

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

CONOR CRIMMINS	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No.: 2013 CA 4225 B
	:	
DISTRICT OF COLUMBIA ADVISORY NEIGHBORHOOD COMMISSION 5B	:	
	:	
Defendant.	:	

ORDER

Before the Court are four motions which can be resolved together: Plaintiff’s Motion to Show Cause and for Sanctions filed on November 21, 2014; Defendant District of Columbia Advisory Neighborhood Commission 5B’s Motion for Relief from Order filed January 29, 2014; Plaintiff’s Rule 11 Motion filed February 19, 2014; and Plaintiff’s Motion for Costs and Fees, filed February 18, 2014. Each motion was vigorously opposed by the non-moving party. The Court held an evidentiary hearing on March 19, 2014, on the Motion to Show Cause, and heard testimony from Advisory Neighborhood Commission (“ANC”) 5B Vice Chairperson Carolyn Steptoe and Chief Information Officer of the Office of the Attorney General for the District of Columbia (“OAG”) Lawrence Nelson.

Background

The Court will not rehash the factual background of the case which is set forth in the Court’s Order of November 1, 2014. In its Order, the Court determined that a digital recording made by Commissioner Carolyn Steptoe during an ANC Single Member District (“SMD”)

5B04¹ meeting was a public record, and was therefore subject to disclosure under FOIA. Defendant ANC 5B claimed that the recording was not within its custody and control—rather it was in the physical possession of ANC 5B Vice Chairperson Carolyn Steptoe who created it using her privately-owned recording device. The Court found that

Defendant ANC 5B is a statutorily created entity which is part of the government of the District of Columbia. Commissioner Carolyn Steptoe is the Vice Chairperson of ANC 5B. In her official capacity as Commissioner of SMD 5B04 she held a public meeting concerning issues important to the people of her district. She recorded that meeting as required under the law and she referred to the recording in the exercise of her official duties. The law requires that she make that recording available to the public

The Court ordered ANC 5B Vice Chairperson Carolyn Steptoe to make the audio recording of the April 27, 2013, SMD 5B04 meeting available to the Plaintiff for review and reproduction. Shortly after the Court ordered that the digital recording be disclosed to Plaintiff, the Court learned that the recording no longer existed and very little information was provided about what became of the recording. Plaintiff suspected that Commissioner Steptoe destroyed the recording in order to avoid complying with the Court's order. Plaintiff filed his Motion to Show Cause and for Sanctions shortly thereafter. Counsel for Defendant attempted to determine what had happened to the recording by submitting the digital recorder to Lawrence Nelson, the Chief Information Officer of the OAG. Mr. Nelson confirmed that the recording was not on the digital recorder and could not be retrieved, but he could not state what happened to it. The OAG filed a Motion for Relief from the Court's order essentially requesting that ANC 5B be excused from complying with the Court's order because the recording could not be located. The OAG offered no explanation or theory as to why the recording was missing from the recording device. On

¹ SMD 5B04 represents residents of the geographic area bordered by 9th, 13th and Monroe Streets, and Rhode Island Avenue in Northeast D.C. Single Member Districts are intended to represent approximately 2000 people. D.C. Code § 1-309.03.

March 19, 2014, the Court held an evidentiary hearing to find out what happened to the recording. Plaintiff subpoenaed Commissioner Carolyn Steptoe and Lawrence Nelson to testify.

During the hearing, Commissioner Carolyn Steptoe testified that she purchased the recording device upon becoming an ANC Commissioner in January 2010; she kept the recorder in her possession and did not share the device with others. The recorder is an RCA VR5220 digital voice recorder, and it has 200 hours of recording capacity. Commissioner Steptoe stated that she recorded numerous hearings over the past four years and never downloaded or deleted any of the files.

According to Commissioner Steptoe, she received an email from the OAG in late summer advising her to preserve the recording in its original format. In early November, the OAG requested that she provide a copy of the recording to Plaintiff pursuant to the Court's November 1, 2014, Order. Ms. Steptoe does not recall receiving a copy of the Court's November 1, 2014, Order; however, she generally recalls that there was an order. She stated that the recording was not given to Plaintiff because it was "unavailable" and she did not know why. She claimed that much of the content on the recorder was "no longer on there." "Nothing I did unfortunately obliterated anything but, when I was asked to produce it, that's when I decided to go back and try to find it and it wasn't there." Ms. Steptoe further testified that she did not know why the recording was not on the device: "I did nothing to it, I was required and asked by OAG to retain it in its original format which meant nothing to me other than leave it as it is." "There is nothing I did consciously or unconsciously, deliberately or inadvertently to do anything to the recording." She never made a copy, nor did anyone else, and she stated that she never lost or lent the recorder to anybody.

