



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**May 21, 2019 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2013-43 and 2013-53

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered May 14, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Council should adopt the Honorable Tricia M. Caliguire’s, Administrative Law Judge, April 22, 2019 Initial Decision in which she approved the settlement agreement “as evidenced by the statements of their representatives,” and ordered the parties to comply with the settlement terms. Further, the Council should adopt the ALJ’s April 18, 2019 Order on Motion awarding the Complainant \$12,417.00 in prevailing party attorneys’ fees.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 21<sup>st</sup> Day of May 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 22, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
May 21, 2019 Council Meeting**

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

**GRC Complaint No. 2013-43  
& 2013-53<sup>2</sup>**

v.

**Borough of South Bound Brook (Somerset)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 11, 2012 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence between any agent for the Borough of South Bound Brook (“Borough”) including but not limited to Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, any police department employee, the Custodian and Joseph Danielsen regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 11, 2012.

February 3, 2013 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence from Joseph Danielsen to any agent for the Borough including but not limited to the Custodian, Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, and any police department employee regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 31, 2012.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** December 11, 2012 and February 3, 2013

**Response Made by Custodian:** December 19, 2012 and February 12, 2013

**GRC Complaint Received:** February 7, 2013 and February 19, 2013

**Background**

March 25, 2014 Council Meeting:

At its March 25, 2014 public meeting, the Council considered the March 18, 2014

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<sup>1</sup> 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).

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

<sup>3</sup> Represented by Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previously represented by Robert G. Wilson, Esq., of Kovacs & Wilson (Somerville, NJ).

Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian is in contempt of the Council's September 24, 2013 Interim Order because he failed to comply with the terms of said Order within the prescribed time frame.
2. "The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's September 24, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to OPRA requests that the Council determined to be valid in accordance with precedential case law. The Council rejected Custodian Counsel's request for reconsideration and the Appellate Division denied a motion for leave to appeal the Council's September 24, 2013 Interim Order; thus, the Custodian was required to comply with the Council's Order. Having failed to comply, the Custodian is in contempt of said Order. Therefore, based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the OAL for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Pursuant to the Council's September 24, 2013, Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that both OPRA requests were valid and ordered disclosure of any responsive records or a certification to the disclosability or existence of same. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the amount of the award of reasonable attorney's fees.

## Procedural History:

On March 26, 2014, the Council distributed its Interim Order to all parties. On September 9, 2014, the Government Records Council (“GRC”) transmitted this consolidated complaint to the Office of Administrative Law (“OAL”).

On April 18, 2019, Honorable Tricia M. Caliguire, Administrative Law Judge (“ALJ”), issued an Order on Motion “**CONCLUD[ING]** that the [Complainant’s] request for attorney fees in the amount of \$12,417.00 is reasonable.” The ALJ thus “**ORDER[ED]** that [the Complainant] is entitled to an award of attorneys’ fees in the amount of \$12,417.00.” The ALJ’s Order provided that it may be “reviewed by [the GRC] either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.”

On April 22, 2019, the ALJ, issued an Initial Decision as follows:

[The Complainant] withdraws his claims that [the Custodian] knowingly and willfully violated OPRA and that [the Custodian] unreasonably denied [the Complainant] access to the public records [he] requested. Further, [the Complainant] withdraws any other claims that were brought in this matter against [the Custodian] and the Borough, other than the dispute over reasonable attorneys’ fees, which was the subject of the Order on Motion for Attorneys’ Fees issued by the undersigned on April 18, 2019.

The ALJ, “[h]aving reviewed the record and the settlement terms,” found that:

1. The parties have voluntarily agreed to the settlement as evidenced by the statements of their representatives.
2. The settlement fully disposes of all issues in controversy other than attorneys’ fees and is consistent with the law.

The ALJ thus “**CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.” The ALJ further “**ORDER[ED]** that the parties comply with the above-described terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.”

## Analysis

### Administrative Law Judge’s Initial Decision

No analysis required.

### Administrative Law Judge’s Order on Motion

The ALJ’s April 18, 2019 Order on Motion, set forth as “Exhibit A,” determined that:

[t]he [Complainant's] request for attorney fees in the amount of \$12,417.00 is reasonable. Based on the briefs, exhibits and certifications submitted, I hereby **ORDER** that [the Complainant] is entitled to an award of attorneys' fees in the amount of \$12,417.00."

[Id. at 12.]

The ALJ also provided that the Order may be "reviewed by [the GRC] . . . at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6." This provision of the Uniform Administrative Procedure Rules provides that:

Within 45 days after the receipt of the initial decision, or sooner if an earlier time frame is mandated by Federal or State law, the agency head may enter an order or a final decision adopting, rejecting or modifying the initial decision.

