



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**April 26, 2016 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2015-423

v.

NJ Department of Education  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the February 16, 2016 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:

1. The Custodian has failed to establish in his request for reconsideration of the Council’s September 29, 2015 Final Decision that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant failed to establish that the complaint should be reconsidered. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Because the Complainant failed to deliver to the Council a request for reconsideration of the Council’s September 29, 2015 Final Decision within ten (10) business days following receipt of said Final Decision pursuant to N.J.A.C. 5:105-2.10, the Complainant’s request for reconsideration is denied.

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 26<sup>th</sup> Day of April, 2016

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 2, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**April 26, 2016 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-423**

v.

**New Jersey Department of Education<sup>2</sup>**  
**Custodial Agency**

**Record Relevant to Complaint:** “Item number 4”<sup>3</sup>

**Custodian of Record:** Dominic Rota  
**Request Received by Custodian:** November 13, 2014  
**Response Made by Custodian:** November 14, 2014  
**GRC Complaint Received:** December 11, 2014

**Background**

September 29, 2015 Council Meeting:

At its September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 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, found that:

1. The Custodian’s response was insufficient because the records responsive to request item number 5 are immediate access records, and the Custodian failed to notify the Complainant immediately that the requested records do not exist. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. Because the records responsive to request item number 4 are not immediate access records, and because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired, the complaint, as pertaining to request item number 4, is materially defective and must be dismissed. See Inzelbuch, GRC 2012-323.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Angela L. Velez.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

Harry B. Scheeler, Jr. v. New Jersey Department of Education, 2014-423 – Supplemental Findings and Recommendations of the Executive Director

## Procedural History:

On October 5, 2015, the Council distributed its September 29, 2015 Final Decision to all parties. On October 20, 2015, the tenth (10<sup>th</sup>) business day following transmission of the Council's Order to the Custodian, the Custodian's Counsel filed a request for reconsideration based on mistake. On October 22, 2015, the second (2<sup>nd</sup>) business day following receipt of the Custodian's request for reconsideration, the Complainant submitted an objection to the Custodian's request for reconsideration and also requested reconsideration of paragraph 2 of the Council's September 29, 2015 Final Decision based on mistake.

## Analysis

### Reconsideration

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

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's September 29, 2015 Final Decision on October 20, 2015, ten (10) business days from the issuance of the Council's Order.

Applicable case law holds that:

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

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

Here, the Custodian's Counsel filed the request for reconsideration based on allegations of mistake. Counsel argues that the Council mistakenly determined that the records responsive to

request item number 5 are immediate access records and that the Custodian's response was insufficient because he failed to notify the Complainant immediately that the requested records do not exist.

The Custodian's Counsel contends that the records responsive to request item number 5, legal bills associated with fee-shifting litigation, are not immediate access records because they were not bills submitted to the agency for payment. In support of her argument, Counsel cites three unpublished Superior Court decisions and two GRC decisions: Brennan v. Bergen Cnty Prosecutor's Office, 2015 N.J. Super. Unpub. LEXIS 403 (Law Div., February 25, 2015); Nummermacker v. City of Hackensack, 2014 N.J. Super. Unpub. LEXIS 1287 (Law Div., May 27, 2014); Main St., LLC v. City of Hackensack, 2013 N.J. Super. Unpub. LEXIS 1694 (Ch. Div., July 9, 2013); Sorce v. Stafford Twp. (Ocean), GRC Complaint No. 2014-109 (May 2015) and Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007). Counsel argues that in each of the decisions the requested immediate access records were bills submitted to the agency for payment or contracts between the agency and another party.

Counsel contends that in the instant complaint, the requested bills would be part of litigation records that were "not made or maintained" by the Department of Education ("Department"). Counsel states that the Department was never billed for the legal fees expended by Education Law Center ("ELC") in the subject litigation because it was not the client of ELC that was billed for its services, but rather, its adversary.<sup>4</sup> Counsel argues that ELC sought payment of its legal expenses through fee-shifting litigation resulting in an order of the court to make payment, not by submitting a bill for payment. Counsel further argues that, because the requested record could only have been a litigation record, and not a bill directed to the Department for payment, it was not subject to immediate access under OPRA.

Objecting to the request for reconsideration, the Complainant argues that the GRC's ruling in this matter is consistent with previous rulings for the same type of records.<sup>5</sup> The Complainant also used his objection as a vehicle to request reconsideration of paragraph 2 of the Council's September 29, 2015 Final Decision. The Complainant states that he was aware that the Council made a mistake on the day he received a copy of the Final Decision, October 5, 2015; however, the Complainant states that he "did not have the energy to request reconsideration" at that time. The Complainant states that the Custodian's request for reconsideration served as the impetus for him to decide to request reconsideration now. The Complainant argues that the Council made a mistake by finding that the Custodian's second extension of time to respond was valid, which resulted in the complaint, as pertaining to request item number 4, to be unripe.