The Court permitted Plaintiff access to the recorder and to see if an expert could retrieve the deleted file or discern what happened to it. On April 2, 2014, the Court received a report from J. Christopher Racich, a certified computer examiner and an adjunct professor of law at American University. According to Professor Racich, upon inspection, Commissioner Steptoe's recorder was fully functioning, there was no evidence of file corruption, and he was able to determine that the recording of the April 27, 2013, meeting had been manually deleted. Mr. Racich could not give the date that the deletion occurred. Mr. Racich was, however, able to recover the missing file, which Plaintiff now has in his possession.

Based upon this evidence, the Court concludes that more likely than not, Commissioner Steptoe deleted the file subject to the FOIA request in order to frustrate attempts to obtain it. What the Court cannot determine is whether the deletion occurred after the OAG asked Commissioner Steptoe to preserve the tape in late summer, or after the Court issued its Order on November 1, 2014. In any case, Commissioner Steptoe's behavior is regrettable and possibly criminal under D.C. Code § 2-537(d). To make matters worse, Commissioner Steptoe testified falsely under oath about this matter. Her testimony was confusing and contradictory. Commissioner Steptoe acknowledged her suspicion that "FOIA requests tend to be pretextual strategies by person/entities seeking a leg up and/or expose." Her contumacious behavior stems from her refusal to provide D.C. residents with an audio recording of an ANC SMD 5B04 meeting that she held regarding an issue of interest to many people in the neighborhood. Ironically, Commissioner Steptoe stated that she wished the recording could be found because the recording would prove she acted appropriately during the hearing.²

² Plaintiff indicated that he sought to obtain a copy of the audio recording to determine whether the meeting was terminated early due to an unruly crowd or due to Commissioner Steptoe's own behavior. Plaintiff represented to Court that the information contained in the recording may be used to mount a political challenge to Commissioner Steptoe.

Motion for Relief from Order

Defendant's Motion for Relief from Order argued that because the recording could not be produced due to its destruction, Defendant could not comply with the Court's November 1, 2014, Order to turn the recording over to Plaintiff and requested to be excused from doing so. In light of Mr. Racich's success in retrieving the recording and providing a copy to Plaintiff, Defendant's Motion for Relief from the Order is now moot. Defendant does not need relief from the Order as previously thought necessary and has now complied with the Order, albeit involuntarily. Thus, the Court denies the motion as moot.

Rule 11 Motion

The Court also denies Plaintiff's Rule 11 Motion. Plaintiff argues that "Defendant's Motion for Reconsideration is intended to harass Plaintiff" and cause unnecessary delay and undue cost of the litigation. Pl. R. 11 Mot. at 1; *see* Super. Ct. Civ. R. 11(b)(1). Plaintiff states that since the recording was destroyed, the issue is moot and any further attempts to re-litigate it are merely harassment. However, the issue was not moot as the recording was recovered and produced. Moreover, the Court believes that defense counsel filed the motion acting as a zealous advocate for her client under the belief that there was a valid argument for the Court to consider. Defense counsel's filings and appearances before the Court have been very professional and competent and the Court does not believe her intent was to harass defendant or the Court; therefore, the Court denies Plaintiff's motion.

Motion to Show Cause and for Sanctions

The Court turns to the Plaintiff's Motion to Show Cause and for Sanctions. The Court held a show cause hearing on March 19, 2014, to determine what happened to the recording, at which time Commissioner Steptoe stated she did not erase or otherwise dispose of the recording. The Plaintiff has provided an affidavit by an expert who reports that the recording was manually

deleted. Defendant has not challenged this finding. Therefore, based upon the record before the Court, it is clear that the recording was manually deleted by Commissioner Steptoe, as she testified that she never lent the recording to anyone. As a sanction, the Court will order ANC 5B to bear the costs of retrieving the file from Commissioner Steptoe's recording device. The Court will not impose criminal sanctions upon Commissioner Steptoe. Instead, the Court will refer the case to the OAG and the U.S. Attorney's Office for potential prosecution of Commissioner Steptoe's perjury and destruction of the recording. Thus, the Court grants the Motion to Show Cause and for Sanctions.

