



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

April 30, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2011-385

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 *In Camera* 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 did not fully comply with the Council’s February 26, 2013 Interim Order because although the Custodian provided nine (9) copies of the unredacted records and his legal certification to the GRC within the extended time frame, the Custodian failed to also submit a document index.
2. **The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the redacted portions of the five (5) records disclosed to the Complainant. N.J.S.A. 47:1A-6.**
3. The Custodian’s response to the Complainant’s OPRA request was insufficient because he failed to set forth the specific lawful basis for the redactions made to the responsive e-mails and the Custodian did not fully comply with the Council’s February 26, 2013 Interim Order by not providing the required document index. However, as determined by the *in camera* review, the Custodian lawfully denied access to the redactions contained in the responsive records. N.J.S.A. 47:1A-6. 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 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.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to



the redactions contained in the responsive e-mails. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Record or Redaction Number	Record Name/Date	Description of Record Or Redaction¹	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination²
E-mail	April 15, 2009	Password for police officer	Administrative or technical information regarding computer ... networks ... <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is login information for an employee. Therefore, because of the inherent risk of disclosing an employee's e-mail login information, this redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
E-mail	November 17, 2009	Address and e-mail for State Police	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is actually a list of numbers including the Internet Protocol ("IP") address, Mask, Gateway ("GW") number, Domain Name System ("DNS") ¹ and DNS ² numbers. Disclosure of these numbers on their face could expose the safety of the Borough's computer network and hardware; therefore, this redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

¹ Because the Custodian did not include a document index as part of his compliance, the GRC relied on the Custodian's December 28, 2011 e-mail to the Complainant describing the redactions made to the records at issue.

² **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped spaces. The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

E-mail	April 26, 2010	Code for computer	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is a serial code for a computer. This code would allow someone to identify a particular computer within the Borough's network thus risking a security breach. This redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
E-mail	May 3, 2010	E-mail address for police officer	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is actually a police officer's cell phone number and not an e-mail address. However, on April 2, 2013, the Custodian certified that the phone number is a personal line. On April 3, 2013, the Complainant submitted a letter containing no competent, credible evidence that the number is a Borough assigned number. Therefore, in accordance with previous GRC case law regarding telephone numbers, this redaction is lawful. <u>N.J.S.A. 47:1A-1, Livecchia v. Borough of Mt. Arlington (Morris), GRC Complaint No. 2008-80 (Interim Order dated November 18, 2009).</u>
E-mail	March 1, 2011	IP address for computer system	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is an IP address that should not be disclosed for the reasons stated above regarding the November 17, 2009 e-mail. Thus, said redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

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 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2011-385

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Redactions made to the following:³

1. E-mail dated April 15, 2009.
2. E-mail dated November 17, 2009.
3. E-mail dated April 26, 2010.
4. E-mail dated May 3, 2010.
5. E-mail dated March 1, 2011.

Request Made: August 27, 2011

Response Made: August 29, 2011

GRC Complaint Filed: December 28, 2011⁴

Records Submitted for *In Camera* Examination:

1. E-mail dated April 15, 2009.
2. E-mail dated November 17, 2009.
3. E-mail dated April 26, 2010.
4. E-mail dated May 3, 2010.
5. E-mail dated March 1, 2011.

Background

At its February 26, 2013 public meeting, the Council considered the February 19, 2013 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, found that:

¹ No legal representation listed on record.

² Donald E. Kazar, Custodian of Records. Represented by Francesco Taddeo, Esq. (Somerville, NJ).

³ The GRC determined these e-mails were the only records at issue based on the evidence of record. The GRC notes that the Complainant provided no specific list of redacted records in the Denial of Access Complaint aside from six (6) e-mail excerpts with no definitive dates.

⁴ The GRC received the Denial of Access Complaint on said date.

1. The Custodian's response to the Complainant's OPRA request was insufficient because the Custodian failed to set forth a specific lawful basis for redactions made to the five (5) e-mails at issue herein, pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008). *See also* Wolosky v. Township of Sparta (Sussex), GRC Complaint No. 2009-325 (Interim Order dated January 31, 2012).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the five (5) e-mails to determine the validity of the Custodian's assertion that the redactions contained therein constitutes "... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security..." pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.

On February 27, 2013, the Council distributed its Interim Order to all parties. On March 1, 2013, the Custodian requested an extension of time until March 12, 2013 to respond. On March 4, 2013, the GRC granted the extension.

On March 11, 2013, one (1) business day before the expiration of the extended time frame to comply, the Custodian responded to the Council's Interim Order. The Custodian certifies that he attached unredacted copies of the records required for an *in camera* review pursuant to the Council's Interim Order.