The Custodian's Counsel makes a well-reasoned argument; however, OPRA does not contain an exception to the immediate access provision for bills that are not submitted to the agency for payment. In Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order February 24, 2011), the complainant requested "copies

---

<sup>4</sup> Counsel stated that the Custodian searched the litigation file in Educ. Law Center v. NJ Dep't of Educ. for the records requested by the Complainant.

<sup>5</sup> The Complainant also posed rhetorical questions and included anecdotes related to previous OPRA requests as part of his objection, which need not be summarized here.

Harry B. Scheeler, Jr. v. New Jersey Department of Education, 2014-423 – Supplemental Findings and Recommendations of the Executive Director

of all . . . invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department.” The Council subsequently determined that the invoices and vouchers requested were “immediate access” records pursuant to N.J.S.A. 47:1A-5(e), and as such, the custodian was obligated to notify the Complainant immediately as to the status of the records. The instant complaint is similar to Darata, in that the immediate access records sought were part of a litigation record and not a bill directly submitted to the Department for payment. OPRA does not make a distinction as to which entity a bill is submitted; rather it requires immediate access to a bill that meets the definition of a government record which is maintained or kept on file by an agency. Moreover, even when such a record is determined to be nonexistent, as here, a custodian is still obligated to notify the requestor to that effect immediately when an immediate access record is at issue. See Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007). See also Ghana v. NJ Dep’t of Corr., GRC Complaint No. 2008-154 (June 2009).

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. 384. The Custodian failed to establish that the complaint should be reconsidered. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. See D'Atria, 242 N.J. Super. 401. Thus, the Complainant’s request for reconsideration should be denied. Cummings, 295 N.J. Super. 384; D'Atria, 242 N.J. Super. 401; Comcast, 2003 N.J. PUC at 5-6.

With respect to the Complainant’s allegation that the complaint should be reconsidered because the Council allegedly erred in finding that the Custodian’s second extension of time was valid, such action is time-barred.

N.J.A.C. 5:105-2.10 provides that parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. The Complainant added his request for reconsideration on the tail end of his objection to the Custodian’s request for reconsideration. Although the Complainant declared that he was aware the Council allegedly made a mistake on October 5, 2015, which was the day he stated he received a copy of the Final Decision, he stated that he “did not have the energy to request reconsideration” at that time. Instead, the Complainant waited a full twelve (12) business days before submitting his request for reconsideration and then only did so incidental to his objection to the Custodian’s request for reconsideration.

Accordingly, because the Complainant failed to deliver to the Council a request for reconsideration of the Council’s September 29, 2015 Final Decision within ten (10) business days following receipt of said Final Decision pursuant to N.J.A.C. 5:105-2.10, the Complainant’s request for reconsideration is denied.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has failed to establish in his request for reconsideration of the Council's September 29, 2015 Final Decision that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant failed to establish that the complaint should be reconsidered. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
  
2. Because the Complainant failed to deliver to the Council a request for reconsideration of the Council's September 29, 2015 Final Decision within ten (10) business days following receipt of said Final Decision pursuant to N.J.A.C. 5:105-2.10, the Complainant's request for reconsideration is denied.

Prepared By: John E. Stewart

February 16, 2016<sup>6</sup>

---

<sup>6</sup> This complaint was prepared for adjudication at the Council's February 23, 2016 meeting, but was tabled based on legal advice. Subsequently, the complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.

Harry B. Scheeler, Jr. v. New Jersey Department of Education, 2014-423 – Supplemental Findings and Recommendations of the Executive Director



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**September 29, 2015 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2014-423

v.

NJ Department of Education  
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 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:

1. The Custodian’s response was insufficient because the records responsive to request item number 5 are immediate access records, and the Custodian failed to notify the Complainant immediately that the requested records do not exist. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. Because the records responsive to request item number 4 are not immediate access records, and because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired, the complaint, as pertaining to request item number 4, is materially defective and must be dismissed. See Inzelbuch, GRC 2012-323.

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 29<sup>th</sup> Day of September, 2015

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: October 5, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2015 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-423**

v.