[N.J.A.C. 1:1-18.6(a).]

If an agency head does not reject or modify the initial decision within 45 days and unless the period is extended as provided by N.J.A.C. 1:1-18.8, the initial decision shall become a final decision.

[N.J.A.C. 1:1-18.6(e).]

The ALJ's Initial Decision clearly settles all issues except for "the dispute over reasonable attorneys' fees," which the ALJ noted was the subject of the April 18, 2019 Order on Motion. Further, the Order allows the GRC to "enter . . . a final decision adopting, rejecting[,] or modifying" it within forty-five (45) days pursuant to N.J.A.C. 1:1-18.6. As such, the Council should avail itself the opportunity to adopt, modify, or reject the Order on Motion because the contested case has ended, and because the issue of attorneys' fees was not part of the approved settlement.

To this end, the ALJ fairly summarized the submissions and evidence, explaining how she weighed the proofs before her and explaining in detail why she credited certain statements over others. The ALJ's Order on Motion conclusions are aligned and consistent with those determinations. Specifically, the ALJ provided a detailed explanation of how she arrived at the final calculation of attorneys' fees, inclusive of a subtraction for Borough fees related to reimbursement for rescheduling of the April 12, 2018 hearing.<sup>4</sup> As such, the GRC is satisfied that it can ascertain which submissions and evidence the ALJ accepted as fact, and further finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, in accordance with N.J.A.C. 1:1-18.6, the Council should accept the ALJ's Order on Motion "**ORDER[ING]** that [the Complainant] is entitled to an award of attorneys' fees in the amount of \$12,417.00."

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<sup>4</sup> The Borough requested and was awarded reimbursement for time spent preparing and attending the April 12, 2018 hearing, to which Complainant and Counsel failed to appear.  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2013-43 & 2013-53 – Supplemental Findings and Recommendations of the Council Staff 4

### **Conclusions and Recommendations**

The Council Staff respectfully recommends that the Council should adopt the Honorable Tricia M. Caliguire's, Administrative Law Judge, April 22, 2019 Initial Decision in which she approved the settlement agreement "as evidenced by the statements of their representatives," and ordered the parties to comply with the settlement terms. Further, the Council should adopt the ALJ's April 18, 2019 Order on Motion awarding the Complainant \$12,417.00 in prevailing party attorneys' fees.

Prepared By: Frank F. Caruso  
Acting Executive Director

May 14, 2019



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**  
**FOR ATTORNEY'S FEES**

OAL DOCKET NO. GRC 11390-14

GRC COMPLAINT NOS. 2013-43, 2013-53

**ROBERT A. VERRY,**

Petitioner,

v.

**BOROUGH OF**

**SOUTH BOUND BROOK (SOMERSET),**

Respondent.

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**John A. Bermingham, Esq.,** for petitioner, Robert A. Verry

**Walter M. Luers, Esq.,** for petitioner, Robert A. Verry (Law Offices of Walter M. Luers, LLC, attorney)

**Francesco Taddeo, Esq.,** for respondent, Borough of South Bound Brook (Somerset) (Francesco Taddeo, LLC, attorney)

BEFORE **TRICIA M. CALIGUIRE, ALJ:**

**STATEMENT OF THE CASE**

On December 11, 2012, and February 3, 2013, petitioner Robert A. Verry (Verry) filed requests for documents under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), with respondent Borough of South Bound Brook (the Borough). On February 6

and 19, 2013, Verry filed Denial of Access Complaints with the Government Records Council (GRC) alleging that he had been unlawfully denied access to the requested documents by Donald E. Kazar (Kazar), the Custodian of Records for the Borough.

### **PROCEDURAL HISTORY**

On September 10, 2014, the GRC transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The GRC directed: (1) that the OAL shall determine whether Kazar knowingly and willfully violated OPRA and unreasonably denied access to the public records requested by Verry; and (2) that because a factual causal nexus exists between Verry's filing of the Denial of Access Complaints and the relief ultimately achieved, and that relief has a basis in law, the OAL shall determine the reasonable attorney's fees to be awarded to Verry as the prevailing party. GRC Complaint Numbers 2013-43 and 2013-53, Interim Order (March 25, 2014).