Upon receipt of the records to be reviewed *in camera*, the GRC noticed that the redaction in the May 3, 2010 e-mail did not comport with the description the Custodian provided the Complainant in his December 28, 2011 e-mail. Specifically, the Custodian noted that the redaction was an e-mail address; however, the redaction was actually a phone number. Thus, on April 1, 2013, the GRC requested additional information from the Custodian asking whether the phone number was a personal line, listed number or number issued by the Borough. On April 2,

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

2013, the Custodian responded certifying that the number, which he errantly referred to as an e-mail address, is a personal cell phone number belonging to a Borough police officer.

On April 3, 2013, the Complainant sent a letter to the GRC in which he argues that the Custodian filed a false certification claiming that the redacted information was an e-mail address and not a phone number. The Complainant further contends that he is not surprised the Custodian asserted the number is a personal line because the Custodian knows the GRC will not verify the accuracy of his certification. The Complainant contends that the Custodian committed perjury by providing false statements in his certification. N.J.S.A. 2C:28-1.⁸ The Complainant contends that the GRC has no way of disproving that the number is a personal line.

Analysis

Compliance

At its February 26, 2013 meeting, the Council determined that:

“...the GRC must conduct an *in camera* review of the five (5) e-mails to determine the validity of the Custodian’s assertion that the redactions contained therein constitutes “... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security...” pursuant to N.J.S.A. 47:1A-1.1.”

Therefore, the Council ordered the Custodian to:

“...deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records ... a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection ... within five (5) business days from receipt of the Council’s Interim Order.” (Footnotes omitted.)

On February 27, 2013, the Council disseminated its Order to the parties. Thus, the Custodian’s response was due by close of business on March 5, 2013. On March 1, 2013, the Custodian sought an extension of time to comply with the Council’s Order. On March 4, 2013, the GRC granted the Custodian said extension.

On March 11, 2013, the Custodian e-mailed his certification along with (9) copies of the unredacted records in accordance with the Council’s Order to all parties. However, the Custodian failed to include a document index, as required by the Council’s Order.

Therefore, the Custodian did not fully comply with the Council’s February 26, 2013 Interim Order because although the Custodian provided nine (9) copies of the unredacted records

⁸ The Complainant notes that in at least six (6) complaints before the GRC, he has argued that the GRC should apply the principle of “false in one, false in all” found in State v. Ernst, 32 N.J. 567, 583 (1960).

and his legal certification to the GRC within the extended time frame, the Custodian failed to also submit a document index.

Unlawful Denial of Access

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

In his Statement of Information (“SOI”), the Custodian argued that the redactions made to the responsive e-mails were lawful under OPRA, which provides that:

“[a] government record shall not include ... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security ...” N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record Or Redaction⁹	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹⁰
E-mail	April 15, 2009	Password for police officer	Administrative or technical information regarding computer ... networks ... <u>N.J.S.A. 47:1A-</u>	The redaction is login information for an employee. Therefore, because of the inherent risk of disclosing an employee’s e-mail login information, this

⁹ Because the Custodian did not include a document index as part of his compliance, the GRC relied on the Custodian’s December 28, 2011 e-mail to the Complainant describing the redactions made to the records at issue.

¹⁰ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped spaces. The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			1.1.	redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
E-mail	November 17, 2009	Address and e-mail for State Police	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is actually a list of numbers including the Internet Protocol (“IP”) address, Mask, Gateway (“GW”) number, Domain Name System (“DNS”)1 and DNS2 numbers. Disclosure of these numbers on their face could expose the safety of the Borough’s computer network and hardware; therefore, this redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
E-mail	April 26, 2010	Code for computer	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is a serial code for a computer. This code would allow someone to identify a particular computer within the Borough’s network thus risking a security breach. This redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
E-mail	May 3, 2010	E-mail address for police officer	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is actually a police officer’s cell phone number and not an e-mail address. However, on April 2, 2013, the Custodian certified that the phone number is a personal line. On April 3, 2013, the Complainant submitted a letter containing no competent, credible evidence that the number is a Borough

				assigned number. Therefore, in accordance with previous GRC case law regarding telephone numbers, this redaction is lawful. <u>N.J.S.A. 47:1A-1, Livecchia v. Borough of Mt. Arlington (Morris)</u> , GRC Complaint No. 2008-80 (Interim Order dated November 18, 2009).
E-mail	March 1, 2011	IP address for computer system	Administrative or technical information regarding computer hardware. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction is an IP address that should not be disclosed for the reasons stated above regarding the November 17, 2009 e-mail. Thus, said redaction is lawful pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

Thus, the Custodian lawfully denied access to the redactions in the responsive records.

