State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

May 24, 2016 Government Records Council Meeting

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

Complaint No. 2015-58

At the May 24, 2016 public meeting, the Government Records Council ("Council") considered the May 17, 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 failed to comply fully with the Council's April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.

2. The instant complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant's possession. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 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 26, 2016

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2015-58**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies of subpoenas served to: the Custodian; Maria Caemmerer; Arleen Lih; Randy Bahr; Mayor Tamas Ormosi; every elected councilmember for 2013, 2014 and 2015; Barbara Flaghety; Bill Boyle; Carol Rice; Donna Alessi; Donna Piazolla; Ken Pine; every Borough of South Bound Brook ("Borough") Public Works employee; Michael Allenovitch; Paul Kaminsky; Chief William C. King; and every Police Department employee from September 23, 2014, to February 4, 2015.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: February 9, 2015
Response Made by Custodian: February 18, 2015
GRC Complaint Received: March 9, 2015

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

2. The Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Thus, the Custodian must conduct

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] Represented by Francesco Taddeo, Esq. (Somerville, NJ).

a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

3. **The Custodian shall comply with item No. 2 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,[3] to the Executive Director.[4]**

4. 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.

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

Procedural History:

On April 28, 2016, the Council distributed its Interim Order to all parties. On May 3, 2016, the Custodian sought an extension of time until May 11, 2016, to comply with the Council's Order, which the GRC granted on May 5, 2016.

On May 11, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that he again searched his files and did not locate any responsive subpoenas.[5] The Custodian affirmed that, upon receipt of the request, he verbally inquired with several officials about the existence of subpoenas. The Custodian certified that he received no responses.

The Custodian also noted that some of the officials were no longer with the agency; he would have to send letters to those individuals to follow up with them. The Custodian affirmed that, notwithstanding the foregoing, the Borough maintains no other responsive records.

[3] "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."

[4] Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

[5] The Custodian attached a number of subpoenas to his compliance submission; however, none were responsive to the Complainant's OPRA request.

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to conduct a more thorough search for responsive subpoenas and certify whether he was able to locate any additional responsive records. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 28, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 5, 2016.

On May 3, 2016, the Custodian sought an extension of time until May 11, 2016, which the GRC granted. On May 11, 2016, the last day of the extended time frame, the Custodian submitted certified confirmation of compliance to the Executive Director. Therein, he certified that he performed the search and that he was unable to locate any additional responsive records.

The GRC previously noted that the Custodian failed to provide adequate details supporting that he conducted a thorough search prior to responding that no records existed. Further, the Complainant provided competent, credible evidence to refute the certification. The Council thus required the Custodian to conduct a thorough search and disclose responsive records.

However, a review of the Custodian's certification does not support that he conducted a more thorough search. Rather, the certification supports that he conducted a less thorough search. The Custodian still only searched his "files in [his] office," as he initially did upon receipt of the request. Further, the Custodian certified that he previously contacted certain officials verbally but then affirmed that he did not contact them in connection with the Council's Order. Having contacted the officials verbally in the first place, the Custodian could not produce any supporting documentation as to how they responded to him (other than that he received no response). Moreover, the Custodian simply certified that, were he to contact some of them, he would have to do so by letter. The Custodian provided no indication as to whether he contacted those same officials who still worked for the Borough. For these reasons, the GRC is not satisfied that the Custodian conducted a more thorough search in accordance with the Council's Order. Further, the certification does not adequately dispel the notion that the Custodian searched outside the four corners of his own office.

Therefore, the Custodian failed to comply fully with the Council's April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.

Contested Facts

The Administrative Procedures Act provides that the OAL "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). In the past, when contested facts have arisen from a custodian's compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See* Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In this matter, the Council found that the Custodian might have unlawfully denied access to additional responsive subpoenas beyond the one the Complainant already possessed. In order to do this, the Council required that the Custodian perform a more thorough search of the Borough's records and certify to that search. As noted above, the Custodian timely provided compliance in which he certified to his secondary search. However, the Custodian's certification further called into question whether he adequately searched for all responsive records. Specifically, the Custodian certified that he essentially conducted a less thorough search than he initially conducted upon receipt of the Complainant's OPRA request. The Custodian's failure to comply fully with the Council's Order and his failure to perform and certify to a more thorough search has made it impossible for the GRC to determine whether the Custodian unlawfully denied access to any additional records. It is thus apparent that a fact-finding hearing would provide the most efficient and effective method for developing the record.

Accordingly, the instant complaint should be referred to OAL for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant's possession. Further, and if necessary, the OAL should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, OAL should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council's April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.

