



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

**JON S. CORZINE**  
Governor

**CHARLES A. RICHMAN**  
Acting Commissioner

**FINAL DECISION**

**August 11, 2009 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2008-235

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 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’s failure to respond in writing to the Complainant’s OPRA request for invoices either granting access, denying access, seeking clarification or requesting an extension of time within the extended ten (10) to fourteen (14) day time frame 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 (October 2007). See Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Because the Complainant submitted proof that he was in possession of the unredacted version of the April 30, 2008 Cooper & Cooper invoice for the Police Department, requiring the Custodian to duplicate another copy of the unredacted requested record does not advance the purpose of OPRA pursuant to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the extended ten (10) to fourteen (14) day time frame resulted in a “deemed” denial, the evidence of record shows that Complainant was provided with the requested invoices on October 27, 2008. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.



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 11<sup>th</sup> Day of August, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: August 17, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-235**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Any and all invoices submitted to the Borough by Cooper & Cooper from April 2008 through September 2008.
2. Any and all invoices submitted to the Borough by Eric M. Bernstein & Associates, LLC from March 2008 through September 2008.

**Request Made:** October 4, 2008

**Response Made:** October 6, 2008

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** October 17, 2008<sup>3</sup>

**Background**

**October 4, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**October 6, 2008**

Custodian Counsel's response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant's OPRA request on the same business day as receipt of such request.<sup>4</sup> Counsel states that additional time will be needed to compile and review the records responsive to the Complainant's request. Counsel states that the Borough will respond within ten (10) to fourteen (14) days.

**October 17, 2008**

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

---

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

<sup>2</sup> Represented by William T. Cooper III, Esq. (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant's request was sent to the Custodian on a Saturday and received on Monday, October 6, 2008.

- Complainant's OPRA request dated October 4, 2008.
- Letter from the Custodian's Counsel to the Complainant dated October 6, 2008.

The Complainant states that he submitted an OPRA request for immediate access records on October 4, 2008. The Complainant states that Counsel responded on October 6, 2008, requesting an extension of ten (10) to fourteen (14) days to respond so that the requested records could be compiled and reviewed. The Complainant states that after thirteen (13) days, no immediate access records have been provided.

The Complainant asserts that, based on his experience with prior OPRA requests, all of the requested invoices were previously processed and are easily accessible. The Complainant contends that since the records were readily accessible, Counsel's request for an extension of time was unreasonable. The Complainant questions whether the Borough is delaying access based solely on the fact that the Complainant has requested such records.

The Complainant asserts that the Custodian is knowingly and willfully denying access to immediate access records that are readily available.

The Complainant does not agree to mediate this complaint.

**October 27, 2008**

Letter from the Custodian's Counsel to the Complainant attaching the requested invoices.

Counsel states that the attached invoices are responsive to the Complainant's October 4, 2008 OPRA request. Counsel states that a redaction was made to the April 30, 2008 invoice to the Police Department.

**October 29, 2008**

Request for the Statement of Information sent to the Custodian.

**November 7, 2008**

Custodian's Statement of Information ("SOI")<sup>5</sup> with the following attachments:

- Complainant's OPRA request dated October 4, 2008.
- Letter from the Custodian's Counsel to the Complainant dated October 6, 2008.
- Letter from the Custodian's Counsel to the Complainant dated October 27, 2008 (with attachments).

Counsel states that the Custodian received the Complainant's October 4, 2008 OPRA request on the same day. Counsel states that he responded in writing to the Complainant on October 6, 2008, requesting an extension of time to provide the requested records. Counsel states that he responded to the Complainant's OPRA request in writing on October 27, 2008, providing access to the requested invoices and noting that

---

<sup>5</sup> The Custodian's Counsel signed the SOI, rendering it noncompliant with the GRC regulations *N.J.A.C. 5:105-2.4(f)*. The Custodian provided an amended copy with his signature on December 15, 2008. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-235 – Findings and Recommendations of the Executive Director

the April 21, 2008 entry on Cooper & Cooper invoice dated April 30, 2008 for the Police Department was redacted.

Counsel states that the Complainant's OPRA request was one (1) of four (4) requests submitted to the Custodian on October 4, 2008. Counsel states that the instant request was for seven (7) months' worth of invoices and the Custodian requested that the Complainant be notified that additional time to respond would be needed. Counsel asserts that, because Cooper & Cooper and Eric Bernstein & Associates, LLC, have both provided legal services to the Borough regarding legal matters directly related to the Complainant, the requested invoices required review in order to ensure that attorney work product relating to the legal matters involving the Complainant would not be inadvertently released.

Counsel states that forty-three (43) pages of invoices were provided to the Complainant on October 27, 2008 with one (1) redaction made to the April 30, 2008 invoice to the Police Department because it contained attorney work product.

#### **November 14, 2008**

The Complainant's response to the Custodian's SOI, attaching a copy of the redacted and unredacted April 30, 2008 Cooper & Cooper invoice for the Police Department.