**New Jersey Department of Education<sup>2</sup>  
Custodial Agency**

**Record Relevant to Complaint:** “Item number 4”<sup>3</sup>

**Custodian of Record:** Dominic Rota  
**Request Received by Custodian:** November 13, 2014  
**Response Made by Custodian:** November 14, 2014  
**GRC Complaint Received:** December 11, 2014

**Background**<sup>4</sup>

**Request and Response:**

On November 13, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.<sup>5</sup> On November 14, 2014, the first (1<sup>st</sup>) business day following receipt of said request, the Custodian responded in writing, seeking clarification of the request. On November 14, 2014, the Complainant clarified the request. On November 24, 2014, the sixth (6<sup>th</sup>) business day following receipt of the clarification, the Custodian sought an additional extension of time until December 8, 2014. On December 8, 2014, the Custodian responded to request items numbered 1 through 3 and 6 by disclosing records responsive to those request items. The Custodian informed the Complainant

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Christopher Huber.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> 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.

<sup>5</sup> The Complainant failed to attach a copy of the OPRA request filed with the agency as required per paragraph 5 of the Denial of Access Complaint. However, the Complainant attached the Custodian’s Government Records Request Receipt, which contains the following transcription of the request: “I request the following under OPRA and my Common Law Right of Access [sic]. Please provide copy of civil complaint filed for Education Law Center v. Dep’t [sic] of Education. Please also provide the Dept [sic] of Educations [sic] response to complaint. The judges [sic] order and the final documents released responsive to the order. Please also provide the legal bills submitted under the fee shift [sic] including a copy of the payment made to the prevailing party in Education Law Center v. Dep’t [sic] of Education.”

that the agency has no records responsive to request item number 5 and requested an additional four (4) day extension of time until December 12, 2014, to respond to request item number 4.

Denial of Access Complaint:

On December 11, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on November 13, 2014, he submitted a request seeking item number 4.<sup>6</sup> The Complainant also asserts that he requested legal bills, which are immediate access records. The Complainant states that on November 14, 2014, the Custodian asked for clarification and that he provided the clarification on the same date. The Complainant states that on November 28, 2014, the Custodian requested an extension of time until December 8, 2014.

The Complainant states that on December 8, 2014, the Custodian responded to the request by: (1) informing the Complainant that the immediate release records were denied because the agency does not keep copies of legal bills; (2) disclosing records responsive to all but one other request item; and (3) requesting a second extension of time to address the remaining request item. The Complainant also states that “[o]ne of the requests for legal bills were [sic] subject to immediate release...I request the custodian be found in violation of OPRA for failing to provide an immediate release document ‘at once without delay’.”

Statement of Information:

On January 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on November 13, 2014, and that he requested clarification on November 14, 2014.<sup>7</sup> The Custodian certifies that on November 28, 2014, he requested an extension of time because he had to retrieve the requested records from storage.

The Custodian certified that the Complainant alleges that the Custodian failed to provide a response to request item numbers 4 and 5 of his November 13, 2014, request. The Custodian certifies that the records responsive to request item number 4 are 439 pages of documents that had been released to the plaintiff in Educ. Law Center v. NJ Dep’t of Educ.<sup>8</sup> The Custodian certifies that the records responsive to request item number 5 are the legal bills submitted by the plaintiff in said legal action.

The Custodian certifies that he conducted a review of the extensive file associated with Educ. Law Center v. NJ Dep’t of Educ. and thereafter, on December 8, 2014, he disclosed

---

<sup>6</sup> The Complainant did not number any of the items in his request; however, the Custodian in his December 8, 2014, response broke the request down into “Parts.” Subsequently, the Complainant used the Custodian’s numbering system, renaming the Parts as Items. For purposes of clarity and consistency, the GRC will refer to the corresponding Parts/Items as “request item numbers.”

<sup>7</sup> The evidence of record reveals that the Complainant responded on November 14, 2014, and clarified his request with the following statement: “[t]hey had to sue more then [sic] once lol [sic] You guys need to get your act together... The case was in 2012 Docket L-1598-12 (Mercer County).”

<sup>8</sup> The Custodian did not provide a citation for this case; however there is no dispute between the parties that the matter is under Docket L-1598-12 (Mercer County).

certain records responsive to several request items, informed the Complainant that the agency does not have records responsive to request item number 5, and requested an additional extension of time until December 12, 2014, to respond to request item number 4. The Custodian certifies that on December 12, 2014, he forwarded eight (8) e-mails to the Complainant, which in the aggregate served to disclose the records responsive to request item number 4.<sup>9</sup>

The Custodian attached to the SOI a Government Records Request Receipt, which states that on November 24, 2014, an extension of time was needed until December 8, 2014.

#### Additional Submissions:

On July 22, 2015, the GRC e-mailed the Custodian's Counsel, informing him that page 3, item 8, of the SOI states that the Custodian requested the first extension of time on November 28, 2014; however, the Records Request Receipt attached to the SOI states that the extension of time was requested on November 24, 2014. The GRC advised Counsel that, due to this conflicting information, it needed a certification from the Custodian confirming the date of the correspondence requesting the first extension of time.