2. The instant complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant's possession. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

May 17, 2016

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INTERIM ORDER

April 26, 2016 Government Records Council Meeting

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

Complaint No. 2015-58

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a unanimous vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

2. The Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Thus, the Custodian must conduct a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

3. **The Custodian shall comply with item No. 2 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]**

[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 record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. 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.

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

Interim Order Rendered by the
Government Records Council
On The 26th 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: April 28, 2016

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.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Robert A. Verry[1] **GRC Complaint No. 2015-58**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies of subpoenas served to: the Custodian; Maria Caemmerer; Arleen Lih; Randy Bahr; Mayor Tamas Ormosi; every elected councilmember for 2013, 2014 and 2015; Barbara Flaghety; Bill Boyle; Carol Rice; Donna Alessi; Donna Piazolla; Ken Pine; every Borough of South Bound Brook ("Borough") Public Works employee; Michael Allenovitch; Paul Kaminsky; Chief William C. King; and every Police Department employee from September 23, 2014, to February 4, 2015.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: February 9, 2015
Response Made by Custodian: February 18, 2015
GRC Complaint Received: March 9, 2015

Background[3]

Request and Response:

On February 4, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 7, 2015, a Saturday, the Complainant asked the Custodian to confirm receipt of the OPRA request because he received "undeliverable" notices in several other e-mails.

On February 18, 2015, the sixth (6th) business day after receipt of the OPRA request,[4] the Custodian responded in writing, seeking additional time until February 26, 2015, to respond to the Complainant's OPRA request. On March 2, 2015, two (2) business days after the last day of the extension, the Custodian responded in writing, first noting that neither Ms. Caemmerer nor Ms. Alessi was employed during the relevant time frame. The Custodian stated that, in

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] Represented by Francesco Taddeo, Esq. (Somerville, NJ).
[3] The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.
[4] President's Day, a federal holiday, was observed on February 16, 2015.

accordance with the Borough's process, he was supposed to receive any submitted subpoenas. To that end, he received no subpoenas. The Custodian also noted that the subpoenas might be confidential in nature.

On March 3, 2015, the Complainant sought clarification of the Custodian's response. The Complainant asserted that the Custodian's statement that he was given no subpoenas is unclear and could mean that records exist but the Custodian was unable to obtain them, or no records exist. On the same day, the Custodian responded via e-mail, stating that no record exist "in [the Custodian's] office."

Denial of Access Complaint:

On March 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian failed to respond timely to his OPRA request. The Complainant acknowledged that he resent his request to the Custodian on February 7, 2015, based on an error with his initial e-mail; however, the Custodian confirmed receipt of the OPRA request on February 9, 2015. The Complainant asserted that the last day for the Custodian to respond was February 17, 2015, and that he did not respond to the Custodian's request for an extension of time because it was one day late.

The Complainant contended that the Custodian, who is well-versed in the statutory response time based on numerous prior GRC decisions against him, knowingly and willfully failed to respond timely to the subject OPRA requests. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160 *et seq*. (Final Decision dated September 25, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-161 *et seq*. (Interim Order dated August 28, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013). The Complainant asserted that notwithstanding the Custodian's request for an extension of time, he still failed to provide a response until three (3) calendar days after the expiration of the extension, or on March 2, 2015. The Complainant also argued that the Custodian's denial of access appeared to be unlawful because he only stated that no records were in his possession.

The Complainant stated that given the Custodian's twenty-four (24) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

The Complainant thus requested that the GRC: 1) determine that the Custodian's responses resulted in a "deemed" denial; 2) order disclosure of all responsive recordings; 3) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) order any further relief deemed appropriate.

Statement of Information:

On April 9, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 18, 2015.[5] The Custodian certified that his search included "review[ing] records." The Custodian certified that he responded in writing on March 3, 2015,[6] advising that no records existed. The Custodian affirmed that he did not maintain any records responsive to the Complainant's OPRA request.

Additional Submissions:

On May 29, 2015, the Complainant's Counsel submitted a letter brief, arguing that the Custodian provided vague responses regarding the non-existence of responsive subpoenas to deceive the Complainant. Specifically, Counsel asserted that the Custodian's responses only indicated that he did not personally possess any responsive records. Counsel contended that the Custodian also used a vague response in the SOI to avoid presenting a willfully false statement should the Complainant find evidence of responsive subpoenas. Counsel stated that, in response to an unrelated OPRA request, the Complainant uncovered such evidence in an invoice from Custodian's Counsel containing a January 15, 2015 entry "Motion to Quash subpoena."

