



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. 2012-288, 2012-289, 2012-290,
2012-293 & 2012-294

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 nine (9) 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. 2012-288, 2012-289,
2012-290, 2012-293 and 2012-294²**

v.

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

Records Relevant to Complaint:

February 2, 2011 OPRA request No. 1: Electronic copies via e-mail of all e-mails regarding resolutions from January 1, 2009 to February 2, 2011 sent and/or received by eight (8) persons.

February 2, 2011 OPRA request No. 2: Electronic copies via e-mail of all e-mails regarding Commissioners' salaries from January 1, 2008 to February 2, 2011 sent and/or received by nine (9) persons.

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

February 2, 2011 OPRA request No. 4: Electronic copies via e-mail of all e-mails regarding legal services from January 1, 2008 to February 2, 2011 sent and/or received by ten (10) persons.

February 21, 2011 OPRA request: Electronic copies via e-mail of all e-mails regarding insurance from December 28, 2010 to February 21, 2011 sent and/or received by eight (8) persons, "John Doe" and "Jane Doe."

Custodian of Record: Melissa Kosensky⁴

Request Received by Custodian: February 7, 2011 and February 28, 2011

Response Made by Custodian: February 11, 2011 and February 28, 2011

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. 2012-288 through 2012-290 was received on October 24, 2012 and GRC Complaint Nos. 2012-293 and 2012-294 were 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 13, 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 nine (9) 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 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 nine (9) 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 13, 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 nine (9) 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 nine (9) 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 nine (9) 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 nine (9) 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

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INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Jeff Carter
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Complaint Nos. 2012-288, 2012-289, 2012-290,
2012-293 and 2012-294

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 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).

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. 2012-288, 2012-289,
2012-290, 2012-293 and 2012-294²**

v.

Franklin Fire District No. 1³
Custodial Agency

Records Relevant to Complaint:

February 2, 2011 OPRA request No. 1: Electronic copies via e-mail of all e-mails regarding resolutions from January 1, 2009 to February 2, 2011 sent and/or received by eight (8) persons.

February 2, 2011 OPRA request No. 2: Electronic copies via e-mail of all e-mails regarding Commissioners' salaries from January 1, 2008 to February 2, 2011 sent and/or received by nine (9) persons.

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

February 2, 2011 OPRA request No. 4: Electronic copies via e-mail of all e-mails regarding legal services from January 1, 2008 to February 2, 2011 sent and/or received by ten (10) persons.

February 21, 2011 OPRA request: Electronic copies via e-mail of all e-mails regarding insurance from December 28, 2010 to February 21, 2011 sent and/or received by eight (8) persons, "John Doe" and "Jane Doe."

Custodian of Record: Melissa Kosensky⁴

Request Received by Custodian: February 7, 2011 and February 28, 2011

Response Made by Custodian: February 11, 2011 and February 28, 2011

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. 2012-288 through 2012-290 was received on October 24, 2012 and GRC Complaint Nos. 2012-293 and 2012-294 were 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. Although the Custodian timely responded to the Complainant's February 21, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because the Custodian failed to attempt to reach a reasonable accommodation prior to denying access to the Complainant's February 2, 2011 OPRA requests, the Custodian's response is insufficient. N.J.S.A. 47:1A-5(g); Herron, *supra*.
3. The Custodian failed to bear her burden of proving a lawful denial of access to any responsive records to the February 2, 2011 OPRA requests and the remainder of the Complainant's February 21, 2011 OPRA request identifying specific individuals. N.J.S.A. 47:1A-6; Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-234 (Interim Order dated March 22, 2013). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA requests, 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.
4. **The Custodian shall comply with item No. 3 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**
5. The Custodian has borne her burden of proving a lawful denial of the access to the portion of the Complainant's February 21, 2011 OPRA request including the terms "John Doe" and "Jane Doe." N.J.S.A. 47:1A-6; Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192 (October 2011).

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

6. 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.
7. 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 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 neither an extraordinary circumstance or 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



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INTERIM ORDER

August 27, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint Nos. 2012-288, 2012-289, 2012-290,
2012-293 and 2012-294

v.

