



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 25, 2023 Government Records Council Meeting

John R. Carty, Esq.
Complainant

Complaint No. 2021-248

v.

Florence Township (Burlington)
Custodian of Record

At the April 25, 2023 public meeting, the Government Records Council (“Council”) considered the April 18, 2023 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 responsive appraisal was exempt from disclosure under the “advantage to competitors and bidders” exemption because the evidence of record supports that, at the time of the Complainant’s OPRA request, disclosure would have been injurious to the Township’s bargaining position. N.J.S.A. 47:1A-1.1. Thus, the Custodian lawfully denied access to the appraisal at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-6.
2. The Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA based on the fact that the courts have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not an attorney who is the plaintiff representing himself. See Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006); Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2005-71 (April 2006).

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of April 2023

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 1, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2023 Council Meeting**

**John R. Carty, Esq.¹
Complainant**

GRC Complaint No. 2021-248

v.

**Florence Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of the appraisal for Carty Farm obtained from January 1, 2020 to September 23, 2021.³

Custodian of Record: Nancy L. Erlston
Request Received by Custodian: September 23, 2021
Response Made by Custodian: October 4, 2021
GRC Complaint Received: October 12, 2021

Background⁴

Request and Response:

On September 23, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 4, 2021, the Custodian responded in writing denying access to the subject OPRA request under the “advantage to competitors or bidders” exemption. N.J.S.A. 47:1A-1.1; Murray v. Twp. of Warren, GRC Complaint No. 2006-196 (February 2008); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-308 (June 2014).

On October 5, 2021, the Complainant e-mailed Kelly Grant, Esq. of Malamut & Associates, LLC., asking her to “confirm promptly that the 2 elements of [Kohn, GRC 2013-308] required applied when craft[ing]” the response:

1. That Florence Township (“Township”) has decided “since September 22 to bid and compete for ownership” of the property; and

¹ No legal representation listed on record.

² Represented by Robert Wright, Esq., of Malamut & Associates, LLC. (Cherry Hill, NJ).

³ The Complainant sought additional records that he does not identify as at issue in this complaint.

⁴ 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.

2. Identify the entities that are “bidders and competitors vying with the [T]ownship for ownership of the” property.

The Complainant stated that without the above answers, he would file a Denial of Access Complaint. The Complainant urged the Township to address the above to “save” the Township from prevailing party attorney’s fees and assessment of a civil penalty for a knowing and willful violation. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-11.

Denial of Access Complaint:

On October 12, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that his OPRA request resulted from conversations he had with the Township about purchasing his property that began in 2020. The Complainant stated that in July 2021, the Township “engaged” Sockler Realty Services to perform an appraisal of the property. The Complainant stated that he attempted to obtain the appraisal from both Sockler and the Township without success, which led to him submitting the instant OPRA request.

The Complainant contended that the Custodian unlawfully denied access to the appraisal because she failed to meet the required elements set forth in Kohn, GRC 2013-208. The Complainant further contended that the Custodian knowingly and willfully denied access to the appraisal. The Complainant requested that the GRC order disclosure and award him prevailing party attorney’s fees.

Statement of Information:

On October 21, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 23, 2021. The Custodian certified that she contacted Custodian’s Counsel for advice on whether the appraisal was exempt from disclosure. The Custodian certified that upon receiving the advice, she responded in writing on October 4, 2021 denying access to the responsive appraisal under the “advantage to competitors or bidders” exemption.

The Custodian certified that in 2021, the Township commissioned Sockler to appraise Carty Farm for purposes of potentially acquiring the property. The Custodian affirmed that on August 17, 2021, the Township received the completed appraisal, and the Complainant began asking for it. The Custodian noted that on September 22, 2021, in response to the Complainant’s inquiries, the Township advised him that the Council had not yet determined whether it would make an offer on Carty Farm. The Custodian also noted that two (2) warehouse developers contacted the Township with interest in the property and, based upon information and belief, the Complainant engaged a real estate broker to sell the property. The Custodian affirmed that on October 4, 2021, after denying access to the OPRA request, the Township Council met in closed session to discuss, among other topics, the Carty Farm property. The Custodian further affirmed that on October 13, 2021, after the filing of this complaint, the Township Council again entered into closed session to discuss the Carty Farm property.

The Custodian contended that the Council has held that appraisals are exempt from disclosure under the “advantage” exemption. The Custodian noted that in Murray, GRC 2006-196, counsel for a property owner sought access to the appraisal of that property, which was done in connection with potential development by a township. The Custodian stated that the custodian denied access to it and the Council agreed, holding that the appraisal was exempt under the “advantage” exemption. Id. at 7. The Custodian noted that the Council reasoned that disclosure could hinder the township’s position and could be used to start a bidding war. Id. at 8; see also Kohn, GRC 2013-208.

