



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**September 25, 2012 Government Records Council Meeting**

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

Complaint Nos. 2011-161, 2011-162, 2011-163, 2011-164, 2011-165, 2011-166 & 2011-167

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 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 timely complied with the Council’s August 28, 2012 Interim Order by certifying that no responsive records existed for the relevant time frame.
2. The Custodian’s insufficient written response failing to grant access, deny access, request an extension of time or seek clarification resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007) and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive subpoenas pursuant to N.J.S.A. 47:1A-6. However, the Custodian disclosed the responsive records on August 17, 2012 pursuant to the Council’s July 31, 2012 Interim Order in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012) and the Custodian timely complied with the Council’s August 28, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

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 25<sup>th</sup> Day of September, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: September 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

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

**GRC Complaint No. 2011-161, 2011-162,  
2011-163, 2011-164, 2011-165, 2011-166 &  
2011-167**

v.

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

**Records Relevant to Complaint:** Copies of

1. Subpoena or Subpoenas served on Mr. William T. Cooper, III, Esq. (“Mr. Cooper”), the Custodian, Mr. Terry G. Warrelman (“Mr. Warrelman”), Ms. Jo-Anne B. Schubert (“Ms. Schubert”), and the Borough of South Bound Brook (“Borough”) by the Somerset County Prosecutor’s Office (“SCPO”) whereby the State of New Jersey is the victim for the time frame of January 1, 2005 to December 31, 2005.<sup>3</sup>
2. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2006 to December 31, 2006.<sup>4</sup>
3. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2007 to December 31, 2007.<sup>5</sup>
4. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2008 to December 31, 2008.<sup>6</sup>
5. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2009 to December 31, 2009.<sup>7</sup>
6. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2010 to December 31, 2010.<sup>8</sup>

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> This request is the subject of GRC Complaint No. 2011-161.

<sup>4</sup> This request is the subject of GRC Complaint No. 2011-162.

<sup>5</sup> This request is the subject of GRC Complaint No. 2011-163.

<sup>6</sup> This request is the subject of GRC Complaint No. 2011-164.

<sup>7</sup> This request is the subject of GRC Complaint No. 2011-165.

<sup>8</sup> This request is the subject of GRC Complaint No. 2011-166.

7. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2011 to May 1, 2011.<sup>9</sup>

**Request Made:** May 1, 2011

**Response Made:** May 1, 2011

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** May 12, 2011<sup>10</sup>

### **Background**

#### **August 28, 2012**

Government Records Council's ("Council") Interim Order. At its August 28, 2012 public meeting, the Council considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted, by a majority vote, to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian provided a written response to the Complainant's seven (7) OPRA requests within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, the Complainant's seven (7) OPRA requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007). *See also* LaRosa v. Plainfield Municipal Utilities Authority, GRC Complaint No. 2009-220 (June 2010).
2. The Custodian unlawfully denied access to the Complainant's seven (7) OPRA requests because they are valid pursuant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012), and Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council's July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of March 20, 2011 and May 1, 2011 or legally certify that no responsive records exist.
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, if necessary, and simultaneously**

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<sup>9</sup> This request is the subject of GRC Complaint No. 2011-167.

<sup>10</sup> The GRC received the Denial of Access Complaint on said date.

**provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>11</sup> to the Executive Director.<sup>12</sup>**

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.

#### **August 29, 2012**

Council's Interim Order ("Order") distributed to the parties.

#### **September 5, 2012**

Custodian's response to the Council's Interim Order. The Custodian certifies that the Council's August 28, 2012 Order required him to provide any subpoenas that came into existence between March 20, 2011 and May 1, 2011 or certify that no records responsive exist. The Custodian certifies that no records responsive exist for the time frame indicated in the Council's Order.

### **Analysis**

#### **Whether the Custodian complied with the Council's August 28, 2012 Interim Order?**

At its August 28, 2012 meeting, the Council ordered the Custodian to:

"...either provide any records that fall within the time period of March 20, 2011 and May 1, 2011 or legally certify that no responsive records exist. **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, to the Executive Director.**" (Footnotes omitted.)

