



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

March 25, 2014 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2012-284, 2012-285, 2012-286,
2012-287 & 2012-295

v.

Franklin Fire District No. 1
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 Supplemental 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 since there are significant issues of contested facts, this complaint should be referred to Office of Administrative Law for a fact-finding hearing to resolve the following:

1. A determination of whether the current Custodian conducted a sufficient search and fully complied with the Council’s August 27, 2013 Interim Order in its totality. This includes any attachments that exist within those e-mails provided. If it is determined that compliance was not fully met, the Office of Administrative Law may order disclosure of any deficient records.
2. A determination of whether the current Custodian unlawfully denied access the six (6) e-mails to which access was denied, by way of *in camera* review of same.
3. A determination of whether the original Custodian and/or current Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.
4. A determination of the award of a reasonable attorney’s fee because the Complainant primarily prevailing based on the Council’s Order and the Franklin Fire District’s subsequent compliance with same. N.J.S.A. 47:1A-6.



Interim Order Rendered by the
Government Records Council
On The 25th Day of March, 2014

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: March 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2012-284, 2012-285,
2012-286, 2012-287 and 2012-295²**

v.

**Franklin Fire District No. 1³
Custodial Agency**

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of all e-mails regarding employee salaries and benefits from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 2: Electronic copies via e-mail of all e-mails regarding ethics from January 1, 2007 to February 2, 2011 sent and/or received by eleven (11) persons.

OPRA request No. 3: Electronic copies via e-mail of all e-mails regarding personnel policies and procedures from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 4: Electronic copies via e-mail of all e-mails regarding workplace harassment and violence from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 5: Electronic copies via e-mail of all e-mails regarding mediation from January 1, 2010 to February 2, 2011 sent and/or received by six (6) persons.

Custodian of Record: Melissa Kosensky⁴

Request Received by Custodian: February 3, 2011

Response Made by Custodian: None.

GRC Complaint Received: October 24, 2012 and November 1, 2012⁵

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA) and Walter M. Luers, Esq., of Law Office of Walter M. Luers, LLC (Clinton, NJ).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

⁴ The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

⁵ GRC Complaint Nos. 2012-284 through 2012-287 were received on October 24, 2012 and GRC Complaint No. 2012-295 was received on November 1, 2012.

Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 22, 2013 Supplemental 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:

[T]he Custodian's Counsel has failed to establish in his request for reconsideration of the Council's August 27, 2013 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on extraordinary circumstances or new evidence. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the GRC's imposition of a statute of limitation based on Mason v. City of Hoboken, 196 N.J. 51 (July 22, 2008), contradicts the plain language in the Supreme Court's holding. Thus, the Custodian Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Procedural History:

On October 30, 2013, the Council distributed its Interim Order to all parties. On November 4, 2013, the Custodian's Counsel filed a motion for leave to appeal the Council's October 29, 2013 Interim Order. On November 6, 2013, Counsel submitted to the GRC a request for stay of the Council's Order to appeal same, which the GRC granted on November 7, 2013. On December 6, 2013, the Appellate Division denied Counsel's motion for leave to appeal the Council's decision.

On December 20, 2013, the Complainant's Counsel notified the GRC that Franklin Fire District No. 1's ("FFD") motion for leave to appeal was denied. Counsel further requested that the GRC's stay be lifted and that the Custodian be ordered to comply with the October 29, 2013 Order. On December 26, 2013, the Custodian's Counsel sought an extension of time until January 13, 2014 to comply with the Council's Order. On the same day, the GRC lifted the stay and granted the Custodian's Counsel until January 13, 2014 to comply.

On January 9, 2014, the Custodian's Counsel sought an additional 45 days to comply with the Council's Order based on a number of factors. On January 10, 2014, the Complainant's Counsel objected to the extension. The GRC agreed that 45 days was excessive; however, it did

allow for a 30 day extension until February 10, 2014 based on the number of requests and possibly responsive records.⁶

Between February 7, 2014 and February 10, 2014, the Custodian complied with each OPRA request by providing responsive records, providing a document index identifying six (6) e-mails for which access was not provided, and submitting certified confirmation of compliance that the records provided are the records responsive to the Complainant's OPRA requests.⁷

On March 10, 2014, the Complainant's Counsel submitted a letter brief setting forth a multitude of issues as a result of the preliminary review of the FFD's compliance with the Council's Order. Counsel argued that the evidence of record proves that the original Custodian knowingly and willfully violated OPRA. Counsel contended that the totality of the circumstances proves a number of factors motivated the original Custodian to withhold access to the responsive records at that time, including her 2011 bid for re-election, resignation of a commissioner due to criminal conduct, the FFD's defense of a sexual harassment/workplace violence lawsuit, sanction of Open Public Meetings Act ("OPMA") by the Somerset County Prosecutor's Office and repeated OPMA violations. Counsel contended that the original Custodian's failure to provide the responsive records at that time nearly three (3) years ago prevented the Complainant from using the information contained in the e-mails to question the viability of the original Custodian as a candidate.