The Custodian contended that the facts in Murray are on point with the facts here. The Custodian argued that disclosure of the appraisal would provide the public with the negotiation range and could ignite a bidding war with private companies. The Custodian further argued that the Complainant’s allegation that no other bidders exist is contrary to the third-party contact with the Township and the Complainant’s assumed hiring of a broker to facilitate a sale. The Custodian contended that although the Township has yet to decide on making a formal offer to purchase the property, it was appropriate to characterize the Township as a competing party. The Custodian thus argued that disclosure would greatly hinder the Township’s negotiating position.

The Custodian thus contended that she lawfully denied access to the responsive appraisal. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian also argued that the Complainant is not entitled to an award of prevailing party attorney’s fees because he is neither a prevailing party or licensed to practice law in New Jersey.

Additional Submissions:

On October 24, 2021, the Complainant e-mailed the GRC a response to the SOI. Therein, the Complainant contended that the Township has yet to determine whether to purchase Carty Farm although possessing the appraisal for over three (3) months. The Complainant posited that the delay was because the appraisal was higher than the Township was willing to pay for the property. The Complainant further argued that the Township’s October 13, 2021 closed session discussion likely resulted in the Council’s vote to ask Burlington County (“County”) to add Carty Farm to its list of properties to consider for preservation. The Complainant argued that this vote, coupled with the Township’s longstanding position of preserving farmland and indication that it would not rezone properties to allow for warehouse development, has effectively eliminated any private warehouse developers from the pool of competitors. The Complainant also argued that additional evidence of the lack of competitors exists in the Township’s refusal to expand public water or sewer to Carty Farm, which any developer would require. The Complainant also confirmed that he hired a broker; however, no purchase offers have been submitted or are expected. The Complainant thus contended that no competitors or bidders exist.

The Complainant finally noted that he may receive an award of prevailing party attorney’s fees if he prevails in this complaint. The Complainant thus contended that the Custodian’s arguments against a fee award are unsupported.

On November 10, 2021, the Complainant e-mailed the GRC advising that the Township had yet to make any offer for Carty Farm. The Complainant reiterated that the Township added

Carty Farm to its “Burlington County Farmland Preservation Program” (“Program”) acquisition targeting list on October 13, 2021, which was prior to submission of the SOI. The Complainant thus argued that the Township’s actions prove that it has no intent to purchase the property. On November 21, 2021, the Complainant e-mailed the GRC again advising that he has not received an offer from the Township.

On February 3, 2022, the Complainant e-mailed the GRC advising that the Township still had not submitted an offer. The Complainant noted that the Carty Farm listing was set to expire after a year without an offer, and the State Agriculture Development Committee approved his application to preserve the property. The Complainant noted that the County also agreed to preserve the Farm. The Complainant thus contended that the GRC should order the Township should disclose the appraisal without any additional “false excuse[s]” and award him “legal fees as sanctions for the damages” related to their denial and this complaint.

On March 30, 2022, the Complainant e-mailed the GRC advising that the Township had not yet submitted a bid and he has not garnered any additional bids from third parties. On July 24, 2022, the Complainant e-mailed the Custodian’s Counsel again seeking disclosure of the appraisal, noting that no parties, including the Township, made a bid on Carty Farm. The Complainant asked whether he should file another OPRA request and asserted that denying a new request would be inapposite to Kohn, GRC 2013-208. On January 13, 2023, the Complainant e-mailed the GRC again advising that he had yet to receive a bid on the property from the Township or any other party.

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.

OPRA provides that the definition of a government record shall not include “. . . information which, if disclosed, would give an advantage to competitors or bidders . . .” N.J.S.A. 47:1A-1.1 (emphasis added). In Murray, GRC 2006-196, the complainant sought, among other records, “. . . the appraisal report or reports . . . regarding the Facey property . . .” The custodian responded denying access to the record under N.J.S.A. 10:4-12(b)(5) of the Open Public Meetings Act,⁵ and argued in the SOI that disclosure of the records would also give an advantage to bidders and competitors. The Council determined that the custodian lawfully denied access to the responsive appraisals under N.J.S.A. 47:1A-1.1, reasoning that:

⁵ N.J.S.A. 10:4-12(b)(5) states: “[a] public body may exclude the public only from that portion of a meeting at which the public body discusses . . . [a]ny matter involving the purchase, lease or acquisition of real property with public funds . . . where it could adversely affect the public interest if discussions of such matters were disclosed.”

