



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**

**December 18, 2012 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2011-322

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 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. Because the Custodian failed to provide the responsive e-mail to the Complainant, he unlawfully denied access to same pursuant to N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the record because it was attached to the Statement of Information provided to both the GRC and Complainant on November 22, 2011.
2. Although the Custodian unlawfully denied access to the responsive e-mail pursuant to N.J.S.A. 47:1A-6, the GRC declined to order disclosure of e-mail because same was provided to the Complainant as part of the Statement of Information on November 22, 2011. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s unlawful denial of access did 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 18<sup>th</sup> Day of December, 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: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

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

**GRC Complaint No. 2011-322**

v.

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

**Records Relevant to Complaint:** Copy of an e-mail from Mr. Benjamin T. Wetzel, Esq. (“Mr. Wetzel”)<sup>3</sup> to the Complainant dated September 9, 2011 forwarding the Statement of Information (“SOI”) relevant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-280 to all parties.

**Request Made:** September 13, 2011

**Response Made:** September 22, 2011

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** September 26, 2012<sup>4</sup>

**Background**

**September 9, 2011**

E-mail from Mr. Wetzel to the Complainant. Mr. Wetzel states that attached is the SOI relevant to GRC Complaint No. 2011-280. Mr. Wetzel states that a copy of same is being forwarded via regular mail.

**September 11, 2011**

E-mail from the Complainant to the Government Records Council (“GRC”). The Complainant states that the GRC granted the Custodian an extension of time until September 9, 2011 to submit the SOI. The Complainant asserts that the Custodian either refused to or failed to submit the SOI before this deadline.

**September 12, 2011**

E-mail from Mr. Wetzel to the Complainant. Mr. Wetzel states that he sent the Complainant the SOI relevant to GRC Complaint No. 2011-280 via e-mail on September 9, 2011.

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

<sup>2</sup> Represented by Francis P. Linnus, Esq. (Somerset, NJ).

<sup>3</sup> Mr. Wetzel appears to be an attorney either working for or with the Custodian’s Counsel.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**September 12, 2011**

E-mail from the Complainant to Mr. Wetzel. The Complainant states that he did not receive this e-mail and requests that Mr. Wetzel forward same to him.

**September 12, 2011**

E-mail from Mr. Wetzel to the Complainant. Mr. Wetzel states that he is forwarding his September 9, 2011 e-mail with attachment to the Complainant.

**September 13, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is via e-mail.

**September 13, 2011**

E-mail from Mr. Wetzel to the Custodian. Mr. Wetzel states that this e-mail confirms that he sent the Complainant the SOI relevant to GRC Complaint No. 2011-280 via e-mail on September 9, 2011.

**September 13, 2011**

E-mail from the Custodian to Mr. Wetzel. The Custodian requests that Mr. Wetzel provide him with the actual e-mail.

**September 13, 2011**

E-mail from Mr. Wetzel to the Custodian. Mr. Wetzel states that attached is the entire SOI as sent to the Complainant on September 9, 2011.

**September 22, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that he is forwarding the only e-mail he has on record, which is an e-mail from Mr. Wetzel to the Custodian dated September 13, 2011.

**September 22, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that the e-mail the Custodian disclosed is not the responsive record. The Complainant states that Mr. Wetzel's September 12, 2011 e-mail confirms that the e-mail exists. The Complainant states that an e-mail is an identifiable government record and there is no lawful basis for denying access to same.

The Complainant states that unless Counsel advises that no such e-mail dated September 9, 2011 exists, the record must be disclosed. The Complainant states that to be clear, if the Custodian does not either provide the responsive record or get a statement from Counsel confirming that no record exists by the end of the seventh (7<sup>th</sup>) business day, the Complainant will assume that the Custodian knowingly and willfully denied access to the e-mail.

**September 22, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that the September 13, 2011 e-mail is the only record he received from Counsel. The Custodian states that he possesses no other records regarding the OPRA request.