On July 23, 2015, the Custodian's Counsel forwarded to the GRC a certification from the Custodian in which the Custodian states that the correct date on which he requested the first extension of time is November 24, 2014.

### Analysis

#### Sufficiency of Response

OPRA provides that immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. N.J.S.A. 47:1A-5(e).

In Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007), the complainant sought an employment contract for the Township's Chief Financial Officer. Although an employment contract is an immediate access record, the custodian responded several days after receipt of the request, informing the complainant that the requested record did not exist. The Council held that, "[w]hile the Custodian certifies that the requested contract does not exist, the immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant of such."

Request item number 5 sought legal bills, which are immediate access records under N.J.S.A. 47:1A-5(e). The Custodian therefore had an obligation to act immediately, either to grant access or provide the Complainant with the legal basis for denial. The evidence of record reveals, however, that the Custodian did not notify the Complainant that the records did not exist until December 8, 2014, which was the last day of the first extended time period for a response.

---

<sup>9</sup> The Custodian certified that due to the large file size, he had to break it down into eight (8) separate .pdf attachments.

Accordingly, the Custodian's response was insufficient because the records responsive to request item number 5 are immediate access records, and the Custodian failed to notify the Complainant immediately that the requested records do not exist. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron, GRC 2006-178.

### **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.

A custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

The GRC has held that once a Custodian receives clarification from a Complainant regarding a previously received request, the seven (7) business day response time restarts. *See* Mikle v. Burlington County Board of Taxation, GRC Complaint No. 2010-232 (January 2012)

The Council has found additional extensions of time to be timely when sought inside a prior extended time frame. *See e.g.* Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014), where a second extension of time was found to be timely because "...[the custodian]...sought a second extension and responded prior to the expiration of same..."

Here, there is no dispute between the parties that the request was received by the Custodian on November 13, 2014, and on the following day the Complainant, at the behest of the Custodian, clarified same. As such, the seven (7) business day time period during which the Custodian was required to respond restarted on November 14, 2014. Thereafter, the evidence of record reveals that on November 24, 2014, the sixth (6<sup>th</sup>) business day following said clarification, the Custodian requested in writing an extension of time until December 8, 2014. Thus, the Custodian met his requirement of responding in writing to the Complainant's OPRA request within the mandated seven (7) business day time frame, addressing request item number 5 and requesting an extension of time to respond to request item number 4. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). *See also* Mikle, GRC 2010-232.

It is undisputed that on December 8, 2014, the Custodian disclosed ninety-two (92) pages of requested records that are not relevant to this complaint, informed the Complainant that the agency had no records responsive to request item number 5, and sought a second extension of time until December 12, 2014, to address request item number 4. Here, as in Delbury, GRC 2013-240, the second extension of time was sought before expiration of the prior extension.

Moreover, the request for an additional four (4) day extension was not unreasonable, given that four hundred thirty-nine (439) pages of records were found to be responsive to the request item.

Although the evidence of record indicates that the Custodian properly requested an extension of time until December 12, 2014, to address request item number 4, the Complainant verified this complaint on December 9, 2014, three (3) business days prior to the expiration of the extended time frame to respond.

In Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013), the custodian responded to the complainant's requests within the statutorily-mandated time frame by requesting an extension of time for several weeks. In support of his request for the extension of time, the custodian cited, *inter alia*, the voluminous nature of the requests. The complainant, declaring the request for an extension of time to be unacceptable, verified his complaint a few days following receipt of the custodian's response. The Council held that, "...because the Complainant verified his complaint before the statutory time period for the Custodian to respond **as extended** had expired; the complaint is materially defective and must be dismissed" (Emphasis in original).

Here, the Custodian properly requested an extension of time until December 12, 2014, to address request item number 4; however, the Complainant verified the complaint on December 9, 2014, three (3) business days prior to expiration of the extended time frame. The Complainant here, in a manner similar to the actions of the complainant in Inzelbuch, GRC 2012-323, filed his complaint prior to expiration of the extended time frame; thus, the required denial of access for request item number 4 did not exist at the time of the filing of this complaint.

Therefore, because the records responsive to request item number 4 are not immediate access records, and because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired, the complaint, as pertaining to request item number 4, is materially defective and must be dismissed. See Inzelbuch, GRC 2012-323.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response was insufficient because the records responsive to request item number 5 are immediate access records, and the Custodian failed to notify the Complainant immediately that the requested records do not exist. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. Because the records responsive to request item number 4 are not immediate access records, and because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired, the complaint, as pertaining to request item number 4, is materially defective and must be dismissed. See Inzelbuch, GRC 2012-323.

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover  
Executive Director

September 22, 2015