Counsel further contended that the current Custodian also benefited from never responding to the subject OPRA requests because he was up for re-election in 2012. Counsel contends that he already submitted evidence to the GRC contradicting the current Custodian's Statement of Information ("SOI") certification that he did not know that the Complainant's OPRA requests were still pending in March 2011.

Counsel also disputed that the current Custodian failed to adequately meet compliance. Counsel argued that the GRC should conduct an *in camera* review of the six (6) e-mails for which access was denied. Counsel further argued that, at the very least, the Council should order disclosure of any e-mails containing more than three (3) commissioners on them because they constitute a violation of OPMA and any privilege is thus forfeited. Counsel further argued that several e-mails contained attachments that were not disclosed. Counsel contended that in some instances, the FFD failed to provide records for the entire time frame requested. Counsel argued that this is proof that either the search conducted was woefully insufficient or corrupted by conflict of interest. Counsel noted that no e-mails from the previous commissioner and subject of the sexual harassment lawsuit were provided. Counsel implored the GRC to order an independent party to conduct a search of the FFD's e-mail, as well as the relevant e-mail accounts of all other named officials to ensure that all records were provided.

⁶ On January 11, 2014, the Complainant's Counsel submitted a letter brief urging the GRC to establish procedures and safeguards in situations where responsive records might exist in personal e-mail accounts and address conflict of interest issues. However, the GRC has already established a policy on the issue of location of government records. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (Interim Order dated December 8, 2005); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Further, the GRC declines to adjudicate any possible conflict of interest issues as OPRA does not expressly afford the GRC the opportunity to do so. N.J.S.A. 47:1A-7(b).

⁷ The GRC received no objections to the Custodian's compliance.

Counsel argued that the Complainant has used OPRA to identify different forms of misconduct within the FFD, which is what OPRA was intended to accomplish. Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009); Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011). Counsel contends that the multitude of evidence surrounding his attempts to root out misconduct, as well as the evidence present in this and other Denial of Access complaints currently in various stages of adjudication against the FFD, warrant a hearing before the Office of Administrative Law ("OAL") to determine the issue of a knowing and willful violation. Counsel contended that the actions of the FFD are best weighed by a fact finder with the ability to ". . . observe the demeanor of the involved witnesses . . ." In re Tenure Hearing of Tyler, 236 N.J. Super. 478 485 (App. Div. 1989).

Analysis

Compliance

At its August 27, 2013 meeting, the Council ordered the Custodian to provide records reasonably responsive to the Complainant's five (5) OPRA requests or to certify to the disclosability and/or existence of same. The Order further required that the Custodian submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On August 28, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order.

Following the Council's denial of a request for reconsideration on October 29, 2013, the GRC granted Custodian Counsel's request for a stay of this Order to allow the Appellate Division to rule on Custodian Counsel's motion for leave to appeal. On December 6, 2013, the Appellate Division denied the motion. On December 26, 2013, the GRC lifted the stay and stated that the Custodian must comply with the Council's Order.

Thereafter, the Custodian's Counsel sought two (2) extensions of time, with the last extension expiring on February 10, 2014. Between February 7, 2014 and February 10, 2014, the Custodian provided responsive records to the Complainant, identified six (6) e-mails to which access was denied, and simultaneously provided certified confirmation of compliance to the Executive Director.

On March 10, 2014, Complainant's Counsel submitted an extensive letter brief (with attachments) addressing a multitude of issues. Among the issues of relevance to the GRC's adjudication of this complaint was his dispute of the Custodian's compliance. Further, Counsel alleged a selective search for the responsive records. Counsel also presented a complex argument in favor of finding that both the original and current Custodians knowingly and willfully violated OPRA.