The Council disseminated its Interim Order to the parties on August 29, 2012. Thus, the Custodian's response was due by close of business on September 6, 2012. On September 5, 2012, the Custodian certified that no records responsive for the time frame March 20, 2011 to May 1, 2011 existed.

Therefore, the Custodian timely complied with the Council's August 28, 2012 Interim Order by certifying that no responsive records existed for the relevant time frame.

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<sup>11</sup> "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."

<sup>12</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

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 (Felder 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).

The Custodian’s insufficient written response failing to grant access, deny access, request an extension of time or seek clarification resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007) and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive subpoenas pursuant to N.J.S.A. 47:1A-6. However, the Custodian disclosed the responsive records on August 17, 2012 pursuant to the Council’s July 31, 2012 Interim Order in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012) and the Custodian timely complied with the Council’s August 28, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's August 28, 2012 Interim Order by certifying that no responsive records existed for the relevant time frame.
2. The Custodian's insufficient written response failing to grant access, deny access, request an extension of time or seek clarification resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007) and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive subpoenas pursuant to N.J.S.A. 47:1A-6. However, the Custodian disclosed the responsive records on August 17, 2012 pursuant to the Council's July 31, 2012 Interim Order in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012) and the Custodian timely complied with the Council's August 28, 2012 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 2012



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Robert A. Verry  
Complainant  
v.

Complaint Nos. 2011-161, 2011-162,  
2011-163, 2011-164, 2011-165,  
2011-166 & 2011-167

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 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. Although the Custodian provided a written response to the Complainant’s seven (7) OPRA requests within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, the Complainant’s seven (7) OPRA requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007). *See also* LaRosa v. Plainfield Municipal Utilities Authority, GRC Complaint No. 2009-220 (June 2010).
2. The Custodian unlawfully denied access to the Complainant’s seven (7) OPRA requests because they are valid pursuant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012), and Byrnes v. Morris County Prosecutor’s Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council’s July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of March 20, 2011 and May 1, 2011 or legally certify that no responsive records exist.
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, if necessary, and simultaneously provide certified confirmation of**





**compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of August, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: August 29, 2012**

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<sup>1</sup> "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."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 28, 2012 Council Meeting**

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

**GRC Complaint No. 2011-161, 2011-162,  
2011-163, 2011-164, 2011-165, 2011-166 &  
2011-167**

v.

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

**Records Relevant to Complaint:** Copies of

1. Subpoena or Subpoenas served on Mr. William T. Cooper, III, Esq. (“Mr. Cooper”), the Custodian, Mr. Terry G. Warrelman (“Mr. Warrelman”), Ms. Jo-Anne B. Schubert (“Ms. Schubert”), and the Borough of South Bound Brook (“Borough”) by the Somerset County Prosecutor’s Office (“SCPO”) whereby the State of New Jersey is the victim for the time frame of January 1, 2005 to December 31, 2005.<sup>3</sup>
2. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2006 to December 31, 2006.<sup>4</sup>
3. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2007 to December 31, 2007.<sup>5</sup>
4. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2008 to December 31, 2008.<sup>6</sup>
5. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2009 to December 31, 2009.<sup>7</sup>
6. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2010 to December 31, 2010.<sup>8</sup>

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> This request is the subject of GRC Complaint No. 2011-161.

<sup>4</sup> This request is the subject of GRC Complaint No. 2011-162.

<sup>5</sup> This request is the subject of GRC Complaint No. 2011-163.

<sup>6</sup> This request is the subject of GRC Complaint No. 2011-164.

<sup>7</sup> This request is the subject of GRC Complaint No. 2011-165.

<sup>8</sup> This request is the subject of GRC Complaint No. 2011-166.

7. Subpoena or Subpoenas served on Mr. Cooper, the Custodian, Mr. Warrelman, Ms. Schubert, and the Borough by the SCPO whereby the State of New Jersey is the victim for the time frame of January 1, 2011 to May 1, 2011.<sup>9</sup>

**Request Made:** May 1, 2011

**Response Made:** May 1, 2011

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** May 12, 2011<sup>10</sup>

### **Background**

#### **April 29, 2011**

E-mail from Mr. Cooper to the Complainant. Mr. Cooper states that he is in receipt of the Complainant's e-mail seeking assistance on properly identifying government records. Mr. Cooper states that limiting an OPRA request for subpoenas to those issued by the SCPO only partially narrows the request. Mr. Cooper states that seeking these records over a period of six (6) years (2005 through 2011) would require the Custodian to undertake a lengthy research through the Borough's files.