The Complainant contends that the requested invoices were hand delivered to the Complainant by the Custodian on June 4, 2008 in response to a previous OPRA request, yet Counsel argues in the SOI that the requested records were not immediately available four (4) months later. Further, the Complainant argues that although he was given access to the unredacted April 30, 2008 Police Department invoice on June 4, 2008, Counsel tried to withhold disclosure of the immediate access records in order to ensure that attorney work product would not be inadvertently released to the Complainant. The Complainant questions why the redacted entry that Counsel now deems as attorney work product was not redacted on June 4, 2008.

The Complainant states that the Custodian's failure to sign the SOI and Counsel's failure to certify and provide the SOI until one (1) day after the GRC's deadline is another example of the Borough's failure to comply with OPRA.

#### **November 25, 2008**

Letter from the Custodian's Counsel to the GRC attaching a Tort Claim Notice dated September 9, 2008. Counsel states that since June 2008, the Complainant has filed a Tort Claim against the Borough. Counsel asserts that, in light of the adversarial position of both parties, the Custodian requested that Counsel review the requested invoices. Counsel asserts that one (1) entry contained attorney work product pertaining to the Complainant and his Tort Claim.

Counsel asserts that the Complainant's November 14, 2008 e-mail response shows that the Complainant was already in possession of the records responsive to his October 4, 2008 OPRA request. Counsel argues that if the Complainant was already in possession of the unredacted April 30, 2008 invoice at the time of the October 4, 2008

OPRA request, there is no complaint. Finally, Counsel contends that because the circumstances between the Complainant and the Borough became adversarial, the April 30, 2008 invoice was properly redacted.

### **December 1, 2008**

E-mail from the Complainant to the GRC. The Complainant asserts that the SOI should not be allowed into the record because Counsel's submission of it was delinquent. The Complainant adds that though the Custodian did not provide all records responsive to the instant request on June 4, 2008, the Custodian did provide an unredacted copy of the April 30, 2008 invoice; therefore, the complaint is founded and the evidence supports the Complainant's argument that the Borough knowingly and willfully delayed immediate access to the requested invoices.

### **December 15, 2008**

Custodian's amended Statement of Information. Counsel states that the SOI submitted on November 7, 2008 was incorrectly executed. Counsel states that the Custodian has reviewed the SOI and properly signed it.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested invoices?**

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 also states that:

"[i]mmediate 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." (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and

promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In this matter currently before the Council, the Custodian responded in writing to the Complainant’s October 4, 2008 OPRA request on the same day as receipt of the Complainant’s request, seeking an extension of ten (10) to fourteen (14) days to respond.

However, the Custodian failed to respond to the Complainant's OPRA request granting or denying access to the requested records within the extended ten (10) to (14) day response time.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request for invoices either granting access, denying access, seeking clarification or requesting an extension of time within the extended ten (10) to fourteen (14) day time frame 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 (October 2007). See Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

Additionally, in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had it in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted).

The Appellate Division's decision in Bart, *supra* turns upon the specific facts of that case. In the adjudication of the Denial of Access Complaint, the Council's decision noted the certification of the custodian that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public; moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Housing Authority, GRC Complaint No. 2005-145 (May 2006).

In the instant matter, the Complainant stated that he previously received a copy of the unredacted April 30, 2008 Cooper & Cooper invoice for the Police Department on June 4, 2008. Moreover, the Complainant actually submitted a copy of said unredacted invoice to the GRC. Although the invoices requested were not readily available to an member of the public, as was the record requested in Bart, the Complainant's submission of the unredacted April 30, 2008 invoice is evidence that the Complainant was in possession of the record redacted by the Custodian in response to the Complainant's October 4, 2008 OPRA request.

Therefore, because the Complainant submitted proof that he was in possession of the unredacted version of the April 30, 2008 Cooper & Cooper invoice for the Police Department, requiring the Custodian to duplicate another copy of the unredacted requested record does not advance the purpose of OPRA pursuant to Bart, *supra*.

Moreover, the Complainant's contention regarding the redacted April 30, 2008 Cooper & Cooper invoice for the Police Department is moot because the Complainant is already in possession of an unredacted copy of the record requested.



**Whether the Custodian’s “deemed” denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the extended ten (10) to fourteen (14) day time frame resulted in a “deemed” denial, the evidence of record shows that the Complainant was provided with the requested invoices on October 27, 2008. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request for invoices either granting access, denying access, seeking clarification or requesting an extension of time within the extended ten (10) to fourteen (14) day time frame 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 (October 2007). See Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Because the Complainant submitted proof that he was in possession of the unredacted version of the April 30, 2008 Cooper & Cooper invoice for the Police Department, requiring the Custodian to duplicate another copy of the unredacted requested record does not advance the purpose of OPRA pursuant to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the extended ten (10) to fourteen (14) day time frame resulted in a "deemed" denial, the evidence of record shows that Complainant was provided with the requested invoices on October 27, 2008. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009