The Administrative Procedures Act provides that the OAL "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts have arisen from a custodian's compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. See Mayer v. Borough of Tinton Falls

(Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Township of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

A review of this complaint and all the evidence submitted to date has painted a picture of a significant adversarial relationship, conflicting certified statements and contested compliance. Specifically, this picture includes:⁸

- The original Custodian certified her SOI that she attached responsive records, yet none were present.
- The current Custodian certified in the SOI that he had no knowledge of the requests at issue here, yet there is evidence that he at least had cursory knowledge of all requests submitted based on a February 27, 2011 e-mail between Custodians submitted as part of the Denial of Access Complaint.
- Although the OPRA requests contained varying time frames, a review of the records provided suggests that the current Custodian's search only encompassed a period between 2008 and the date of the requests.
- There is a lack of evidence regarding the search conducted to obtain access to all possibly responsive e-mails, to include those that may be in existence in personal e-mail accounts of the individuals named in each OPRA request.
- Complainant's Counsel has also disputed whether the current Custodian lawfully denied access to the six (6) e-mails withheld as part of compliance.
- Complainant further disputed the current Custodian's failure to provide e-mail attachments as part of compliance.

Based on the foregoing, it is clear that a fact-finding hearing will provide the most efficient and effective method for properly adjudicating the contested facts present in this complaint.

Therefore, since there are significant issues of contested facts, this complaint should be referred to OAL for a fact-finding hearing to resolve the following:

1. A determination of whether the current Custodian conducted a sufficient search and fully complied with the Council's August 27, 2013 Interim Order in its totality. This includes any attachments that exist within those e-mails provided. If it is determined that compliance was not fully met, the OAL may order disclosure of any deficient records.
2. A determination of whether the current Custodian unlawfully denied access the six (6) e-mails to which access was denied, by way of *in camera* review of same.
3. A determination of whether the original Custodian and/or current Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.
4. A determination of the award of a reasonable attorney's fee because the Complainant primarily prevailing based on the Council's Order and the FFD's subsequent compliance with same. N.J.S.A. 47:1A-6.

⁸ The GRC has no authority to address the various OPMA and conflict of interest issues presented and thus does not include these points as part of its consideration.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since there are significant issues of contested facts, this complaint should be referred to Office of Administrative Law for a fact-finding hearing to resolve the following:

1. A determination of whether the current Custodian conducted a sufficient search and fully complied with the Council's August 27, 2013 Interim Order in its totality. This includes any attachments that exist within those e-mails provided. If it is determined that compliance was not fully met, the Office of Administrative Law may order disclosure of any deficient records.
2. A determination of whether the current Custodian unlawfully denied access the six (6) e-mails to which access was denied, by way of *in camera* review of same.
3. A determination of whether the original Custodian and/or current Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.
4. A determination of the award of a reasonable attorney's fee because the Complainant primarily prevailing based on the Council's Order and the Franklin Fire District's subsequent compliance with same. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

March 18, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
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INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2012-284, 2012-285, 2012-286,
2012-287-2012-295

v.

Franklin Fire District No. 1
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Supplemental 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 the Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s August 27, 2013 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian’s Counsel failed to establish that the complaint should be reconsidered based on extraordinary circumstances or new evidence. The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the GRC’s imposition of a statute of limitation based on Mason v. City of Hoboken, 196 N.J. 51 (July 22, 2008), contradicts the plain language in the Supreme Court’s holding. Thus, the Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Interim Order Rendered by the
Government Records Council
On The 29th Day of October, 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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting

Jeff Carter¹
Complainant

**GRC Complaint Nos. 2012-284, 2012-285,
2012-286, 2012-287 and 2012-295²**

v.

Franklin Fire District No. 1³
Custodial Agency

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of all e-mails regarding employee salaries and benefits from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 2: Electronic copies via e-mail of all e-mails regarding ethics from January 1, 2007 to February 2, 2011 sent and/or received by eleven (11) persons.

OPRA request No. 3: Electronic copies via e-mail of all e-mails regarding personnel policies and procedures from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 4: Electronic copies via e-mail of all e-mails regarding workplace harassment and violence from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 5: Electronic copies via e-mail of all e-mails regarding mediation from January 1, 2010 to February 2, 2011 sent and/or received by six (6) persons.

Custodian of Record: Melissa Kosensky⁴

Request Received by Custodian: February 3, 2011

Response Made by Custodian: None.