This matter was assigned to the Honorable John Schuster, III, Administrative Law Judge (ALJ), who held a case management telephone conference with the parties on August 26, 2015. On January 14, 2017, after the retirement of Judge Schuster, this matter was reassigned to the Honorable Susan M. Scarola, ALJ, who held prehearing telephone conferences with the parties on March 9, 2017; June 5, 2017; and August 14, 2017, during the last of which the parties stated that they were involved in settlement discussions. Petitioner failed to call into a status conference Judge Scarola scheduled for September 25, 2017; this conference was rescheduled for November 2, 2017, during which a hearing was scheduled for March 8, 2018.

On March 1, 2018, after the retirement of Judge Scarola, this matter was reassigned to the undersigned. On March 6, 2018, I adjourned the March 8, 2018, hearing at the request of respondent and with the consent of petitioner. The hearing was rescheduled for April 12, 2018, written notice of which was sent to both parties by the Clerk of the OAL on March 6, 2018. Verry failed to appear at the hearing due to an apparent miscommunication between the two law offices representing him. Respondent, who did appear for the hearing, asked that the matter be dismissed for lack of prosecution and asked to file an application to recover from petitioner the fees and costs expended by the Borough. After receipt of petitioner's written request that his



failure to appear be deemed to have been for good cause, I issued a letter ruling on April 13, 2018, that good cause did not exist for the failure of petitioner to appear at the hearing, but as permitted by N.J.A.C. 1:1-14(c)(2)(ii), I would reschedule the hearing on a peremptory basis and would also consider an award to the Borough for its costs related to appearing for the hearing.

The peremptory hearing was held on July 26, 2018. During a prehearing conference with the parties, the parties requested additional time to negotiate the terms of a settlement agreement. Accordingly, I adjourned the hearing until September 24, 2018. At the request of the parties, this hearing was adjourned on September 21, 2018, and a case management telephone conference was scheduled for October 25, 2018, written notice of which was sent to the parties by the Clerk of the OAL on September 21, 2018.

Neither party appeared for the October 25, 2018, case management conference. Both parties claimed to have neglected to calendar the date for the conference upon receipt of the above-described notice. Both parties also stated that negotiations over a settlement agreement continued. Following the December 12, 2018, inquiry from my office as to the status of settlement negotiations, the parties stated that they were unable to resolve the issue of attorney's fees and that petitioner would be filing a motion to recover the same. By letter of December 18, 2018, I directed petitioner to file his motion for counsel fees on or before February 15, 2019.

Petitioner filed a motion for an award of reasonable counsel fees and costs, and attorneys' certifications, on February 15, 2019. The Borough requested an extension to file its response due to the illness of counsel, which was granted to March 11, 2019. On March 11, 2019, the Borough filed a responsive brief, attorney's certification, and claim for reimbursement for costs related to preparing for, attending, and rescheduling the April 12, 2018, hearing. Petitioner filed a reply brief on March 21, 2019. The motion is now ripe for determination.

### **FACTUAL DISCUSSION AND FINDINGS**

Petitioner seeks an award of \$15,642.50, in attorneys' fees and costs, broken down as follows:

1. \$6,934.50 for the time of attorney Walter Luers (Luers) (20.7 hours x \$335/hour).
2. \$8,655.00 for the time of attorney John Bermingham (Bermingham) (28.2 hours x \$300/hour + 0.6 hours x \$325/hour).
3. \$52.50 for the time of paralegal Angela Simone (Simone) (0.7 hours x \$75/hour).
4. \$0.50 for costs.

[Certification of Services of Walter M. Luers (Luers Cert.)  
(February 14, 2019), at 1.]

Respondent objects to the reasonableness of the fee, specifically to the hours expended, the hourly rates of both attorneys, and petitioner's lack of success in this matter.<sup>1</sup> Letter Brief of Resp't (March 11, 2019), at 1. Respondent requests that Luers's rate be reduced to \$300.00/hour and that Bermingham's rate be reduced to an amount lower than that awarded to Luers. Id. at 5-6. Respondent makes no objection to the time expended by paralegal Simone nor to her rate.

I **FIND** that the billing records of both attorneys are complete as to the amount of time spent on each task and the associated description of the legal services involved. Luers certified that he spent 20.7 hours working on the case; Bermingham certified that he spent 28.8 hours on the case. Luers Cert., ¶ 1.1(1), Ex. A; Bermingham Cert., ¶ 1(2), Ex. A. Pursuant to agreement, petitioner has not paid any amount to either attorney.

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<sup>1</sup> This final objection can be dispensed with by reference to the transmittal of this matter from the GRC, directing the OAL to determine (1) whether the records custodian knowingly violated OPRA by his initial refusal to provide documents to petitioner; and (2) the reasonable attorney's fees to be awarded to petitioner as the prevailing party. Clearly, petitioner was successful in this matter.