Franklin Fire District No. 1
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“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, finds that:

1. Although the Custodian timely responded to the Complainant’s February 21, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because the Custodian failed to attempt to reach a reasonable accommodation prior to denying access to the Complainant’s February 2, 2011 OPRA requests, the Custodian’s response is insufficient. N.J.S.A. 47:1A-5(g); Herron, *supra*.
3. The Custodian failed to bear her burden of proving a lawful denial of access to any responsive records to the February 2, 2011 OPRA requests and the remainder of the Complainant’s February 21, 2011 OPRA request identifying specific individuals. N.J.S.A. 47:1A-6; Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-234 (Interim Order dated March 22, 2013). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant’s OPRA requests, 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.
4. **The Custodian shall comply with item No. 3 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 1:4-4,¹ to the Executive Director.²

5. The Custodian has borne her burden of proving a lawful denial of the access to the portion of the Complainant's February 21, 2011 OPRA request including the terms "John Doe" and "Jane Doe." N.J.S.A. 47:1A-6; Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192 (October 2011).
6. 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.
7. 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

¹ "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."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter¹
Complainant**

**GRC Complaint Nos. 2012-288, 2012-289,
2012-290, 2012-293 and 2012-294²**

v.

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

Records Relevant to Complaint:

February 2, 2011 OPRA request No. 1: Electronic copies via e-mail of all e-mails regarding resolutions from January 1, 2009 to February 2, 2011 sent and/or received by eight (8) persons.

February 2, 2011 OPRA request No. 2: Electronic copies via e-mail of all e-mails regarding Commissioners' salaries from January 1, 2008 to February 2, 2011 sent and/or received by nine (9) persons.

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

February 2, 2011 OPRA request No. 4: Electronic copies via e-mail of all e-mails regarding legal services from January 1, 2008 to February 2, 2011 sent and/or received by ten (10) persons.

February 21, 2011 OPRA request: Electronic copies via e-mail of all e-mails regarding insurance from December 28, 2010 to February 21, 2011 sent and/or received by eight (8) persons, "John Doe" and "Jane Doe."

Custodian of Record: Melissa Kosensky⁴

Request Received by Custodian: February 7, 2011 and February 28, 2011

Response Made by Custodian: February 11, 2011 and February 28, 2011

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 was 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 four (4) 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. On February 11, 2011, Mr. William T. Cooper, Esq., previous Franklin Fire District No. 1 (“FFD”) Counsel, responded on behalf of the Custodian denying the Complainant’s OPRA requests. Mr. Cooper stated that requiring the Custodian and/or office staff to search through years of e-mails would substantially disrupt agency operations. Mr. Cooper stated that as an accommodation, the FFD would consider contacting its Information Technology (“IT”) Agent to perform a search of e-mails stored in the system. Mr. Cooper requested that the Complainant confirm whether he wished to pursue the requests and the FFD would obtain a quote from the IT Agent.

On February 21, 2011, the Complainant submitted an OPRA request to the Custodian. On February 28, 2011, the Custodian responded in writing requesting an extension of one (1) week to respond due to a pending change of custodian. The Complainant rejected said request stating that the Custodian had a smartphone capable of receiving e-mails and that the Custodian had a reasonable amount of time to respond. On March 22, 2011, Mr. Cooper responded on behalf of the Custodian denying the Complainant’s OPRA request as overly broad.

Denial of Access Complaint:

On October 24, 2012, the Complainant filed Denial of Access Complaints for GRC Complaint Nos. 2012-288, 2012-289 and 2012-290 with the Government Records Council (“GRC”). On November 1, 2012, the Complainant filed a Denial of Access Complaint for GRC Complaint Nos. 2012-293 and 2012-294 with the GRC. The Complainant notes that his February 21, 2011 OPRA request is nearly identical to the request at issue in Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-234 (Interim Order dated March 22, 2013), except for the time frame and addition of “John Doe” and “Jane Doe.”