**September 22, 2011**

E-mail from the Complainant to the Custodian. The Complainant contends that the Custodian's response is deceptive because the Custodian keeps stating that no record responsive exists in his office. The Complainant states that the physical location of a record does not matter. The Complainant states that if the record does not exist, the Custodian should simply state as much, otherwise the Complainant will assume that a record exists and that the Custodian is knowingly and willfully denying access to same.

**September 23, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that the only record in the office that exists is the record provided.

**September 23, 2011**

E-mail from the Complainant to the Custodian. The Complainant reiterates from his September 22, 2011 e-mail that the physical location of a record does not matter and that the Custodian has intentionally refused to obtain the responsive e-mail from Counsel. The Complainant further reiterates that the Custodian is knowingly and willfully denying access to the responsive record.

**September 24, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that he forwarded the Complainant's OPRA request to Counsel and the only record returned was the September 13, 2011 e-mail. The Custodian contends that he did not knowingly and willfully deny access to any records. The Custodian states that if Counsel possesses another record that he did not forward to the Custodian, the Custodian is unaware of same.

**September 26, 2012**

Denial of Access Complaint filed with the GRC with the following attachments:

- E-mail from Mr. Wetzel to the Complainant dated September 12, 2011.
- E-mail from the Complainant to Mr. Wetzel dated September 12, 2011.
- Complainant's OPRA request dated September 13, 2011.
- E-mail from Mr. Wetzel to the Custodian dated September 13, 2011.
- E-mail from the Custodian to the Complainant dated September 22, 2011 (with attachment).
- E-mail from the Complainant to the Custodian dated September 22, 2011.
- E-mail from the Custodian to the Complainant dated September 22, 2011.
- E-mail from the Complainant to the Custodian dated September 22, 2011.
- E-mail from the Custodian to the Complainant dated September 23, 2011.
- E-mail from the Complainant to the Custodian dated September 23, 2011.
- E-mail from the Custodian to the Complainant dated September 24, 2011.

The Complainant states that the OPRA request at issue herein was the result of an e-mail in which Mr. Wetzel advised the Complainant that he forwarded via e-mail a copy of the SOI relevant to GRC Complaint No. 2011-280 on September 9, 2011. The Complainant states that because he did not receive this e-mail, he requested same from Mr. Wetzel and the Custodian on September 12, 2011. The Complainant states that because neither Mr. Wetzel nor the Custodian responded, he submitted an OPRA request for the e-mail on September 13, 2011.

The Complainant states that the Custodian responded on September 22, 2011 providing an e-mail from Mr. Wetzel dated September 13, 2011 that was not responsive to the Complainant's OPRA request. The Complainant states that he brought this fact to the Custodian's attention immediately after receiving the response. The Complainant states that after a lengthy conversation via e-mail, the Custodian essentially confirmed that he forwarded the e-mail to Counsel and that Counsel either refused or failed to disclose the responsive e-mail to the Custodian. The Complainant states that as of September 23, 2011, the eighth (8<sup>th</sup>) business day after receipt of the Complainant's OPRA request, he had not received the responsive e-mail.

The Complainant argues that OPRA contains no exemptions applicable to the responsive e-mail. The Complainant notes that Mr. Wetzel's written position is that he already sent the e-mail to the Complainant. The Complainant asserts that although he gave the Custodian a chance to state that the record did not exist, the Custodian never stated this: thus the record must exist. The Complainant contends that the either Mr. Wetzel and the Custodian are refusing to disclose the e-mail or Mr. Wetzel never sent the e-mail at issue. The Complainant further notes that the e-mail could not have been destroyed in accordance with the Borough's retention schedule because he requested it just days after the e-mail's supposed creation.

The Complainant thus requests the following:

1. A determination that the Custodian and Counsel violated OPRA by failing to provide the Complainant with the responsive record.
2. A determination ordering disclosure of the responsive e-mail.
3. A determination that the Custodian and Counsel knowingly and willfully violated OPRA and unreasonably denied access to the responsive e-mail under the totality of the circumstances warranting the imposition of civil penalties. N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

**November 4, 2011**

Request for the SOI sent to the Custodian.