Knowing & Willful

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).

The Custodian’s response to the Complainant’s OPRA request was insufficient because he failed to set forth the specific lawful basis for the redactions made to the responsive e-mails and the Custodian did not fully comply with the Council’s February 26, 2013 Interim Order by not providing the required document index. However, as determined by the *in camera* review, the Custodian lawfully denied access to the redactions contained in the responsive records. N.J.S.A. 47:1A-6. 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 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.

Prevailing Party Attorney’s Fees

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51

(2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

“OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney’s fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

Here, the Council requested unredacted copies of five (5) e-mails containing redactions in order to perform an *in camera* review to determine whether said redactions were lawful. The Council conducted the review and determined that the Custodian lawfully redacted the e-mails. Thus, since the Custodian lawfully redacted the records and there is no change in his conduct, the Complainant is not a prevailing party entitled to an award of reasonable attorney’s fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, *supra*. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, the Custodian lawfully denied access to the redactions contained in the responsive e-mails. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's February 26, 2013 Interim Order because although the Custodian provided nine (9) copies of the unredacted records and his legal certification to the GRC within the extended time frame, the Custodian failed to also submit a document index.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portions of the five (5) records disclosed to the Complainant. N.J.S.A. 47:1A-6.**
3. The Custodian's response to the Complainant's OPRA request was insufficient because he failed to set forth the specific lawful basis for the redactions made to the responsive e-mails and the Custodian did not fully comply with the Council's February 26, 2013 Interim Order by not providing the required document index. However, as determined by the *in camera* review, the Custodian lawfully denied access to the redactions contained in the responsive records. N.J.S.A. 47:1A-6. 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 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.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the redactions contained in the responsive e-mails. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
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INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2011-385

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council ("Council") considered the February 19, 2013 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 response to the Complainant's OPRA request was insufficient because the Custodian failed to set forth a specific lawful basis for redactions made to the five (5) e-mails at issue herein, pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008). *See also* Wolosky v. Township of Sparta (Sussex), GRC Complaint No. 2009-325 (Interim Order dated January 31, 2012).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the five (5) e-mails to determine the validity of the Custodian's assertion that the redactions contained therein constitutes "... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security..." pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. 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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2011-385

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Redactions made to the following:³

1. E-mail dated April 15, 2009.
2. E-mail dated November 17, 2009.
3. E-mail dated April 26, 2010.
4. E-mail dated May 3, 2010.
5. E-mail dated March 1, 2011.

Request Made: August 27, 2011

Response Made: August 29, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: December 28, 2011⁴

Background

December 28, 2011

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

- Complainant’s OPRA request dated August 27, 2011.
- E-mail from the Complainant to the Custodian dated December 24, 2011.
- E-mail from the Custodian to the Complainant dated December 24, 2011.
- E-mail excerpts with redactions.⁵

The Complainant states that he submitted an OPRA request to the Custodian on August 27, 2011. The Complainant states that the Custodian responded on September 23, 2011 providing e-mails with redactions.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC determined these e-mails were the only records at issue based on the evidence of record. The GRC notes that the Complainant provided no specific list of redacted records in the Denial of Access Complaint aside from six (6) e-mail excerpts with no definitive dates.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The six (6) excerpts provided by the Complainant do not indicate the specific dates of each e-mail.

The Complainant states that the “Handbook for Records Custodians” (Fifth Edition – January 2011) provides that “[a] proper response to an OPRA request ... includes a record index that identifies each record requested and the specific legal basis for a denial of access (including redactions) to each record.” *Id.* at pg. 25. The Complainant states that although some e-mails contained redactions, the Custodian did not provide as part of his response a record index or specific lawful basis for said redactions. The Complainant states that he e-mailed the Custodian on December 24, 2011 seeking a copy of the record index and lawful basis. The Complainant notes that he gave the Custodian until noon on December 28, 2011 to provide same. The Complainant states that the Custodian responded on the same day stating that he was unaware that any e-mails were redacted. The Complainant states that the Custodian further advised that he would consult with Chief William C. King (“Chief King”), Borough of South Bound Brook Police Chief, on December 27, 2011.

