State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 30, 2013 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2011-323

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the April 23, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that that due to the contested facts present in this complaint, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law to determine whether there has been an unlawful denial of access. N.J.S.A. 47:1A-7(e). Moreover, the Office of Administrative Law shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances and whether the Complainant is entitled to an award of prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April, 2013

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, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2011-323**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: A copy of the CDs delivered to the Custodian in compliance with paragraph No. 6 of the Complainant's settlement agreement with the Borough of South Bound Brook ("Borough").

Request Made: June 21, 2011
Response Made: June 28, 2011
GRC Complaint Filed: October 14, 2011[3]

Background

At its February 26, 2013 public meeting, the Council considered the January 23, 2013 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 at least the two (2) CDs that he identified in the Statement of Information were received by the Borough. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant. However, if said CDs no longer exist or were destroyed, the Custodian must certify to this fact. Additionally, the Custodian must either provide the three (3) CDs he confirmed he received in the October 22, 2007 e-mail or certify that same no longer exist or were destroyed. The Custodian must include supporting documentation if any records were destroyed.

2. **The Custodian shall comply with Item 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**

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Mr. Luers entered his appearance in this matter on December 1, 2011.
[2] Donald E. Kazar, Custodian of Records. Represented by Francesco Taddeo, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 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.

On February 27, 2013, the Council distributed its Interim Order to all parties. On March 1, 2013, the Custodian requested an extension of time until March 12, 2013, to respond to the Council's Interim Order. On March 4, 2013, the GRC granted said request.

On March 11, 2013, the Custodian responded to the Council's Interim Order. In said response, the Custodian certifies that he enclosed a transmittal letter to the Complainant attaching the two (2) CDs ordered to be disclosed to the Complainant.

Further, the Custodian certifies that he does not recall the Complainant handing him any CDs and that he did not locate any CDs with the Complainant's name on them. The Custodian certifies that the Complainant references two (2) CDs in the possession of Custodian's Counsel that were listed in the discovery answers to unrelated litigation. The Custodian further certifies that no proof was ever provided that the Complainant gave any CDs to him. The Custodian certifies that the Complainant never provided any CDs, but that the GRC should note that the Complainant is requesting his own records he claims he provided to the Borough.

The Custodian certifies that he does not recall receiving the three (3) CDs identified in his October 22, 2007 e-mail and further certifies that the CDs no longer exist. The Custodian also certifies that he does not recall that the CDs were destroyed.

On April 3, 2013, the Complainant sent a letter to the GRC in which he disputes the Custodian's compliance. The Complainant contends that this complaint warrants a live hearing to determine whether the Custodian knowingly and willfully violated OPRA. The Complainant contends that the Custodian committed perjury by providing false statements in his certification. N.J.S.A. 2C:28-1.[6]

The Complainant asserts that contrary to the Custodian's certified confirmation, the Complainant provided e-mails from 2007 proving that the Custodian received three (3) CDs and that these CDs are the only records at issue. The Complainant further contends that the evidence

---

[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 records 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.

[6] The Complainant notes that in at least six (6) complaints before the GRC, he has argued that the GRC should apply the principle of "false in one, false in all" found in State v. Ernst, 32 N.J. 567, 583 (1960).

indicates that the Custodian withheld one (1) CD relating to him from the Borough and Council and continues to deny its existence even though an October 24, 2007 e-mail refutes this fact and the Custodian has no evidence the CD was destroyed legally. The Complainant reiterates that the Custodian should be forced to give testimony regarding his apparent refusal to disclose the CD relating to him.

Analysis

Compliance

At its February 26, 2013 meeting, the Council determined that:

> "… the Custodian must provide [CDs] to the Complainant. However, if said CDs no longer exist or were destroyed, the Custodian must certify to this fact. Additionally, the Custodian must either provide the three (3) CDs he confirmed he received in the October 22, 2007 e-mail or certify that same no longer exist or were destroyed. The Custodian must include supporting documentation … **The Custodian shall comply … 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**" (Footnotes omitted).

On February 27, 2013, the Council disseminated its Order to the parties. Thus, the Custodian's response was due by close of business on March 5, 2013. On March 1, 2013, the Custodian sought an extension of time to comply with the Council's Order. The GRC granted the Custodian said extension until March 12, 2013.

On March 11, 2013, the Custodian submitted certified confirmation of compliance that he was forwarding the responsive CDs to the Complainant. Additionally, the Custodian certified he did not recall receiving any CDs, no evidence exists in the record that the Complainant provided CDs to the Custodian, and no CDs as referenced in the October 22, 2007 e-mail exist.