The Complainant states that in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114 *et seq.* (July 2012), the Council validated the complainant’s OPRA requests seeking e-mails, holding that “[t]he Custodian’s search for the responsive records ... requires the Custodian to conduct a search of his e-mail account based on the requisite information ... to locate responsive records.” *Id.* The Complainant contends that because his OPRA requests were properly formatted and because he noted the Custodian’s obligation to search files in the same OPRA request, Mr. Cooper, acting on the current Custodian’s behalf, knowingly and willfully violated OPRA. The Complainant further notes that Mr. Cooper represented a custodian in other matters in which the Council contemplated OPRA requests for

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.

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e-mails. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-108 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). The Complainant further asserts that while the requests at issue in GRC Complaint Nos. 2009-108 and 2009-124 lacked a subject matter, the following necessary criteria are present and underlined in his OPRA requests: (1) the content and/or subject of the e-mail, (2) the 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. Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010); Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). The Complainant contends that the evidence herein proves that Mr. Cooper knew what constituted a valid OPRA request for e-mails and consciously, deliberately and intentionally denied the OPRA requests anyway.

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 and Mr. Cooper violated OPRA by failing to provide records to the Complainant within seven (7) business days; 2) order disclosure of all responsive records; 3) determine that both Custodians and Mr. Cooper knowingly and willfully 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.

Statement of Information:

On February 18, 2013, the Custodian filed Statements of Information ("SOI") for each complaint.

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 40 OPRA requests from January 1, 2011 to February 21, 2011 with the Complainant accounting for 38 of them. The Custodian asserts that the task of sufficiently responding to multiple OPRA requests became burdensome.

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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February 2, 2011 OPRA requests:

The Custodian certifies that she received the Complainant's February 2, 2011 OPRA requests on February 7, 2011, and acknowledged receipt on the same day. The Custodian certifies that Mr. Cooper responded on February 11, 2011, denying the requests as a substantial disruption of agency operations; however, Mr. Cooper offered to accommodate the Complainant by contacting an IT vendor to obtain a quote to retrieve responsive e-mails. N.J.S.A. 47:1A-5(c). The Custodian certifies that the Complainant never responded to Mr. Cooper and filed these complaints almost two (2) years later.

The Custodian's Counsel submitted a letter brief arguing that Mr. Cooper's attempt to reach a reasonable accommodation after advising that the Complainant's OPRA requests would substantially disrupt agency operations was lawful. N.J.S.A. 47:1A-5(g). Counsel states that the Council has previously decided on complaints where custodians asserted that responding to an OPRA request for voluminous records would substantially disrupt agency operations. Vessio v. NJ Dep't of Community Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007); Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009). Counsel notes that in Herron v. Township of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009), the Council determined that the custodian's response was insufficient because she "... failed to attempt a reasonable accommodation ... before denying access ... on the basis that the request would substantially disrupt the Township's operations ..."

Counsel asserts that the facts here are closely related to those in Dittrich, *supra*, in that Mr. Cooper timely responded advising that the Complainant's requests for years of e-mails from multiple individuals would disrupt agency operations. Counsel contends that the Complainant failed to reach an accommodation with the FFD and instead filed these complaints. Counsel contends that the Council should uphold the FFD's denial of access; the actions of the Custodian, current Custodian and Mr. Cooper were not knowing and willful; and the Complainant should not be awarded attorney's fees.

February 28, 2011 OPRA request:

The Custodian certifies that she received the Complainant's February 21, 2011 OPRA request on February 28, 2011. The Custodian certifies that she sought an extension of a week because the current Custodian was starting, which the Complainant denied. The Custodian certifies that she forwarded the request to Mr. Cooper and he responded on March 22, 2011 denying the request as overly broad.

The Custodian certifies that because she responded in a timely manner seeking an extension of time and was no longer the custodian of record for the FFD after February 28, 2011, her actions did not constitute a knowing and willful violation of OPRA.