GRC Complaint Received: October 24, 2012 and November 1, 2012⁵

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

⁴ The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

⁵ GRC Complaint Nos. 2012-284 through 2012-287 were received on October 24, 2012 and GRC Complaint No. 2012-295 was received on November 1, 2012.

Background

August 27, 2013 Council Meeting:

At its August 27, 2013 public meeting, the Council considered the August 20, 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 said requests. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
4. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 28, 2013, the Council distributed its Interim Order to all parties. On September 12, 2013, the Custodian's Counsel filed a request for reconsideration of the Council's

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order based on extraordinary circumstances and new evidence. Specifically, Counsel requested that the Council revise its Order to include consideration of Franklin Fire District No. 1's ("FFD") argument of whether the GRC should impose the statute of limitation that the Superior Court imposed on itself in Mason v. City of Hoboken, 196 N.J. 51 (July 22, 2008).

On September 13, 2013, the Complainant's Counsel submitted objections to the Custodian Counsel's request for reconsideration. Counsel argues that the GRC should not grant the Custodian Counsel's reconsideration because the request asks the GRC to rewrite existing legislation, which it has no authority to do.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's August 27, 2013 Interim Order on September 12, 2013, one (1) day from the extended time frame to submit same.

Applicable case law holds that:

A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The GRC has reviewed the parties' submissions and the Supreme Court's decision in Mason v. City of Hoboken, 196 N.J. 51 (July 22, 2008)(adopting a 45-day statute of limitations

for OPRA actions filed in Superior Court). The GRC is not satisfied that the Court's decision can be applied to its adjudication process, as the Court noted that "requestors have the *additional option of seeking mediation before the GRC* in an informal setting with *no statute of limitations.*" Id. at 70 (emphasis added). In order to engage in the GRC's informal mediation process, a requestor must first submit a formal Denial of Access Complaint. N.J.S.A. 47:1A-7(d). To conclude that the Court's holding in Mason applies to the GRC contradicts the plain language of Mason. See also Rivera v. Twp. of Monroe, Police Department (Middlesex), GRC Complaint No. 2009-331 (Interim Order dated January 25, 2011). Thus, the Council's Order should remain unchanged as the Custodian Counsel's request for reconsideration is based on neither an extraordinary circumstance nor new evidence.

As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on extraordinary circumstances or new evidence. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Thus, the Custodian Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian's Counsel has failed to establish in his request for reconsideration of the Council's August 27, 2013 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on extraordinary circumstances or new evidence. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the GRC's imposition of a statute of limitation based on Mason v. City of Hoboken, 196 N.J. 51 (July 22, 2008), contradicts the plain language in the Supreme Court's holding. Thus, the Custodian Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Senior Case Manager

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

October 22, 2013

4. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of August, 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: August 28, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Jeff Carter¹
Complainant**

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OPRA request No. 2: Electronic copies via e-mail of all e-mails regarding ethics from January 1, 2007 to February 2, 2011 sent and/or received by eleven (11) persons.

OPRA request No. 3: Electronic copies via e-mail of all e-mails regarding personnel policies and procedures from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 4: Electronic copies via e-mail of all e-mails regarding workplace harassment and violence from January 1, 2000 to February 2, 2011 sent and/or received by fourteen (14) persons.

OPRA request No. 5: Electronic copies via e-mail of all e-mails regarding mediation from January 1, 2010 to February 2, 2011 sent and/or received by six (6) persons.

Custodian of Record: Melissa Kosensky⁴

Request Received by Custodian: February 3, 2011

Response Made by Custodian: None.

GRC Complaint Received: October 24, 2012 and November 1, 2012⁵

¹ Represented by John A. Bermingham, Jr., Esq. (Camden, NJ).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

⁴ The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

⁵ GRC Complaint Nos. 2012-284 through 2012-287 were received on October 24, 2012 and GRC Complaint No. 2012-295 was received on November 1, 2012.

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Background⁶

Request and Response:

On February 2, 2011, the Complainant submitted five (5) Open Public Records Act (“OPRA”) requests to the Custodian. On February 7, 2011, the Custodian acknowledged receipt of the Complainant’s OPRA requests and asked that the Complainant complete official OPRA request forms. On February 8, 2011, the Complainant asked the Custodian to explain why he must fill out the forms.