Mr. Cooper advises that the Complainant should review the Council's decision in Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010) for additional suggestions on how to properly compose an OPRA request for subpoenas. Mr. Cooper further advises that if the Complainant is interested in obtaining subpoenas issued by the SCPO, he should consider directing an OPRA request to that agency as the complainant in Byrnes, supra, did when seeking subpoenas issued to Rockaway Township by the Morris County Prosecutor's Office.

#### **May 1, 2011**

Complainant's seven (7) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to these complaint listed above in seven (7) letters referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail or facsimile if the records are not available electronically.

The Complainant notes that in Byrnes, supra, the Council held that:

"[b]ecause the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) [MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)] and [Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)] *do not apply to the request relevant to this complaint*. The Custodian's search is not open-ended, nor does it require research, but rather requires

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<sup>9</sup> This request is the subject of GRC Complaint No. 2011-167.

<sup>10</sup> The GRC received the Denial of Access Complaint on said date.

the Custodian to locate the corresponding subpoena or subpoenas in her files.” (Emphasis added.) *Id.* at pg. 6.

### **May 1, 2011**

Custodian’s response to the Complainant’s seven (7) OPRA requests. The Custodian responds in writing via e-mail to the Complainant’s seven (7) OPRA requests on the same day following receipt of such request. The Custodian states that the Complainant’s OPRA requests are unclear. The Custodian states that he understands the requests “... are subpoenas, but what is the case [the Complainant] is looking for.” The Custodian states that he does not “keep these records in a file for just that purpose.” The Custodian states that if any subpoenas exist, they would be in boxes in the storage area and would take considerable time to locate. The Custodian further states that he is not even sure if the Borough would possess some of the responsive subpoenas because the identified parties may have been served for personal matters.

The Custodian states that he is forwarding the Complainant’s OPRA requests to the GRC for guidance. The Custodian states that the Complainant previously filed complaints regarding the same records and cannot understand why the Complainant continues to file requests for the same records without the GRC rendering a decision in the previously filed complaints.<sup>11</sup>

### **May 1, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that he resubmitted his OPRA requests based on guidance given by Mr. Cooper on April 29, 2011 in which Mr. Cooper referred the Complainant to review Byrnes. The Complainant states that the Council’s holding in Byrnes, *supra*, disagrees with the Custodian’s and Mr. Cooper’s denial of access<sup>12</sup> to previous OPRA requests; however, he will address the Custodian’s questions to eliminate any defense the Borough may use in the instance that the Complainant files additional complaints.

The Complainant states that he filed seven (7) OPRA requests based on Mr. Cooper’s April 29, 2011 e-mail and believes that subpoenas for more recent years are not in storage and should be disclosed immediately.

### **May 12, 2011**

Denial of Access Complaints filed with the Government Records Council (“GRC”) attaching the Complainant’s seven (7) OPRA requests dated May 1, 2011.

The Complainant states that he submitted seven (7) OPRA requests to the Borough on May 1, 2011.

The Complainant states that according to the Handbook for Records Custodians (Fifth Edition – January 2011), “If the custodian fails to respond to the requestor within

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<sup>11</sup> The complaints referred to by the Custodian are Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012).

<sup>12</sup> See F.N. No. 11.

seven business days after receiving a request, the failure to respond will be deemed a denial of the request. N.J.S.A. 47:1A-5.i.” *Id.* at pg. 16. The Complainant states that the seven (7) business day time frame expired on May 11, 2011 and the Custodian failed to provide the responsive records.

The Complainant contends that the Custodian knowingly and willfully violated OPRA. The Complainant asserts that until the GRC holds the Custodian accountable for his continuous disregard for OPRA, the Custodian will not change his practices to comply with the law. The Complainant thus requests the following:

1. A determination ordering the Custodian to disclose the responsive records.
2. A determination that the Custodian knowingly and willfully violated OPRA and is subject to a civil penalty. N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

### **May 13, 2011**

E-mail from the Custodian to the Complainant with the following attachments:

- N.J. Court Rules, R. 3:6 et seq. – The Grand Jury.
- N.J. Court Rules, R. 3:13 et seq. – Depositions; Discovery.
- Patterson v. Somerdale Board of Education, GRC Complaint No. 2004-127 (December 2004).
- E-mail chain (undated).