The Custodian's Counsel submitted a letter brief arguing that Mr. Cooper's denial of access to the February 28, 2011 OPRA request was lawful because "John Doe" and "Jane Doe" are not identifiable senders/recipients and the inclusion of "any reasonably construed variation

thereof” is not an identifiable subject. Counsel contends that a custodian is not required to conduct research for e-mails from unknown individuals based on their proposed variations of insurance. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007); Elcavage, supra; Sandoval, supra. Counsel thus contends that Mr. Cooper’s denial of access should be upheld; the actions of the Custodian, current Custodian and Mr. Cooper were not knowing and willful; and the Complainant should not be deemed a prevailing party.

Additional Submissions:

On July 11, 2013, the Complainant contends that the SOIs are yet another example of the lengths the FFD will go to in order to defend its unlawful denials of access. The Complainant requests that the GRC take judicial notice of all submissions for Carter, 2011-234, and apply the same logic to these complaints. 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 contends that the GRC must consider 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 because the Custodian denied every OPRA request seeking e-mails during this time frame (which are the subject of several complaints before the GRC), it is unreasonable to believe that the denials are not interconnected to the events taking place at that time. The Complainant argues that the GRC must consider the totality of these circumstances when determining whether the Custodian’s actions rose to the level of a knowing and willful violation of OPRA.

Further, the Complainant asserts that the inclusion of “John Doe” and Jane Doe” in his February 21, 2013 OPRA request was so that the Custodian and Mr. Cooper could not claim that an e-mail containing anyone other than those names identified in the OPRA request was not responsive. The Complainant contends that because of the Custodian and Mr. Cooper’s repeated denials of access to valid OPRA requests, he believed that the inclusion of these terms was justified and warranted under the totality of the circumstances. The Complainant asserts that even if it is determined that the terms are overly broad, this inclusion did not render the remainder of the OPRA request invalid.

The Complainant argues that this response further proves his argument that the Custodian and Mr. Cooper have concocted different reasons for denying access to valid OPRA requests. The Complainant notes that they denied access to his other requests as a substantial disruption of agency operations requiring a special service charge for their IT vendor to search for responsive records.

Analysis⁸

Timeliness

OPRA provides that, “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5(g).

Further, OPRA provides that:

Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... If the government record is in storage or archived, the requestor shall be *so advised within seven business days* after the custodian receives the request. The requestor *shall be advised by the custodian when the record can be made available*. If the record *is not made available by that time, access shall be deemed denied*.

N.J.S.A. 47:1A-5(i) (emphasis added).

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

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant’s OPRA request. However, the custodian responded on April 20, 2007, stating that he would provide the requested records later in the week, and the evidence of record showed that the Custodian provided no records until May 31, 2007. The Council held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.”

⁸ 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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Id.

Here, as in Kohn, *supra*, the Custodian responded in writing to the Complainant's February 21, 2011 OPRA request seeking an extension of one (1) week to respond; thus, the Custodian's written response granting or denying access to the requested minutes was due by that date. However, the Custodian failed to respond in writing to the Complainant prior to the expiration of the extended deadline.

Therefore, although the Custodian timely responded to the Complainant's February 21, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn, *supra*. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

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.

OPRA provides that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5(g) (emphasis added). In Herron v. Township of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009), the complainant requested a list of the total number of juveniles arrested in the last twelve (12) months organized by race, gender, and offense, and a list of the total number of juveniles sent to Essex County Youth Facility organized by race, gender, and offense. The custodian responded in writing to the complainant's OPRA request on the seventh (7th) business day following receipt of such request stating that 178 juveniles were arrested in Montclair and 32 were sent to the Essex County Youth Facility during the year 2007. The custodian further stated that she would have to research every report to find the race, gender, and offense of each juvenile. Thus, the custodian denied the Complainant access to the requested records stating that fulfilling the request would substantially disrupt the operation of the agency pursuant to N.J.S.A. 47:1A-5(g). In analyzing the facts of Herron, *supra*, the Council reasoned that:

Although OPRA permits a custodian to deny access to a records request on the basis that fulfilling the request would substantially disrupt agency operations, OPRA requires that the custodian must first attempt to reach a reasonable accommodation of the request with the requestor before denying access. N.J.S.A. 47:1A-5. See Vessio v. NJ Department of Community Affairs, 2007-63 (May 2007)(holding that the custodian must attempt to reach a reasonable

accommodation before denying access based on substantial disruption of agency operation).