On April 3, 2013, the Complainant submitted a letter refuting the Custodian's certification. The Complainant noted that he provided proof that the Custodian acknowledged receipt of the CDs at issue to include the CD relating to the Custodian. *See* E-mail from the Custodian to the Complainant dated October 24, 2007. The Complainant further contended that Custodian should be forced to give testimony regarding his apparent refusal to disclose the CD relating to him.

OPRA states that if the GRC "… is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [("APA")]." N.J.S.A. 47:1A-7(e).

The evidence of record in the instant complaint indicates that there are contested facts present. Specifically, the Custodian certified in his compliance that the Borough never received the responsive records; yet, he then certifies that he provided two (2) CDs pursuant to the Council's Order. The Custodian's certified statements are similar to those in the Statement of Information, where the Custodian certifies that the Complainant never provided CDs to the Borough as part of extent litigation, but then certifies that two (2) CDs were provided as part of the same litigation.

Further, the Custodian certified in his compliance that the record provided no evidence corroborating that he ever received any CDs. However, he confirmed receipt of three (3) CDs in the October 24, 2007 e-mail, which the Complainant provided to the GRC in a letter dated February 7, 2012. The GRC notes that significant time has passed since October 2007; however, the e-mail is clear evidence that the Custodian did receive the CDs. Additionally, the Custodian managed to provide two (2) CDs even after certifying that he never received any CDs.

Therefore, due to the contested facts present in this complaint, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law ("OAL") to determine whether there has been an unlawful denial of access. N.J.S.A. 47:1A-7(e). Moreover, the OAL shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances and whether the Complainant is entitled to an award of prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that due to the contested facts present in this complaint, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law to determine whether there has been an unlawful denial of access. N.J.S.A. 47:1A-7(e). Moreover, the Office of Administrative Law shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances and whether the Complainant is entitled to an award of prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2011-323

At the February 26, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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 may have unlawfully denied access to at least the two (2) CDs that he identified in the Statement of Information were received by the Borough. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant. However, if said CDs no longer exist or were destroyed, the Custodian must certify to this fact. Additionally, the Custodian must either provide the three (3) CDs he confirmed he received in the October 22, 2007 e-mail or certify that same no longer exist or were destroyed. The Custodian must include supporting documentation if any records were destroyed.

2. **The Custodian shall comply with Item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2]**

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.

[1] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
[2] Satisfactory compliance requires that the Custodian deliver the records 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.

Interim Order Rendered by the
Government Records Council
On The 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2011-323**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: A copy of the CDs delivered to the Custodian in compliance with paragraph No. 6 of the Complainant's settlement agreement with the Borough of South Bound Brook ("Borough").

Request Made: June 21, 2011
Response Made: June 28, 2011
Custodian: Donald E. Kazar
GRC Complaint Filed: October 14, 2011[3]

Background

June 21, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an unofficial OPRA request form. The Complainant indicates that the Custodian should not use regular mail when providing the responsive records.

June 28, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested record is denied because his office does not possess same.

June 28, 2011

E-mail from the Complainant to the Custodian. The Complainant asks if it is the Custodian's position that the CDs are not physically maintained at his office and that no agent of the Borough has possession of the CDs.

[1] Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Mr. Luers entered his appearance in this matter on December 1, 2011.
[2] Represented by Francesco Taddeo, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

June 28, 2011

E-mail from the Custodian to the Complainant. The Custodian states that there is no record that is responsive to the Complainant's OPRA request.[4]

July 7, 2011

E-mail from the Complainant to the Custodian. The Complainant states that it is the Custodian's official position that the responsive CDs are not maintained at the Custodian's office and that they are not in the possession of any agent of the Borough. The Complainant further states that it is the Custodian's official position that he did not apply for or receive approval to destroy the CDs from Records Management Services ("RMS"). The Complainant thus requests that the Custodian advise as to the location of the responsive CDs.

July 8, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he has no recollection of the Complainant handing him any CDs, thus he does not possess them. The Custodian states that he looked in his office and found no CDs with the Complainant's name on them. The Custodian requests that the Complainant provide proof that he gave CDs to the Custodian. The Custodian further requests that, if the Complainant still has copies of the CDs, he provide same to the Borough. The Custodian contends that under OPRA, the Complainant would be legally required to disclose same to the Custodian because the Complainant was an employee at the time that the Complainant allegedly gave the Custodian the CDs.