The Custodian states that he believes the subpoenas sought are exempt from disclosure pursuant to R. 3:6. et seq. The Custodian states that subpoenas are the products of grand jury requests and are not subject to OPRA as noted in Patterson.<sup>13</sup>

### **May 13, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that the documents attached to the Custodian’s e-mail are silent on the disclosure of subpoenas and are therefore not relevant. The Complainant notes that the GRC determined in Byrnes that an OPRA request similar to the Complainant’s seven (7) OPRA requests was valid.

The Complainant states that he has received guidance from Mr. Cooper, previous Counsel for the Borough, on April 29, 2011 directing the Complainant to review the Council’s decision in Byrnes on how to properly request subpoenas.<sup>14</sup>

### **May 13, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that he believes that R. 3:6-1 et seq. is relevant because subpoenas are grand jury records. The

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<sup>13</sup> The GRC notes that in Patterson, the Council determined that it did not have the authority to compel disclosure of debit card records because the grand jury, which is an arm of the Judiciary, had possession of sole copies of said records. The facts of that complaint are in apposite to the facts herein.

<sup>14</sup> The Complainant notes that he requested said the records at issue herein pursuant to OPRA and the common law right of access.

Custodian states that the Complainant has already filed many complaints with the GRC regarding these records and that the Borough's position will not change if the Complainant submits additional requests for the same records. The Custodian states that he does not believe he can disclose any subpoenas without a Court Order.

**May 13, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that he sought Mr. Cooper's guidance in order to submit an appropriate OPRA request for subpoenas and Mr. Cooper referred him to Byrnes. The Complainant states that in order to avoid any misunderstandings, it appears as though the Custodian believes that Mr. Cooper's guidance was erroneous.

**June 29, 2011**

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

**June 29, 2011**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 15, 2011 to submit the SOIs. The Custodian states that this extension is necessary because of the upcoming holiday and the Custodian will be out of the office for part of the following week.

**June 29, 2011**

E-mail from the GRC to the Custodian. The GRC states that it will routinely grant one (1) extension of five (5) business days to submit an SOI; however, based on the circumstances, the GRC grants the Custodian an extension of time until July 15, 2011 to submit the SOIs.

**July 14, 2011<sup>15</sup>**

Custodian's SOIs with the following attachments:

- E-mail from Mr. Cooper to the Complainant dated April 21, 2011.
- Letter from the GRC to the Custodian dated June 29, 2011.

The Custodian certifies that the Complainant's OPRA requests at issue herein were the subject of a series of OPRA requests the Complainant submitted to the Borough on March 20, 2011.<sup>16</sup>

The Custodian contends that the Borough's response to these prior requests applies to the requests at issue herein: same are invalid pursuant to MAG, *supra*, and Bent, *supra*. The Custodian contends that the requests lack specificity and are open-ended demands for records. The Custodian asserts that the courts have consistently upheld such a denial. MAG, *supra*.

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<sup>15</sup> The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

<sup>16</sup> The March 20, 2011 OPRA requests are the subject of Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128 et. seq.

The Custodian finally requests that the GRC review whether the Borough is capable of seeking fees from the Complainant for misleading or omitting information and submitting frivolous complaints.

Counsel submits a letter brief in support of the Borough's position in the instant complaint. Counsel contends that this matter should be dismissed as a frivolous and harassing action against the Custodian. Counsel contends that the Complainant failed to acknowledge that he was denied access to several similar requests in March, 2011.

Counsel contends that this complaint, taken in conjunction with multiple other complaints simultaneously filed before the GRC clearly indicates that the intent of the Complainant is not to promote transparency, but to harass and overburden the Custodian with meaningless complaints. Counsel disputes the Complainant's comments regarding the Custodian as an attempt to taint the GRC process. Counsel contends that *in toto*, these factors evidence the Complainant's clear, malicious intent in filing this complaint.