[A]t the time of the request, the Township was negotiating the purchase of property belonging to a client of the Complainant. The records responsive to this request represent a part of the negotiation phase that gives a party interested in buying or selling a property a level of bargaining power.

[Id. at 7-8. See also Kohn, GRC 2013-208.]

However, in Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354 (App. Div. 2010), plaintiff sought access to various records to include property appraisals of a large parcel of land that defendants obtained as part of their exploration of acquiring same for the Green Acres Program. Defendants denied access to the appraisals, which were completed eleven (11) months prior to the OPRA request, under multiple exemptions and plaintiff filed a verified complaint in New Jersey Superior Court. Tractenberg v. Twp. of W. Orange, Docket No. L-9535-07. Following the trial court's decision to disclose the appraisals with redactions, plaintiff appealed and defendant cross-appealed. Defendants included in their cross appeal the argument that the appraisals were exempt under the "advantage" exemption based on Murray. Tractenberg, 416 N.J. Super. at 377-378. The Appellate Division held that the exemption did not apply and that the facts there were distinguishable from Murray:

[I]t cannot be said that the competitive advantage exemption clearly applies to these facts. Unlike in Murray, the Township has not initiated negotiations with WEHI to purchase the Highlands, nor have they demonstrated that such negotiations are probable any time in the near future. The Township has held the appraisals for over two years, and yet the record indicates that no decision regarding the Highlands has been made. To contend that the mere potential for future negotiations, without a strong showing that negotiations are probable, satisfies the OPRA competitive advantage exemption "subverts the broad reading of OPRA as intended by the Legislature." [Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535, 874 A.2d 1064 (2005)]. We therefore reject defendant's argument that OPRA's competitive advantage exemption applies.

[Id. at 379.]

The court ultimately affirmed in part, reversed in part, and remanded for an order to release unredacted copies of the appraisal to plaintiff.

Here, the Complainant sought access to the appraisal received by the Township on his property, to which the Custodian denied access under the "advantage" exemption. N.J.S.A. 47:1A-1.1. This complaint ensued, wherein the Complainant argued that that the Custodian failed to meet the standards set forth in Kohn, GRC 2013-208. The Complainant requested that the GRC order disclosure of the appraisal and award him attorney's fees. In the SOI, the Custodian maintained her position that the requested appraisal was exempt from disclosure under OPRA. The Custodian argued that although the Township had not yet decided on whether to make an offer on the property, competition existed in the form of warehouse developers that contacted Township and the Complainant hired a broker. The Custodian thus argued that the facts here were similar to

Murray, GRC 2006-196 and that the GRC should find that she lawfully denied access to the appraisal.

Following submission of the SOI, and over the span of about fifteen (15) months, the Complainant sent multiple e-mails to the GRC and Township wherein he noted that neither the Township nor any other parties made an offer on Carty Farm. However, the Complainant did note in one e-mail that the Township asked the County for inclusion of the property on the Program acquisition target list in an October 13, 2021 meeting. The Complainant also noted in another e-mail that he applied with the County to enter his property into the Program.⁶

The GRC finds the relevant case on the issue of appraisal disclosure to be distinguishable from the facts present in the instant complaint. Specifically, both Murray, GRC 2006-196 and Kohn, GRC 2013-208 involved appraisals that were part of an active negotiation between the respondents and property owners. Further, the Tractenberg, 416 N.J. Super. 354 court found compelling that defendants possessed the appraisal for “over two years” and had failed to either initiate negotiations for the property or indicate that they planned to do so. The GRC notes that plaintiffs in Tractenberg sought the appraisal eleven (11) months after it was received by defendants. Thus, the facts present here, when compared to the above, create a novel issue: prior case law may be instructive but not directly on point.

When considering all the facts and evidence of record, the GRC is persuaded that at the time of the Complainant’s OPRA request, the Custodian’s denial of access under the “advantage” exemption was lawful. First and foremost, the Township took steps to discuss the potential for purchasing the property in two (2) executive session meetings concurrent to the submission of the subject OPRA request and subsequent complaint. These discussions also occurred within two (2) months after receipt of the requested appraisal. Second, the Township averred and the Complainant confirmed that he hired a broker to facilitate a sale. Third, other interested parties in the form of warehouse developers were in contact with the Township during that time. Thus, the GRC finds these facts contrary to the Complainant’s assertion that no competition existed at that time. Thus, it follows that disclosure of the appraisal at that stage, while absent any active negotiations, would have significantly disadvantaged the Township’s bargaining power. Further, the GRC does not find the Complainant’s October 24, 2021 arguments regarding steps the City took or typically took to limit certain types of development in the Township as sufficient proof that no other competitors could have existed.