Denial of Access Complaint:

On October 24, 2012, the Complainant filed Denial of Access Complaints for GRC Complaint Nos. 2012-284, 2012-285, 2012-286 and 2012-287 with the Government Records Council (“GRC”). On November 1, 2012, the Complainant filed a Denial of Access Complaint for GRC Complaint No. 2012-295 with the GRC. The Complainant contends that according to e-mails received in response to an unrelated OPRA request, on January 21, 2011, Mr. William T. Cooper, Esq., previous Franklin Fire District No. 1 (“FFD”) Counsel, advised the Custodian to institute a policy of not responding to OPRA requests unless the requestor completed an official OPRA request form. The Complainant argues that the policy is contrary to OPRA and prevailing case law; thus, the Custodian’s failure to respond constitutes a knowing and willful violation of OPRA. The Complainant argues that the current Custodian and Counsel also knowingly and willfully violated OPRA because they had knowledge of the Complainant’s pending OPRA requests and still failed to respond. The Complainant contends that proof of their knowledge is indicated in an “OPRA Request Log” submitted as part of another GRC complaint and an e-mail between the Custodians on February 27, 2011. *See Carter v. Franklin Fire District No. 1 (Somerset)*, GRC Complaint No. 2011-234 (Interim Order dated March 22, 2013).

The Complainant requests that the Council take judicial notice of *Carter*, because the facts of that complaint are similar and the Complainant’s submissions therein of the conduct of both Custodians and Mr. Cooper apply here. The Complainant further requests that the Council take judicial notice of its holding in *Carter v. Franklin Fire District No. 1 (Somerset)*, GRC Complaint No. 2011-76 (Interim Order dated August 28, 2012), in which the Council referred the complaint to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian knowingly and willfully violated OPRA.⁷

The Complainant requests that the Council: 1) determine that both Custodians violated OPRA by failing to respond to the Complainant’s OPRA request; 2) order disclosure of all responsive records; 3) determine that both Custodians and Mr. Cooper knowingly and willfully

⁶ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁷ In that complaint, the custodian certified that no financial disclosure statements existed. However, the complainant provided evidence showing that the custodian was in possession of responsive records. Thus, the Council determined that the custodian’s denial of access could rise to the level of a knowing and willful violation under the totality of the circumstances.

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violated OPRA and unreasonably denied access to the responsive record under the totality of the circumstances; and 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. The Complainant also requests that the Council determine, as a matter of policy, that whenever a new custodian is made aware of pending OPRA requests from the previous custodian's tenure, the current custodian is "immediately" required to respond.

Statement of Information:

On February 11, 2013, the Custodian filed Statements of Information ("SOI") for GRC Complaint Nos. 2012-284, 2012-285, 2012-286 and 2012-287. On February 18, 2013, the Custodian filed an SOI for GRC Complaint No. 2012-295. The Custodian certifies that she received the Complainant's OPRA requests on February 3, 2011, and acknowledged receipt of same on February 7, 2011.

The Custodian argues that due to an apparent miscommunication, she unintentionally failed to respond providing the responsive records to the Complainant. The Custodian further contends that the Complainant submitted many voluminous requests at the time that the Custodian had difficulty tracking since her term was running out.

The Custodian also disputes the Complainant's argument that the FFD withheld access until completion of an official OPRA request form. The Custodian certifies that she has provided him with records regardless of whether the Complainant completed the form. The Custodian certifies that although she requested the official form to be completed, she has never denied access to any OPRA requests solely for failure to complete same.

The Custodian certifies that she was an elected member of the Board of Commissioners ("Board"). The Custodian certifies that as an elected official, she must utilize personal time to handle OPRA requests. The FFD conducts reorganization on March 1 of every year because of possible turnover from election results. The Custodian certifies that she was not re-elected in 2011; thus, the Board had to transition to the current Custodian. The Custodian certifies that she received approximately 39 OPRA requests from January 1, 2011 to February 2, 2011, with the Complainant accounting for 37 of them. The Custodian asserts that the task of sufficiently responding to multiple OPRA requests became burdensome. The Custodian certifies that she forwarded the requests to Mr. Cooper but they were overlooked because of the amount of requests being logged at that time. The Custodian further asserts that, although not required to do so, the Complainant could have sought a status update for these requests now over two (2) years old. The Custodian asserts that it would have made the situation easier for herself and the current Custodian given the amount of requests received at a time when the designation of custodian was transitioning.