The Complainant contends that as of noon on December 28, 2011, the Custodian failed to provide the missing record index and specific lawful basis for each redaction. The Complainant requests the following:

1. A determination that the Custodian violated OPRA by failing to provide a record index and specific lawful basis for redactions.
2. A determination ordering the Custodian to immediately disclose the responsive records.
3. A determination that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances warranting the imposition of a civil penalty pursuant to N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

January 11, 2012

Custodian’s Statement of Information (“SOI”) with the following attachments:⁶

- Complainant’s OPRA request dated August 27, 2011.
- E-mail from the Custodian to the Complainant dated August 29, 2011.
- E-mail from the Custodian to the Complainant dated September 21, 2011.
- E-mail from the Complainant to the Custodian dated December 24, 2011.
- E-mail from the Custodian to the Complainant dated December 24, 2011.
- E-mail from the Custodian to the Complainant dated December 28, 2011.

The Custodian certifies that his search for the requested records included himself and Chief King searching for all responsive e-mails.

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.

⁶ The Custodian provided additional documents that are not relevant to the instant complaint.
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The Custodian certifies that he received the Complainant's OPRA request on August 27, 2011. The Custodian certifies that he responded on August 29, 2011 stating that an extension of ten (10) business days was necessary. The Custodian certifies that he e-mailed the Complainant on September 21, 2011 stating that Chief King was still preparing his response and that records would be provided to the Complainant by September 26, 2011. The Custodian certifies that he sent all 500 pages of responsive e-mails to the Complainant via facsimile on September 23, 2011.

The Custodian certifies that on December 24, 2011, the Complainant e-mailed him inquiring about redactions made to certain e-mails. The Custodian certifies that he responded on the same day noting that he was unaware of any redactions but that he would check with Chief King on December 27, 2011. The Custodian certifies that he responded on December 28, 2011 noting that he reviewed all of the e-mails sent and also spoke with Chief King. The Custodian certifies that he further advised that he was unaware that Chief King made any redactions, but that that lawful basis for each is N.J.S.A. 47:1A-1.1, exempting "... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security ...". The Custodian certifies that he also provided the Complainant with a general description of the information redacted as follows:

1. E-mail dated April 15, 2009 – Password for police officer.
2. E-mail dated November 17, 2009 - Address and e-mail for State Police.
3. E-mail dated April 26, 2010 - Code for computer.
4. E-mail dated May 3, 2010 – E-mail address for police officer.
5. E-mail dated March 1, 2011 – IP address for computer system.

The Complainant certifies that he requested that the Complainant advise if any redactions were missed. The Custodian certifies that he did not see the Complainant's Denial of Access Complaint until after he sent his December 28, 2011 response to the Complainant.

The Custodian argues that he did not notice that the Complainant set a deadline of noon on December 28, 2011. The Custodian asserts that he assumed the deadline was until the end of the business day because this has been the case in other extensions in the past. The Custodian contends that he timely sent the Complainant the record index and to this day has not received any disputes from the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the redacted portions of the requested e-mails?

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 ... A government record shall not include the following information which is deemed to be confidential ... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further 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).

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.

At issue in the instant complaint are redactions to five (5) e-mails. The Complainant argued in the Denial of Access Complaint that the Custodian violated OPRA by failing to provide a record index and specific lawful basis for redactions. Thus, the GRC will briefly address this issue.

N.J.S.A. 47:1A-5(g) requires that a custodian provide the specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008), the Custodian responded in a timely manner providing redacted records to the Complainant; however, the Custodian failed to provide a specific legal basis for said redactions. The Council, relying on prior decisions in Paff v. Township of Plainsboro, GRC Complaint No. 2005-29, (July 2005) and Schwarz v. NJ Department of Human Services, GRC Complaint No. 2004-60, (February, 2005) held that:

“[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction ... Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.” *Id.*

Here the Custodian disclosed records with redactions and failed to prove the lawful basis for each at the time of his response. Therefore, the Custodian’s response to the Complainant’s OPRA request was insufficient because the Custodian failed to set forth a specific lawful basis for redactions made to the five (5) e-mails at issue herein, pursuant to N.J.S.A. 47:1A-5(g) and Paff, supra. See also Wolosky v. Township of Sparta (Sussex), GRC Complaint No. 2009-325 (Interim Order dated January 31, 2012).

Regarding the redacted e-mails, in Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC⁷ in which the GRC dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f),

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the five (5) e-mails to determine the validity of the Custodian’s assertion that the redactions contained therein constitutes “... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security...” pursuant to N.J.S.A. 47:1A-1.1.

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?

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. The Custodian’s response to the Complainant’s OPRA request was insufficient because the Custodian failed to set forth a specific lawful basis for redactions made to the five (5) e-mails at issue herein, pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008). *See also* Wolosky v. Township of Sparta (Sussex), GRC Complaint No. 2009-325 (Interim Order dated January 31, 2012).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the five (5) e-mails to determine the validity of the Custodian’s assertion that the redactions contained therein constitutes “... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security...” pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. 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
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013