Counsel contended that the entry proved that the Borough received at least one (1) subpoena during the time frame identified in the OPRA request. In fact, Counsel attached a copy of the subpoena in question, which was served on the Custodian by Walter M. Luers, Esq., on December 29, 2014, in regard to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-323 (OAL Docket No. 09328-2013S). Counsel contended that this conflicting fact raises the question of how many subpoenas the Custodian failed to or refused to disclose. Counsel further contended that the Custodian could not be trusted to disclose responsive records and the instant complaint is evidence of the knowing and willful natured of his repeated OPRA violations. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114, *et seq*. (Interim Order dated July, 31, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated March 25, 2014); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-311 (Interim Order dated November 18, 2014).

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to

[5] This date appears to be the date the Custodian initially responded and not the date he actually received the OPRA request.
[6] This date is one day after the Custodian initially responded, although he did again respond on March 3, 2015, reiterating that no records existed.

N.J.S.A. 47:1A-5(g).[7] Thus, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Additionally, OPRA provides that:

> If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request, seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

> The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i), resulting in a "deemed" denial of access to the records.

Id.

As a threshold issue, the Complainant contended that, initially, the Custodian did not timely respond to his OPRA request. However, the Complainant noted in the Denial of Access Complaint that the Custodian acknowledged receipt of the request on February 9, 2015. Further, the evidence supports that the Custodian initially responded to the Complainant in writing on February 18, 2015, the sixth (6th) business day after receipt of the request, taking into account the Borough's closure on President's Day. For this reason, the Custodian's initial response was timely.

However, although the evidence of record indicates that the Custodian initially responded to the Complainant's OPRA request appropriately by seeking an extension until February 26,

[7] A custodian's written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

2015, to respond, he did not actually respond until March 2, 2015. The response fell two (2) days beyond the expiration of the extended time frame. In accordance with N.J.S.A. 47:1A-5(i), the request was "deemed" denied at that time.

Therefore, although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

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.

As a threshold issue, there is no dispute that the Complainant's OPRA request is valid under OPRA. In fact, the GRC previously addressed similar OPRA requests in Verry v. Borough of South Bound Brook (Somerset), 2011-128, *et seq*. (Interim Order dated July 31, 2012).

In Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012), the custodian initially denied access to the subject OPRA request, asserting that the Franklin Fire District ("FFD") did not maintain responsive financial disclosure statement ("FDS forms") and certified to this in the SOI. However, the complainant subsequently provided competent, credible evidence that the FFD did maintain FDS forms. The Council distinguished that case from Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), and held that the custodian unlawfully denied access to responsive records. In coming to this conclusion, the Council reasoned that "the Complainant provided competent, credible evidence refuting the Custodian's denial of access: an e-mail from Ms. Nelson to the Custodian dated January 25, 2011 forwarding FDS forms from 2007." Id. at 8.

In the matter currently before the Council, the Custodian responded to the Complainant stating "[no] record given to the clerk" and subsequently "[n]o records exist in [the Custodian's] office for subpoenas." In the SOI, the Custodian certified that the Borough did not maintain any records responsive to the subject OPRA request. However, there was a significant lack of detail or supporting documentation in the SOI regarding the Custodian's search other than "reviewed records." Such a description provides no insight into whether the Custodian contacted anyone else in the Borough or Custodian's Counsel prior to responding to either the subject OPRA request or the instant complaint. On May 29, 2015, the Complainant's Counsel provided competent, credible evidence to the contrary. Specifically, the Borough disclosed an invoice annotating that the Custodian's Counsel drafted a motion to quash a subpoena in early January, 2015. Additionally, the Complainant was in possession of at least one (1) responsive subpoena.[8]

[8] The GRC notes that there is no evidence in the record to indicate how the Complainant came into possession of same, except that same referred to Verry, GRC 2011-323. However, it is likely that the Complainant, or his legal

The facts of this complaint are similar to the facts of Carter. Specifically, the Complainant provided competent, credible evidence refuting the Custodian's denial of access: at least one (1) subpoena falling within the time frame identified in the OPRA request existed. Additionally, it is possible that the January 15, 2015 invoice entry references another subpoena. Thus, the GRC is not satisfied that the Custodian bore his burden of proving a lawful denial of access.

Accordingly, the Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter, GRC 2011-76. Thus, the Custodian must conduct a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

2. The Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Thus, the Custodian must conduct a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order

representative in Verry, was already in possession of the subpoena prior to submitting the subject OPRA request. *See* Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008).

disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

3. **The Custodian shall comply with item No. 2 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]**

4. 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.

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

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

March 22, 2016[11]

[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 record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

[11] This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.