New York and New Jersey (“PANYNJ”) retained a third party to operate the PTP system, it was not absolved of obtaining and disclosing records maintained therein. Lagerkvist v. Dep’t of Env’tl. Prot., 2011 N.J. Super. Unpub LEXIS 1912 (July 12, 2011) (citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010)). Counsel stated that the PANYNJ’s own regulations and rules “retains, appropriately, the power and

¹ Represented by Emma Rebhorn, Esq. (New York, NY).

² Represented by Caitlin Sullivan, Esq. (New York, NY).

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.

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responsibility to govern access to its terminals . . . but specifically with regard to drayage trucks.” FMC Schedule No. PA 10; Rules and Regulations, Subrule 34-1150. Counsel thus “reiterated” the subject OPRA request and asked that the Custodian respond within seven (7) business days.

On September 24, 2019, Complainant’s Counsel e-mailed the Custodian advising that he failed to respond to her September 9, 2019 letter. Counsel noted that should the Complainant file a complaint, she would be compelled to also seek an award of attorney’s fees. On September 30, 2019, Assistant General Counsel Stephen Marinko sent Complainant’s Counsel a letter stating that PANYNJ was initiating an internal “administrative appeal” and will decide that appeal within ten (10) business days. On October 2, 2019, Complainant’s Counsel acknowledged that PANYNJ was reviewing its denial of the subject OPRA request.

On October 11, 2019, Freedom of Information Office Bin Bin Chen responded in writing advising that PANYNJ reviewed Complainant Counsel’s “appeal” and was denying same. Mr. Chen noted that PANYNJ did not retain a third-party to manage the PTP system and thus Lagerkvist was not applicable. Mr. Chen stated that although PANYNJ retains full control over its terminals, this control does not require it to also maintain drayage records.

Denial of Access Complaint:

On October 16, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that in 2012, the PANYNJ contracted with Sustainable Terminal Services (“STS”) to operate their PTP system. The Complainant noted that the PTP system appears to be that referred to in the Custodian’s initial denial of access. The Complainant stated that PANYNJ’s Rules and Regulations noted that PTP was a “nonprofit corporation created by marine terminal operators to promote secure, environmentally sensitive, and efficient marine terminal operations in the [PANYNJ].” PAMT FMC No. PA 10; Subrule 34-1072. The Complainant further stated that PANYNJ also acknowledged its obligation “in connection with the [R]egistry” by stating that it “will supplement security programs already in place and all the [PANYNJ] and its terminal operators to know the content of containers coming to and from the port . . .” The Complainant noted that the PANYNJ, consistent with the foregoing obligation, released a list of drayage trucks in response to OPRA requests as recently as 2017. The Complainant contended that it now appears that PANYNJ has decided in the last two (2) years that “these once-public records should be concealed from public view.”

The Complainant contended that the requested list is specifically referred to in PANYNJ’s regulations. PAMT FMC No. PA 10; Subrule 34-1080, Section G. The Complainant argued that PANYNJ’s regulations and rules clearly require the existence of the Registry and that any argument that it can effectively perform its functions without creating and maintaining same is “absurd.” The Complainant argued that to the extent that PANYNJ contracted with a third-party, which it refuted in its second denial of the request, then the Custodian had an obligation to produce the requested records. The Complainant further asserted that PANYNJ retained “ready access” to the Registry but was nonetheless required to obtain and disclose records in the instance that it did not have access.

The Complainant asserted that New Jersey precedent and PANYNJ's authority and obligation regarding drayage trucks, as well as their previous disclosures, prove that the Custodian unlawfully denied access to the Registry sought here. The Complainant thus requested that the Council: 1) order disclosure of the Registry "within two [(2)] business days;" and 2) determine that the Complainant is a prevailing party subject to an award of reasonable attorney's fees.

Statement of Information:⁴

On March 6, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on July 8, 2019. The Custodian certified that his search included forwarding the request to the Port Department, who advised that the Registry "belonged to a third party" and no records existed. The Custodian certified that he responded in writing on July 25, 2019 extending the time frame to respond before ultimately denying access to the OPRA request on August 18, 2019 because no records existed.

The Custodian contended that PANYNJ does not possess the records sought because the "aggregate data of the [Registry] are not kept, held, filed, produced, or reproduced with or for" it. The Custodian argued that instead, the Registry is created and maintained by STS and no legal authority required PANYNJ to ask the third party to obtain same. The Custodian noted that notwithstanding this position, PANYNJ attempted to obtain the responsive Registry data from STS but "such permission was denied."

The Custodian asserted that PANYNJ did not contract the storage and maintenance of the Registry to STS. The Custodian asserted that instead, the Registry was "migrated" to an RFI tracking system created and maintained by STS on behalf of a consortium of terminal operators. The Custodian stated that PANYNJ receives periodic reports "based on some of this data" and can query the Registry individually per its contract with STS. The Custodian argued that its contract with STS supports that PANYNJ had no access to the underlying data.

The Custodian further argued that Burnett, 415 N.J. Super. 506 is not applicable here because STS does not make or maintain the Registry on PANYNJ's behalf. The Custodian contended that PANYNJ did not contract with STS to manage the Registry; rather, PANYNJ chose to no longer maintain it and decided that limited access through the new RFI system was sufficient. The Custodian noted that whether PANYNJ previously maintained and disclosed Registry data in response to an OPRA request does not convert STS's Registry data into a "government record."