### **July 18, 2011**

Letter from the Complainant to the GRC with the following attachments:

- E-mail from Mr. Cooper to the Complainant dated April 29, 2011.
- E-mail from the Complainant to the Custodian dated May 1, 2011.
- E-mail from the Custodian to the Complainant dated May 1, 2011.
- E-mail from the Complainant to the Custodian dated May 1, 2011.

The Complainant contends that the Custodian failed to respond to his OPRA requests. The Complainant further notes that the Custodian was previously fined by the GRC for failing to respond to an OPRA request. Paff v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2006-158 (May 2007). The Complainant further contends that the GRC has decided several other complaints in which the Custodian failed to respond to an OPRA request. *See* Perilli v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2006-180 (September 2007); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-49 (June 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (January 2012); LaGrua v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-335 (January 2011)(voluntary withdrawal); LaGrua v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-336 (January 2011)(voluntary withdrawal), etc. The Complainant contends that these complaints prove that the Custodian has a long history of ignoring OPRA requests.

The Complainant states that he submitted his OPRA requests via e-mail at 12:39 p.m. on Sunday, May 1, 2011. The Complainant states that the Custodian responded at 1:37 p.m. seeking clarification of the records sought. The Complainant states that the Custodian further advised that the responsive records may be in storage and could require additional time to locate and provide to the Complainant. The Complainant states that the Custodian also advised that he was going to seek guidance from the GRC.

The Complainant states that he responded to the Custodian on the same day answering the Custodian's questions and pointing out that he submitted the requests at issue based on guidance the Complainant received from Mr. Cooper on April 29, 2011.

The Complainant contends that the evidence of record supports that the Custodian:

1. Never requested an extension of time to respond to the Complainant's OPRA requests.
2. Never provided access to the responsive records.
3. Never requested guidance from the GRC.<sup>17</sup>
4. Never referenced any of Mr. Cooper's correspondence with the Complainant prior to submission of the OPRA requests at issue herein.
5. Never stated that the requests were invalid because they were overly broad, did not specifically identify the records sought and were an open-ended demand for records.
6. Never directed the Complainant to Mr. Cooper's previous denial of access to his requests at issue in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128 et seq.

The Complainant contends that it is thus clear that the Custodian knowingly and willful violated OPRA by blatantly ignoring the Complainant's valid OPRA requests. The Complainant contends that the Custodian's actions directly led to the filing of these complaints.

The Complainant contends that based on Mr. Cooper's guidance and the GRC's holding in Bynes, the Complainant's seven (7) OPRA requests are valid and the Custodian's reliance on MAG is erroneous. The Complainant contends that even if MAG applies to his OPRA requests, the Complainant submitted said requests based on Mr. Cooper's guidance. The Complainant contends that it is obvious that the Custodian willfully ignored the Complainant's valid OPRA requests because Mr. Cooper would have advised the Custodian to disclose the responsive records. The Complainant asserts that had Mr. Cooper advised the Custodian to perform any action other than disclosure, it would have called into question Mr. Cooper's own guidance to the Complainant.

The Complainant further contends that the Custodian previously received guidance from Mr. Cooper regarding a valid OPRA request for subpoenas that would persuade disclosure in response to the OPRA requests at issue; however, the Custodian chose to ignore Mr. Cooper's guidance and not respond to the OPRA requests. The Complainant contends that this is evidenced by the Custodian's statement that he did not understand why the Complainant continued to file new requests for the same records already at issue in complaints before the GRC.

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<sup>17</sup> The Complainant notes that if the Custodian did in fact seek guidance from the GRC, it should be considered *ex parte* communications because the Custodian did not copy the Complainant on these e-mails. The GRC notes that it has no record that the Custodian ever contacted the GRC regarding the OPRA requests at issue. The GRC further notes that *ex parte* communication would only have been at issue if the Complainant filed his complaint prior to the Custodian seeking guidance from the GRC.



The Complainant states that the Custodian's Counsel argued in the SOIs that the Complainant's conduct "... is not warranted, nor do I believe should influence the GRC's decisions regarding the Custodian's conduct in dealing with the Complainant's endless amount of mostly frivolous requests." The Complainant contends that this argument is contradictory because the Custodian appears to handle the Complainant's OPRA requests in a negative or defensive posture based on the identity of the requestor. The Complainant asserts that the GRC should not allow the Custodian to respond in this manner. The Complainant further asserts that the Custodian Counsel's characterization of the Complainant's OPRA requests as "mostly frivolous" indicates that even Counsel believes the requests are not frivolous. The Complainant notes that not one of his requests has ever been frivolous.