October 14, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Carmagnola & Ritardi, LLC, Invoice No. 1684 dated January 2, 2008.
- Complainant's OPRA request dated June 21, 2011.
- E-mail from the Custodian to the Complainant dated June 28, 2011.
- E-mail from the Complainant to the Custodian dated June 28, 2011.
- E-mail from the Custodian to the Complainant dated June 28, 2011.
- Complainant's OPRA request dated June 28, 2011.[5]
- E-mail from the Custodian to the Complainant dated July 7, 2011.
- E-mail from the Complainant to the Custodian dated July 7, 2011.
- E-mail from the Custodian to the Complainant dated July 8, 2011.

The Complainant states that he submitted an OPRA request to the Custodian on June 21, 2011. The Complainant states that the Custodian responded in writing via e-mail on June 28, 2011 stating that his office did not possess the responsive records. The Complainant states that he sought clarification of the Custodian's response on June 28, 2011 to confirm that the records were not in possession of an agent of the Borough. The

[4] On June 28, 2011, the Complainant submitted an OPRA request seeking the "Request and Authorization for Records Disposal Form" authorizing the Custodian and/or any other agent of the Borough to dispose of the CDs. The Custodian responded on July 7, 2011 stating that no records responsive existed.

[5] This OPRA request is not at issue in the instant complaint.

Complainant states that the Custodian responded on the same day stating that no records exist. The Complainant states that he subsequently submitted an OPRA request seeking the "Request and Authorization for Records Disposal Form" ("Authorization") to dispose of the CDs: the Custodian responded stating that no record exists. The Complainant states that he again confirmed on July 7, 2011 that neither the Custodian nor an agent of the Borough are in possession of the responsive CDs. The Complainant states that the Custodian answered in the affirmative stating that he could not provide a record of which he had no knowledge.

The Complainant states that in a January 2, 2008 bill from Carmagnola & Ritardi, LLC, shows that the Custodian's Counsel billed the Borough for reviewing the CDs at issue on December 11, 2007. The Complainant contends that the Custodian either did not contact Counsel regarding the CDs or Counsel denied having possession of same even in light of the 2008 invoice. The Complainant further notes that in the absence of an Authorization, the Borough could not have destroyed the CDs. The Complainant requests the following:

1. A determination that the Custodian and Counsel violated OPRA by failing to provide the Complainant with the responsive records.
2. A determination ordering the Custodian to immediately disclose the responsive records.
3. A determination that the Custodian and Counsel knowingly and willfully violated OPRA under the totality of the circumstances warranting an imposition of the civil penalty pursuant to N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

November 4, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

November 15, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until November 22, 2011 to submit the SOI.

November 15, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 22, 2011 to submit the SOI.

November 22, 2011[6]

Custodian's SOI with no attachments.

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by RMS is not applicable.

[6] The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

The Custodian certifies that the Complainant is seeking CDs that he failed to provide to the Borough as part of a settlement agreement that is currently in litigation. The Custodian certifies that in that litigation, the Borough countersued the Complainant because he failed to turn over a number of CDs. The Custodian certifies that two (2) CDs were turned over as a result of the litigation; however, the Complainant has still failed to turn over numerous other CDs.

The Custodian asserts that the Complainant is now attempting to gain access to records for which he has sole control.[7] The Custodian certifies that he is not in possession of the responsive CDs. The Custodian contends that this complaint is an example of a highly frivolous and harassing nature of the Complainant's repeated OPRA requests. The Custodian contends that the Borough is seeking the same records from the Complainant as part of its countersuit. The Custodian requests that the GRC review whether the Borough is capable of seeking fees from the Complainant for misleading or omitting information and submitting frivolous complaints.

December 8, 2011

Complainant's legal certification.[8] The Complainant contends that he stands by his Denial of Access Complaint argument that the Custodian failed to provide the Complainant with responsive records.

The Complainant certifies that in the SOI, the Custodian certifies that no CDs exist and then contradicts himself by certifying that the Borough received two (2) CDs as part of a countersuit. The Complainant contends that notwithstanding the invoice attached to the Denial of Access Complaint, the SOI offers more proof that either the Custodian or Custodian's Counsel possess at least two (2) CDs, although the Complainant believes that more CDs exist. The Complainant thus contends that this contradiction means that one of the Custodian's certified statements is knowingly and willfully false.

The Complainant argues that Counsel failed to ever affirmatively argue that he was or was not in possession of any responsive CDs. The Complainant contends that if the Custodian does not possess all the responsive CDs, it is logical to assume that Counsel possesses the rest and either denied having the CDs or illegally destroyed same and is not trying to cover his actions. The Complainant further contends that Counsel likely assisted or drafted the SOI containing contradictory statements thus making him equally liable to a knowing and willful violation of OPRA and civil penalty under N.J.S.A. 47:1A-11.