The Custodian finally asserted that its 2011 Port of New York and New Jersey Sustainable Services Agreement allowed operator-members to designate certain drayage information as confidential. FMC No. 201210. The Custodian asserted that the agreement requires PANYNJ to contact that operator-members to alert them to a request for disclosure in instances where the drayage data is marked confidential. The Custodian asserted that the operator-members have an opportunity to explain the reasons for the confidential designation, which PANYNJ may decline. The Custodian noted that should PANYNJ decline the explanation, operator-members have an

⁴ On November 6, 2019, this complaint was referred to mediation. On February 25, 2020, this complaint was referred back to the GRC for adjudication.

ability to submit additional information and appeal disclosure pursuant to PANYNJ's freedom of information policy.

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 custodian claimed that records in possession of a third-party contractor executed on behalf of an agency are not subject to access. The Appellate Division reviewed the Law Division's ruling, interpreting Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005) and holding that the defendant did not have to disclose the records responsive to the plaintiff's OPRA request because the records were not in the defendant's possession. The Appellate Division found that the motion judge interpreted Bent, *supra*, too broadly. The Appellate Division held:

We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

[Id. at 517.]

However, in Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014), the complainant sought, among other records, contracts and agreements between an advertising agency under contract with NJ Transit and vendors who contracted with said agency. The Council distinguished the relationship between the advertising agency and NJ Transit, finding that unlike the custodian in Burnett, 415 N.J. Super. 506, NJ Transit was not bound by, nor has any discretion over, contracts made between the advertising agency and client vendors. Hittinger, GRC 2013-324. The terms of the agreement between NJ Transit and the advertising agency provided that the agency accepted full responsibility for the procurement of advertising. Id. at 3. The Council therefore held that NJ Transit was not obligated to obtain responsive records pertaining to agreements and communications between the advertising agency and client vendors. Id. at 7.

At issue before the Council is whether the Custodian had the ability and obligation to obtain the responsive Registry information from STS and disclose it to in response to the subject OPRA request. The Complainant has argued that long after the 2012 launch of the RFI program, PANYNJ disclosed the information sought here in 2017. The Complainant thus disputed that PANYNJ did

not maintain any responsive records and argued that the Custodian had an obligation to obtain the information from the Registry and disclose it. See Lagerkvist, 2011 N.J. Super. Unpub LEXIS 1912. Conversely, the Custodian has argued that the PANYNJ no longer maintained the information because it transferred the Registry to the STS. The Custodian also argued that prior disclosure of the information did not convert the Registry to a “government record” here. Further, the Custodian noted that although the agreement between PANYNJ and STS set forth a process by which the Custodian could obtain responsive records when requested, STS denied him access to the requested Registry information.

Initially, the GRC disagrees with the Complainant that Lagerkvist applies to and controls this case. Lagerkvist involved a third party that was a conglomerate of ten (10) states including New Jersey which the court concluded was a “public agency” under OPRA as an instrumentality of the State. Id. at 11; 25-26. The same cannot be said here because, as noted by the Complainant, the STS is a “nonprofit corporation created by marine terminal operators to promote secure, environmentally sensitive, and efficient marine terminal operations in the [PANYNJ].” PAMT FMC No. PA 10; Subrule 34-1072 (providing that the PTP system is a service provided by the STS). Further, neither the Complainant nor Custodian have asserted that the STS is a “public agency” which is in contrast to Lagerkvist.

In comparing this complaint to both Burnett, 415 N.J. Super. 506 and Hittinger, GRC 2013-234, the GRC is persuaded that the facts here trend towards the former and away from the latter. In support of this conclusion, the GRC first notes that PANYNJ’s September 20, 2012 press release on the RFI initiative frames its agreement with the STS as a partnership wherein they shared the cost of implementing the system.⁵ Further, as the Custodian stated in the SOI, PANYNJ’s agreement with STS sets forth a process by which information possessed by STS can be obtained for disclosure in response to an OPRA request. See FMC No. 201210 at Article VIII(D)-(E). This is direct contradiction with the assertion that PANYNJ did not maintain the requested Registry information and that no legal authority requiring it to obtain such information from a third party existed. Further contradictions exist in the Custodian’s assertion that PANYNJ receives periodic reports containing certain information and can query the Registry for individual records. All of the forgoing taken together supports that the STS is maintaining the Registry for, or on behalf of, PANYNJ and that the Custodian had an obligation to obtain and disclose the responsive data or deny access under a specific lawful basis.

Accordingly, the Custodian may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506. Specifically, the PANYNJ shared control over the Registry through its partnership with the STS and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it the Complainant; or 2) deny access and provide a specific lawful basis for said denial.

Knowing & Willful

⁵ https://www.panynj.gov/port-authority/en/press-room/press-release-archives/2012_press_releases/port_authority_partnerswithsustainableterminalservicestobringrfi.html (accessed April 8, 2021)

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 may have unlawfully denied access to the Registry sought by the Complainant. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Specifically, the Port Authority of New York & New Jersey shared control over the Registry through its partnership with the Sustainable Terminal Services, Inc. and was required to obtain and disclose the requested data or provide a specific lawful basis for non-disclosure. Thus, the Custodian shall obtain the responsive data and either 1) disclose it the Complainant; or 2) deny access and provide a specific lawful basis for said denial.
2. **The Custodian shall comply with conclusion No. 1 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 shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

⁶ 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.

⁷ "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."

⁸ 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.

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April 20, 2021