To the above, Murray and Kohn presents informed guidance due to the short amount of time between receipt of the appraisal, submission of the OPRA request, the Township’s internal discussions of the property, contact from interested parties, and the Complainant’s hiring of a broker to facilitate a sale. While the Township was not engaged in active negotiations with the Complainant during that time, it is reasonable to arrive at the conclusion that requiring disclosure of the appraisal at that early phase of the Township’s review process would have been injurious to their position in potential negotiations.

⁶ The Township subsequently offered official support for the property’s acceptance into the program on February 2, 2022 through Resolution No. 2022-61.

Further, Tractenberg is distinguishable from the facts here because the OPRA request at issue there was submitted almost a year after the appraisal was received with no action by defendants. Further, there was no evidence to support that defendants intended to use the appraisal in negotiations. Here, the Complainant has e-mailed the GRC multiple times during the pendency of this complaint asserting that the Township never made an offer on the property. This more closely mirrors a major factor on which the Tractenberg court rejected defendants' denial. However, the GRC cannot ignore the timing of the Township's receipt of the appraisal and actions taken in close proximity to the submission of the OPRA request and this complaint in the ensuing months. To say now with the benefit of hindsight that the Township unlawfully denied access to the responsive appraisal at that time sets a dangerous precedent of requiring disclosure of appraisals going forward simply because a government agency failed to enter negotiations within days of receiving same.

Accordingly, the responsive appraisal was exempt from disclosure under the "advantage to competitors and bidders" exemption because the evidence of record supports that, at the time of the Complainant's OPRA request, disclosure would have been injurious to the Township's bargaining position. N.J.S.A. 47:1A-1.1. Thus, the Custodian lawfully denied access to the appraisal at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6.

The GRC notes that it will not address the knowing and willful issue here as unnecessary because no unlawful denial of access has occurred.

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.

The more complicated aspect of this issue is whether the Complainant would qualify for reasonable attorney's fees. According to the New Jersey Supreme Court, the New Jersey Legislature has promulgated a "substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for the prevailing party.*" (emphasis added) New Jerseyans For A Death

Penalty Moratorium v. N.J. Dep't of Corrections and Devon Brown, 182 N.J. 628 (2005) (decision without a published opinion) (quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for incorporating a fee-shifting measure: to ensure “that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.” New Jerseyans (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)). Thus, the courts of the State have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself.

OPRA provides that a person who is denied access to a government record may either file a proceeding in Superior Court or file action with the GRC. N.J.S.A. 47:1A-6. In Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the requestor was an attorney requesting records and did not identify that he was representing a client. The Council held that “[b]ased on the fact that the courts of the state have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff *not an attorney who is the plaintiff representing himself*, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA.” (Emphasis added.) See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2005-71 (April 2006).

Here, the Complainant argued that he should be awarded prevailing party attorney’s fees. The Custodian has argued that the Complainant should not be awarded fees because she lawfully denied access to the appraisal and the Complainant was not a licensed attorney in New Jersey. Upon review and application of Boggia, the Complainant, who identified himself as an attorney “filing this complaint for [his] family,” is not eligible for attorney’s fees.⁷ The Complainant submitted the OPRA request on his own behalf and sought records related to his own property. Thus, the Complainant cannot be a prevailing party entitled to a fee award because there is no evidence that he has been hired by a client, but is instead representing himself, his own submission of an OPRA request, and his own personal interest in the appraisal.

Therefore, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA based on the fact that the courts have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not an attorney who is the plaintiff representing himself. See Boggia, GRC 2005-36; Pitts, GRC 2005-71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The responsive appraisal was exempt from disclosure under the “advantage to competitors and bidders” exemption because the evidence of record supports that, at the time of the Complainant’s OPRA request, disclosure would have been injurious to

⁷ The GRC notes that even if the Complainant were eligible for fees, he has failed to prevail because his complaint did not bring about a change in the Custodian’s conduct. Teeters, 387 N.J. Super. 423. However, the GRC need not conduct a more complete analysis on the forgoing based on the eligibility issue.

the Township's bargaining position. N.J.S.A. 47:1A-1.1. Thus, the Custodian lawfully denied access to the appraisal at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6.

2. The Complainant is not entitled to reasonable attorney's fees pursuant to OPRA based on the fact that the courts have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not an attorney who is the plaintiff representing himself. See Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006); Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2005-71 (April 2006).

Prepared By: Frank F. Caruso
Executive Director

April 18, 2023