The Complainant finally contends that the Custodian, Custodian's Counsel and Mr. Cooper have routinely asserted that the Complainant is harassing the Borough for the sole purpose of intimidating the Complainant. The Complainant asserts this intimidation is an attempt to allow the Borough to deny the public unfettered access to government records. The Complainant asserts that Paff v. South Bound Brook Borough & Donald E. Kazar, Docket No. L-1212-10 provides an adequate example of the Custodian's aggressive attempt to keep the "Mayor's Wife's family" criminal investigation report hidden from the public. The Complainant thus contends that public officials like the Custodian, Custodian's Counsel and Mr. Cooper should not be allowed to discourage the public from submitting OPRA requests. The Complainant asserts that allowing them to do so would negate the purpose of OPRA and advance government corruption.

### Analysis

#### **Whether the Custodian sufficiently responded to the Complainant's seven (7) OPRA requests?**

OPRA 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 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.<sup>18</sup> 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 (Interim Order October 31, 2007).

The Complainant filed the instant complaints asserting that the Custodian failed to respond to his seven (7) OPRA requests in a timely manner. However, the Complainant subsequently submitted as part of his July 18, 2011 letter evidence that the Custodian responded just one (1) hour after submission of the Complainant's requests. In said response, the Custodian stated that he did not understand the exact records the Complainant was seeking, was concerned about the location and existence of some of the records and that he would seek the GRC's guidance on the matter.

In Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), the custodian provided a written response to the complainant's request; however, said response did not explicitly grant or deny access to the requested record. The Council held that the custodian's response represented a "deemed" denial of access:

"[a]lthough the Custodian responded in writing within the statutory time period under OPRA the Custodian's response to the request for the sign that references the PHA's desire for Spanish-speaking tenants to bring their own interpreter was so vague that it could not be determined if the requested sign did not exist or if the request was being denied."

Subsequent to Bart, *supra*, the Council was again tasked with determining whether a custodian sufficiently responded to an OPRA request based on a similarly vague response. In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009), the complainant's request Item No. 1 sought "... the ordinance creating the position of Municipal Administrator." The custodian responded in writing in a timely manner to the complainant's OPRA request Item No. 1 stating that he believed no ordinance existed. However, the custodian then stated that because the position of Municipal Clerk is noted in the salary ordinance, an ordinance creating the position of Municipal Clerk may exist. The complainant subsequently filed a complaint disputing the custodian's response. The Council thus held that:

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<sup>18</sup> It is the GRC's position that 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.

“N.J.S.A. 47:1A-5.g. states that if a Custodian is ‘unable to comply with a request for access, then the Custodian shall indicate the specific basis’ for noncompliance. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because he failed to provide a definitive response as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.” *Id.* at pg. 5.

The Council’s holding in Verry, *supra*, applies to the instant complaint because the Custodian responded in writing but failed to state definitively whether he was granting access, denying access, seeking clarification or requesting an extension of time to respond. Specifically, the Custodian stated that he understood the Complainant’s OPRA requests sought “...subpoenas, but what is the case [the Complainant] is looking for.” The Custodian then went on to speculate as to the location and the existence of any responsive records.

The GRC recognizes that it has previously expanded the custodian’s options for responding to granting access, denying access, seeking clarification or requesting an extension of time; however, a response must definitively state as much with sufficient clarity, especially in an instance where a custodian is seeking clarification. *See Kelley*, *supra*. In this complaint, the Custodian’s response does not achieve this purpose: the Custodian stated that he knew the requests sought subpoenas but goes on to ask if they are for a specific case. This statement could be perceived as a request for clarification, but is extremely vague taken *in toto* with the rest of the Custodian’s response that responsive records may or may not exist and may be in storage. Simply put, the Custodian did not sufficiently seek clarification nor did the Custodian grant access, deny access or request an extension of time to determine if responsive records existed.