Id. at page 3-4 (emphasis added).

The Council determined that although the custodian asserted that responding to the request would cause a substantial disruption of agency operations, the custodian failed to show that she attempted to reach a reasonable accommodation of the request with the complainant. The Council thus held that "... because the Custodian failed to attempt a reasonable accommodation of the Complainant's OPRA request before denying access to the requested records on the basis that the request would substantially disrupt the Township's operations, the Custodian's response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5(g)" Id. *See also Caldwell v. Vineland Board of Education (Cumberland)*, GRC Complaint No. 2009-278 (March 2011).

Here, Mr. Cooper responded on behalf of the Custodian both denying the February 2, 2011 OPRA requests as a substantial disruption to agency operations and offering the Complainant an accommodation. A plain reading of the statute provides that the accommodation must be made prior to denying the access on these grounds and not simultaneously to the denial. The evidence here clearly indicates that the Custodian failed to attempt to reach the accommodation and thus cannot deny access to the requests as a substantial disruption. Thus, because the Custodian failed to attempt to reach a reasonable accommodation prior to denying access to the Complainant's February 2, 2011 OPRA requests, the Custodian's response is insufficient. N.J.S.A. 47:1A-5(g); Herron, *supra*.

Regarding all OPRA requests, in Carter, 2011-234, the Council was tasked with determining 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.

Conversely, in Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192 (October 2011), the complainant sought e-mails from the clerk to "... every other Municipal Clerk in Morris County ..." The Council applied the Elcavage criteria and determined that the subject request was invalid because it sought "... e-mails from and to a specific class of employee (specifically, Morris County Municipal Clerks) and not individually named senders and recipients." Id. at 6.

Here, the February 2, 2011 and February 21, 2011 OPRA requests are similar to the request in Carter, 2011-234. Specifically, the OPRA requests contain 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 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. The only exception is the terms "John Doe" and "Jane Doe" present in the

February 21, 2011 OPRA request. These terms are non-specific and are even more general than the complainant's request at issue in Wolosky, *supra*. However, the GRC agrees with the Complainant that even the inclusion of these two (2) terms does not render the entire OPRA request invalid.

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 to the February 2, 2011 OPRA requests and the remainder of the Complainant's February 21, 2011 OPRA request identifying specific individuals. N.J.S.A. 47:1A-6; Carter, 2011-234. Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA requests, 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.

However, the Custodian has borne her burden of proving a lawful denial of the access to the portion of the Complainant's February 21, 2011 OPRA request including the terms "John Doe" and "Jane Doe." N.J.S.A. 47:1A-6; Wolosky, *supra*.

The GRC further notes that the Custodian acknowledged receipt of the Complainant's February 2, 2011 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. Although the Custodian timely responded to the Complainant's February 21, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because the Custodian failed to attempt to reach a reasonable accommodation prior to denying access to the Complainant's February 2, 2011 OPRA requests, the Custodian's response is insufficient. N.J.S.A. 47:1A-5(g); Herron, *supra*.
3. The Custodian failed to bear her burden of proving a lawful denial of access to any responsive records to the February 2, 2011 OPRA requests and the remainder of the Complainant's February 21, 2011 OPRA request identifying specific individuals. N.J.S.A. 47:1A-6; Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-234 (Interim Order dated March 22, 2013). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA requests, 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.
4. **The Custodian shall comply with item No. 3 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 1:4-4,⁹ to the Executive Director.¹⁰**
5. The Custodian has borne her burden of proving a lawful denial of the access to the portion of the Complainant's February 21, 2011 OPRA request including the terms "John Doe" and "Jane Doe." N.J.S.A. 47:1A-6; Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192 (October 2011).

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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6. 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.
7. 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