The Custodian contends that there is no content in the responsive records that the FFD is attempting to hide from the Complainant. The Custodian notes that the responsive records are attached as part of the SOI.⁸ The Custodian certifies that with all the simultaneous requests submitted to the FFD, the Custodian mistakenly failed to respond to this OPRA request. The

⁸ The GRC was unable to locate any records attached to the SOIs that appeared to be responsive to the Complainant's OPRA requests.

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Custodian asserts that she was not able to respond in a timely manner based on the totality of the circumstances; however, this “deemed” denial of access does not amount to a knowing and willful violation under OPRA under the totality of the circumstances.

The current Custodian certifies that at the time of receipt of these OPRA requests and the ensuing seven (7) business day time frame, he was not the custodian of record. The current Custodian certifies that he has no recollection or record that the Complainant followed up with him as the new custodian of record when he took over in March 2011. The current Custodian asserts that had the Complainant sought a status update for these requests, although a requestor is not required to, he would have provided a response at that time.

Additional Submissions:

On July 11, 2013, the Complainant disputes that there is nothing in the responsive records that the Custodian would intentionally try to hide. The Complainant contends that it is his right to assess the content of records he receives in light of several events taking place at the time of his requests, which include the Custodian’s re-election bid, the resignation of a commissioner for criminal activities and the FFD’s defense of a sexual harassment/workplace violence lawsuit. The Complainant argues that because of these issues, any delay or denial of access to potentially damaging information benefited the Custodian. The Complainant further contends that the Custodian denied every OPRA request seeking e-mails during this time frame which are the subject of several complaints before the GRC. The Complainant asserts that the GRC has failed to consider the totality of the circumstances in these previous complaints, but they present competent, credible evidence in these complaints that the Custodian knowingly and willfully denied access to the responsive records.

The Complainant further argues that the Custodian filed SOIs similar to the one filed for Carter, 2011-234, even after the Council made a determination that the Custodian unlawfully denied access to the Complainant’s similar OPRA request in that complaint. The Complainant requests that the GRC take judicial notice of all submissions for Carter, 2011-234, in order to establish that the Custodian knowingly and willfully violated OPRA. The Complainant further contends that the current Custodian’s SOI certification that he had no knowledge of these OPRA requests was made in bad faith and contradicts the fact that he received the “OPRA Request Log” in February 2011, and again when it was submitted as part of these complaints.

Finally, the Complainant contends that the SOIs are deficient in that they fail to identify the number of records responsive to the Complainant’s OPRA requests.

Analysis⁹

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s

⁹ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).¹⁰ 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).

Here, the Custodian, by her own admission, failed to respond to the Complainant’s five (5) OPRA requests. Thus, the evidence supports that the Custodian failed to timely respond and the Complainant’s OPRA requests are “deemed” denied.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 said requests. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, supra.

The GRC finally notes that it is incumbent on an incoming custodian to assess those requests that are still outstanding and respond appropriately.

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 Carter, 2011-234, the Council was tasked with determined whether the complainant’s OPRA request seeking “... e-mails from December 1, 2010 through February 2, 2011 regarding insurance sent or received by ...” eight (8) specifically named individuals. Relying on its prior decision in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council determined that the Complainant’s OPRA request fulfilled “...the necessary criteria and thus is a valid OPRA request for which the Custodian should have provided records and failed to do so.” *Id.* at 9.

The requests at issue herein are similar to the request in Carter, 2011-234. Specifically, each OPRA request contains the requisite following information necessary for the Custodian to locate and provide records, if any exist: (1) the content and/or subject of the e-mail, (2) the

¹⁰ 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.

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specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof.

To reiterate, a valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. Further, a completed "subject" line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails to determine if any are responsive: in other words, conduct research.

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.

The GRC further notes that the Custodian acknowledged receipt of the Complainant's OPRA requests on February 7, 2011, and requested that the Complainant complete an official OPRA request form; however, there is no evidence in the record that the Complainant ever completed and submitted his requests on the FFD's official form. It should further be noted that Mr. Cooper advised the Custodian to institute a policy of not responding to OPRA requests unless the requestor completed an official OPRA request form. However, the Custodian's request that the Complainant complete an official Township OPRA request form is an impermissible limitation on access pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA requests clearly invoked OPRA and made clear the nature of the request.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 said requests. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear her burden of proving a lawful denial of access to any responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.¹²**
4. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

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

August 20, 2013

¹¹ "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."

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

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