The Complainant contends that none of his complaints are frivolous: the Custodian's inability to comply with OPRA is to blame. The Complainant thus contends that the Custodian's frivolous and harassing argument is baseless.

[7] The Custodian argues that he believes the Complainant is using this complaint to assist in his lawsuit before the Superior Court.

[8] The GRC notes that a party can only legally certify to facts and not legal arguments.

February 7, 2012

Complainant's supplemental legal certification with the following attachments:

- E-mail from the Complainant to "Mr. Pope" dated October 21, 2007.
- E-mail from the Custodian to the Custodian's Counsel dated October 22, 2007.
- E-mail from the Custodian to the Complainant dated October 24, 2007.
- Invoice dated December 8, 2011.

The Complainant certifies that pursuant to a December 8, 2011 invoice to the Borough, the Custodian's Counsel charged the Borough to draft the SOI for this complaint. The Complainant thus argues that Counsel has defaulted by not defending his actions and sanctions should be assessed accordingly.

The Complainant certifies that in an e-mail to the Borough copying the Custodian on October 21, 2007, the Complainant confirmed delivery of three (3) CDs to the Custodian. The Complainant certifies that the Custodian confirmed receipt of two (2) of the CDs in an e-mail to Counsel dated October 22, 2007. The Complainant further certifies that the Custodian confirmed receipt of all three (3) CDs in an e-mail to the Complainant dated October 24, 2007.

Analysis

Whether the Custodian unlawfully denied access to the requested CDs?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

> "…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

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.

The Complainant filed the instant complaint disputing the Custodian's response that no records responsive existed. The Complainant argued that a 2008 invoice established that the Borough received the responsive CDs and that the Custodian's Counsel reviewed same and billed the Borough. The Complainant further disputed whether the Custodian inquired with Counsel about the records and that same could not be destroyed in the absence of an Authorization.

In the SOI, the Custodian certified that he was not in possession of any responsive CDs because the Complainant failed to provide same to the Borough even though he was supposed to do so as part of a settlement. However, the Custodian also certified that the Borough received two (2) CDs as part of a countersuit to force the Complainant to comply. Moreover, subsequent to the filing of the SOI, the Complainant provided an e-mail from the Custodian to Custodian's Counsel in October 22, 2007 acknowledging receipt of three (3) CDs from the Complainant.

Thus, the crux of this complaint is whether the requested CDs are maintained by the Borough and if so, whether the Custodian unlawfully denied access to same.

Although the Custodian certified in the SOI that he possessed no responsive records, he clearly establishes that the Borough received at least two (2) CDs at some unspecified time as part of a countersuit. However, the Custodian gave no indication of the current location of said CDs. Further, the Custodian provided no competent, credible evidence to refute that the Borough is no longer in possession of either these two (2) CDs or the three (3) CDs the Custodian acknowledged that he received in the October 2007 e-mail. Further complicating the issue is whether two (2) of the same CDs were provided twice.

In weighing the evidence before the GRC, it is clear that the Borough may possess at least two (2) responsive records, if not more. The GRC acknowledges that it may be possible that the CDs were lost or destroyed; however, the GRC has no authority over the destruction of records. *See* Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008). In the absent of further definitive evidence as to the whereabouts of any responsive records, the GRC cannot determine whether the Custodian has unlawfully denied access to at least 2 CDs that he certified in the SOI were received by the Borough.

Therefore, the Custodian may have unlawfully denied access to at least the two (2) CDs that he identified in the SOI were received by the Borough. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant. However, if said CDs no longer exist or were destroyed, the Custodian must certify to this fact. Additionally, the Custodian must either provide the three (3) CDs he confirmed he received in the October 22, 2007 e-mail or certify that same no longer exist or were destroyed. The Custodian must include supporting documentation if any records were destroyed.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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 at least the two (2) CDs that he identified in the Statement of Information were received by the Borough. N.J.S.A. 47:1A-6. Thus, the Custodian must provide same to the Complainant. However, if said CDs no longer exist or were destroyed, the Custodian must certify to this fact. Additionally, the Custodian must either provide the three (3) CDs he confirmed he received in the October 22, 2007 e-mail or certify that same no longer exist or were destroyed. The Custodian must include supporting documentation if any records were destroyed.

2. **The Custodian shall comply with Item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[9] to the Executive Director.[10]**

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.

---

[9] "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."

[10] Satisfactory compliance requires that the Custodian deliver the records 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013[11]

[11] This complaint was originally prepared for the Council's January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.