Therefore, although the Custodian provided a written response to the Complainant’s seven (7) OPRA requests within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5.g., Bart, *supra*, and Verry, *supra*.

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

*kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The records at issue herein are subpoenas for a seven (7) year period served on five (5) parties. The Complainant filed this complaint seeking a determination that the Custodian disclose the responsive records and a determination that the Custodian knowingly and willfully violated OPRA. After further review, the GRC has determined that the parties and the requests at issue herein seeking subpoenas are identical to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012).

Therefore, pursuant to *N.J.A.C. 1:1-15.2(a)* and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. *See Sanders v. Division of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974).

The GRC thus takes judicial notice of Verry, supra. In Verry, the Complainant submitted five (5) Denial of Access Complaints arguing that his OPRA requests were valid pursuant to Byrnes v. Morris County Prosecutor’s Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). The Complainant sought subpoenas for the same seven (7) year period; however, the Complainant submitted one (1) request for a seven (7) year period served on each of five (5) specific parties. Mr. Cooper responded on behalf of the Custodian denying access to said requests stating that same were overly broad and thus invalid pursuant to MAG, supra, Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Council determined that the Complainant’s OPRA requests were valid OPRA requests that:

“... are similar to, if not more specific than, the requests in Byrnes and are valid under OPRA. Specifically, the Complainant included the specific type of record, a time period, (3) key words and five (5) individuals who were named in the subpoenas sought. Thus, said requests contain enough information for the Custodian simply to search his files to find the responsive subpoenas.” *Id.*

The Council thus ordered the Custodian to provide the responsive records to the Complainant and to certify if no records responsive to a particular OPRA request exist.

The GRC further takes judicial notice that the Custodian complied with the Council’s July 31, 2012 Interim Order (“Order”) on August 17, 2012 by providing the responsive subpoenas to the Complainant, certifying that no other responsive records exist and providing certified confirmation of compliance to the Executive Director within the extended time frame to comply with said Order.

Here, the Complainant’s OPRA requests are for the same records at issue in Verry: subpoenas for a seven (7) year period served on five (5) parties. Further, the Council has already determined that the OPRA requests in Verry were valid; thus, the Council’s holding applies here. The Complainant’s seven (7) OPRA requests contain sufficient information for the Custodian to locate the responsive records.

Moreover, the Council ordered the Custodian to disclose the responsive records. The Custodian complied with the Council’s Order on August 17, 2012. Therefore, ordering the Custodian to again disclose the records would not advance the purpose of OPRA, which is to ensure an informed citizenry. *See Bart v. City of Paterson Housing Authority*, 403 N.J. Super. 609 (App. Div. 2008).

However, the GRC notes that the Complainant submitted his OPRA requests at issue in Verry, *supra*, on March 20, 2011 and submitted the OPRA request for 2011 subpoenas at issue herein on May 1, 2011. It could be possible that the Borough received subpoenas in that time frame; therefore, the Custodian must certify whether any responsive subpoenas came into existence between March 20, 2011 and May 1, 2011.

Thus, the Custodian unlawfully denied access to the Complainant’s seven (7) OPRA requests because they are valid pursuant to Verry, *supra*, and Byrnes, *supra*. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council’s July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of March 20, 2011 and May 1, 2011 or legally certify that no responsive records exist.

**Whether the Custodian's insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided a written response to the Complainant's seven (7) OPRA requests within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, the Complainant's seven (7) OPRA requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007). *See also* LaRosa v. Plainfield Municipal Utilities Authority, GRC Complaint No. 2009-220 (June 2010).
2. The Custodian unlawfully denied access to the Complainant's seven (7) OPRA requests because they are valid pursuant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-128, 2011-129, 2011-130, 2011-131 & 2011-132 (Interim Order dated July 31, 2012), and Byrnes v. Morris County Prosecutor's Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010). N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records to the Complainant on August 17, 2012 pursuant to the Council's July 31, 2012 Order. Nevertheless, the Custodian must either provide any records that fall within the time period of March 20, 2011 and May 1, 2011 or legally certify that no responsive records exist.
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, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>19</sup> to the Executive Director.<sup>20</sup>**

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<sup>19</sup> "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."

<sup>20</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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.

Prepared By: Frank F. Caruso  
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Acting Executive Director

August 21, 2012