**November 15, 2011**

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

**November 15, 2011**

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

**November 22, 2011**

Custodian's SOI with the following attachments:<sup>5</sup>

- E-mail from Mr. Wetzel to the Complainant dated September 9, 2011 (with attachment).
- E-mail from the Complainant to the GRC dated September 11, 2011.
- E-mail from Mr. Wetzel to the Complainant dated September 12, 2011.
- E-mail from the Complainant to Mr. Wetzel dated September 12, 2011.
- E-mail from Mr. Wetzel to the Complainant dated September 12, 2011 (with attachment).
- Complainant's OPRA request dated September 13, 2011.
- E-mail from Mr. Wetzel to the Custodian dated September 13, 2011.
- E-mail from the Custodian to Mr. Wetzel dated September 13, 2011.
- E-mail from Mr. Wetzel to the Custodian dated September 13, 2011 (with attachment).
- E-mail from the Custodian to the Complainant dated September 22, 2011 (with attachment).
- E-mail from the Complainant to the Custodian dated September 22, 2011.
- E-mail from the Custodian to the Complainant dated September 22, 2011.
- E-mail from the Complainant to the Custodian dated September 22, 2011.
- E-mail from the Custodian to the Complainant dated September 23, 2011.
- E-mail from the Complainant to the Custodian dated September 23, 2011.
- E-mail from the Custodian to the Complainant dated September 24, 2011.

The Custodian certifies that his search for the requested records included searching his own e-mail account and contacting Counsel's office.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable herein because the Borough has no retention schedule for e-mails.

The Custodian certifies that he received the Complainant's OPRA request on September 13, 2011. The Custodian certifies that he responded in writing on September 22, 2011 providing the Complainant with the responsive record.

On behalf of Counsel, Mr. Wetzel submits a letter brief in support of the Custodian's position. Mr. Wetzel states that on September 9, 2011, he submitted to the GRC an SOI via regular mail and facsimile and simultaneously mailed same to the Complainant. Mr. Wetzel states that as a courtesy, he also forwarded a copy of the SOI to the Complainant via e-mail. Mr. Wetzel states that on September 11, 2011, the

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<sup>5</sup> The Custodian attached additional documents that are not relevant to the instant complaint.

Complainant e-mailed the GRC stating that he never received the SOI. Mr. Wetzel states that on September 12, 2011, he advised the Complainant that the SOI was sent to him via e-mail on September 9, 2011. Mr. Wetzel states that the Complainant requested a copy of this e-mail, which Mr. Wetzel sent to the Complainant (copying all parties to include the GRC) within the hour. Mr. Wetzel asserts that it appears as though the Complainant never received this e-mail.<sup>6</sup> Mr. Wetzel states that the Complainant filed the OPRA request at issue herein on September 13, 2011.

Mr. Wetzel states that upon receipt of the OPRA request, on September 13, 2011, the Custodian asked him to confirm that he e-mailed the SOI to the Complainant on September 9, 2011, which Mr. Wetzel confirmed in an e-mail. Mr. Wetzel states that the Custodian e-mailed him again asking for a copy of the e-mail. Mr. Wetzel states that he responded providing the SOI to Custodian as a pdf. attachment. Mr. Wetzel asserts that it appears that the Custodian did not receive this e-mail. Mr. Wetzel states that the Custodian responded on September 22, 2011 apparently forwarding what he believed to be the responsive record. Mr. Wetzel states that after a series of e-mails between the Custodian and the Complainant on which Mr. Wetzel was not copied, the Complainant filed this complaint.

Mr. Wetzel asserts that the basis for this complaint appears to center around the Complainant's allegation that he did not receive Mr. Wetzel's September 9, 2011 e-mail, which contained a copy of the SOI relevant to GRC Complaint No. 2011-280. Mr. Wetzel argues that the attached evidence clearly shows that the Complainant was supplied with this e-mail on September 9, 2011 and again on September 12, 2011. Mr. Wetzel asserts that it is unclear why the Complainant did not receive these communications, but that it is possible that the size of the SOI file could have affected delivery of the e-mail. Mr. Wetzel notes that he did not receive an "undeliverable" message after either e-mail.