Motion for Costs and Fees

Finally, the Court addresses Plaintiff's Motion for Costs and Fees. Pursuant to D.C. Code § 2-537(c), a party prevailing in his FOIA request may be awarded reasonable attorneys fees and costs of litigation. *See Fraternal Order of Police, Metro. Police Dep't. Labor Comm. v. Dist. of Columbia*, 52 A.3d 822 (D.C. 2012). The Court proceeds under the two-step analysis used to determine whether awarding attorney's fees is appropriate. First, the Court must hold that Plaintiff is eligible for the award, and then find whether he is entitled to it. *Id.* at 828-29. A party is eligible for a fee award if that party prevails in whole or in part. *Id.* at 827. A party prevails if he shows a "causal nexus . . . between the action [brought in court] and the agency's surrender of the information," which is evidenced by the production of documents after the civil action is initiated. *McReady v. Dep't of Consumer & Regulatory Affairs*, 618 A.2d 609, 616 (D.C. 2002) (internal quotation marks omitted); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979). It follows that Plaintiff is therefore eligible for costs and fees, as the Court ordered Defendant to turn over the requested documents and the recordings in response to Plaintiff's Complaint.

Next, the Court evaluates Plaintiff's entitlement to costs and fees under a four-factor framework, considering "(1) the public benefit derived from the case, (2) the commercial benefit to the plaintiff, (3) the nature of the plaintiff's interest in the records, (4) and the reasonableness of the agency's withholding." *Fraternal Order of Police*, 52 A.3d at 829. Looking at these factors as a whole, the Court finds that Plaintiff is entitled to reasonable costs and fees. Plaintiff requested the information to gain a better understanding of ANC 5B's reasoning in its decision making. The Court agrees with Plaintiff that his interest in understanding why ANC 5B opposed the restaurant in the Brookland neighborhood is public-interest oriented; Plaintiff does not wish to use the information for his own economic benefit or for any other commercial gain. Finally, the Court finds that ANC 5B had no colorable argument to withhold the denial of Plaintiff's request. *See id.* at 835; November 1, 2013 Order. The Court rejects Defendant's argument that Plaintiff seeks an award from the District of Columbia, an incorrect party. Def. Opp. at 3. Plaintiff correctly explains that the District is the correct party, as ANC 5B is *non sui juris* in accordance with D.C. Code § 1-309.10(g), which forbids neighborhood commissions from initiating lawsuits. *See Braxton v. Nat'l Capital Housing Auth.*, 396 A.2d 215, 216 (D.C. 1978). Thus, the Court finds that the Plaintiff succeeds under the two-step analysis and is eligible for and entitled to reasonable attorney's fees and costs.

Conclusion

Wherefore, it is on this 15th day of April, 2014, hereby

ORDERED that Defendant's Motion for Relief from the Order is DENIED AS MOOT; and it is further

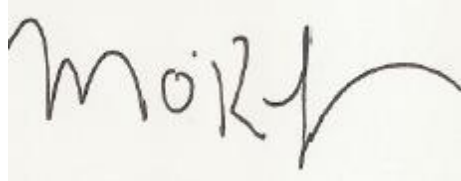
ORDERED that Plaintiff's Rule 11 Motion for Sanction is DENIED; and it is further

ORDERED that Plaintiff's Motion for Show Cause and for Sanctions is GRANTED and will require ANC 5B to reimburse Plaintiff for the costs associated³ with retrieving the deleted audio file from Ms. Steptoe's digital recorder; and it is further

ORDERED that Plaintiff's Motion for Costs and Fees is GRANTED; and it is further

ORDERED that Plaintiff is to serve and file a praecipe as soon as practicable after the total costs and fees incurred by Plaintiff are known, and in sufficient detail to allow this Court to ascertain which costs and fees were reasonably incurred.

SO ORDERED.

A handwritten signature in black ink on a light-colored background. The signature appears to read "M O'K E E F E" with a stylized flourish at the end.

Michael O'Keefe
Superior Court Judge

Copies to counsel of record

³ Plaintiff is instructed to submit the costs associated with the recovery of the audio file to the court for approval.