Mr. Wetzel states that because it appears that the Complainant was not provided with the requested e-mail because of technological issues, the alleged denial of access was not knowing and willful and no sanctions are warranted. Mr. Wetzel further argues that the Complainant's initiation of this complaint, notwithstanding that Mr. Wetzel twice attempted to send the responsive e-mail to the Complainant, was intended only to harass the Borough. Mr. Wetzel further argues that this baseless complaint constitutes an undue burden on the taxpayers of the Borough.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested e-mail?**

OPRA provides that:

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<sup>6</sup> The GRC notes that after an extensive search of its records for this e-mail, the GRC was unable to locate same.



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

Additionally, OPRA defines a government record as:

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

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

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

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

The Complainant filed the instant complaint arguing that the Custodian provided a record that was not responsive to his OPRA request. The Complainant contended that the e-mail is a government record not otherwise exempt from access and should have been provided. The Complainant requested that the GRC determine that the Custodian violated OPRA and order disclosure of the responsive record.

In the SOI, the Custodian certified that he provided the responsive record on September 22, 2011. However, in a letter brief supporting the Borough’s position, Mr. Wetzel stated that he sent the e-mail to the Custodian on September 13, 2011; however, it appears that the Custodian never received same and instead sent the Complainant the e-mail he now disputes was not responsive to his OPRA request. Mr. Wetzel further noted that he was not aware of the ensuing correspondence between the Custodian and Complainant until the filing of this complaint.

Mr. Wetzel asserted that the basis of this complaint appears to center on the failure of the September 9, 2011 e-mail to transmit to the Complainant. Mr. Wetzel asserted that the evidence is clear that he sent the e-mail to the Complainant on September 9, 2011 and September 12, 2011, but there could have been an error based on the size of the attached file and he never received an undeliverable message.

Thus, the crux of this complaint is whether the Custodian provided the Complainant with a copy of the September 9, 2011 e-mail in response to the Complainant's September 13, 2011 OPRA request.

OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. The evidence of record indicates that the Custodian never provided the responsive record to the Complainant until attaching same to the SOI. Although Mr. Wetzel noted that he attempted to send the e-mail to the Complainant on September 9, 2011 and September 12, 2011, this does not affect the Custodian's response to the Complainant's OPRA request, to which the Custodian certified in the SOI that he received same on September 13, 2011.

Mr. Wetzel did assert in his letter brief that there appeared to be transmission issues with sending the e-mail the two (2) previous times and to the Custodian on September 13, 2011. The GRC cannot confirm this assertion; however, it should be noted that the GRC failed to receive Mr. Wetzel's second (2<sup>nd</sup>) attempt to send the September 9, 2011 e-mail to all parties on September 12, 2011. Regardless of whether the e-mail failed to transmit prior to the Complainant's OPRA request, the Custodian was charged with providing the e-mail in response to the OPRA request and failed to do so. Thus, the Custodian unlawfully denied access to the responsive record.

Therefore, because the Custodian failed to provide the responsive e-mail to the Complainant, he unlawfully denied access to same pursuant to N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the record because it was attached to the SOI provided to both the GRC and Complainant on November 22, 2011.

**Whether the Custodian's unlawful denial of access 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 (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 unlawfully denied access to the responsive e-mail pursuant to N.J.S.A. 47:1A-6, the GRC declined to order disclosure of e-mail because same was provided to the Complainant as part of the SOI on November 22, 2011. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's unlawful denial of access did 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. Because the Custodian failed to provide the responsive e-mail to the Complainant, he unlawfully denied access to same pursuant to N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the record because it was attached to the Statement of Information provided to both the GRC and Complainant on November 22, 2011.
2. Although the Custodian unlawfully denied access to the responsive e-mail pursuant to N.J.S.A. 47:1A-6, the GRC declined to order disclosure of e-mail because same was provided to the Complainant as part of the Statement of Information on November 22, 2011. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's unlawful denial of access did 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

November 20, 2012<sup>7</sup>

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<sup>7</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.  
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