The Borough argues that two attorneys were over-billing a straightforward, simple matter. In particular, the Borough takes Bermingham to task for the excessive amount of time that he allegedly spent on simple matters, matters that were actually handled by his client, and for corresponding or communicating with his client. Resp't Br., at 4. The Borough states that Luers was more reasonable in the time he devoted to this case, but he too is criticized for effectively "double billing." *Id.* at 5. The Borough asks the tribunal to carefully assess and reduce these excessive charges.

As to the subtraction of specific time entries, respondent requests that the following charges be eliminated from the total awarded for the reasons detailed below the chart:

<u>Date of Entry</u>	<u>Hours</u>	<u>Services Rendered</u>
01/3/2014	3.9	Legal research regarding standard of review; review GRC decisions; review emails from co-counsel; prepare entry of appearance; prepare cover letter; draft letter brief; email letter brief to client and co-counsel for comments; review and incorporate their comments; prepare papers for service and filing.
03/05/2018	2.1	Review file and put together trial binders; exchange emails with print shop
04/12/2018	0.5	Faxed/Scanned/saved/emailed letter to Court. Scanned/saved/emailed letter from Mr. Taddeo to Court.
04/12/2018	n/a	Expense – scanning fee of \$0.50
04/20/2018	0.3	Attention to rescheduling of hearing date.
04/27/2018	0.2	Attention to scheduling issues.

The Borough asks that close to four hours (3.90) billed by Luers on January 3, 2014, be eliminated from the total because this amount of time is excessive for such a straightforward and simple matter, and the time represents a duplication of efforts with Bermingham. Resp't Br., at 5. On January 3, 2014, Luers devoted time to opposing the motion for interlocutory appeal filed by

Kazar, an effort that by its nature is not necessarily straightforward and simple. But, as respondent noted, on December 10, 2013, the day Kazar filed the motion for appeal, Birmingham billed 3.2 hours to the same task.<sup>2</sup> Birmingham did not work on the case again until six weeks after the Appellate Division denied the motion. Accordingly, I **FIND** that the charge by Birmingham of three hours on December 10, 2013, was not reasonable in that the work was duplicated by Luers and will be deducted from the total award.

The Borough asks that the total awarded to petitioner be reduced by the fees charged by petitioner's attorneys related to preparing for and/or rescheduling the April 12, 2018, hearing and, at the same time, the Borough asks for reimbursement for its costs related to preparing for, attending, and rescheduling the April 12, 2018, hearing.

As described in the procedural history above, on April 12, 2018, counsel for the Borough appeared for a scheduled hearing but neither of petitioner's attorneys did, despite advance written notice from the Clerk of the OAL. Between March 5, 2018, and April 27, 2018, Luers billed 3.1 hours to hearing preparation, notice to the tribunal regarding his failure to appear, and rescheduling. The Borough should not be charged for this time; accordingly, I **FIND** that the charges by Luers of 3.1 hours and \$0.50 in related expenses are not reasonable and will be deducted from the total award.

At the same time, the Borough will be made whole for the expenses it incurred to appear for the April 12, 2018, hearing. As I advised petitioner by letter of April 13, 2018, through a reduction in the total award, the Borough will be reimbursed for the expenses it incurred for counsel to prepare for, attend, and reschedule the hearing on April 12, 2018.<sup>3</sup> Counsel for the Borough Francesco Taddeo (Taddeo) certified to expenditures of \$1,017.50 (5.5 hours x \$185.00), of taxpayers' funds related to the April 12, 2018, hearing. Petitioner objects to the reasonableness of this request, both for the hours expended and the initial rate charged. I disagree as to the hours expended. Two hours to travel round trip from Somerville to Mercerville is certainly not excessive; the remaining 3.5 hours is essentially the same amount of time spent

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<sup>2</sup> See, Birmingham Cert, Ex. B.

<sup>3</sup> As I advised petitioner previously, though permitted by regulation, I will not reduce his award by the expenses incurred by the OAL related to his failure to appear on April 12, 2018.

by petitioner's counsel for the same task.<sup>4</sup> Taddeo initially requested that the Borough be credited based on an hourly rate of \$335.00, to which petitioner objected as being a windfall to the Borough which generally pays its attorneys a much lower hourly rate. Although it is ironic that petitioner objects to reimbursing the Borough at the same hourly rate as petitioner is charging the Borough, Taddeo subsequently agreed that he bills the Borough at a rate of \$185.00/hour, and therefore, the Borough will be credited based on this lower rate. I **FIND** that it is reasonable to reduce the total award of fees by \$1,017.50, to reimburse the Borough for its costs related to the April 12, 2018, hearing.

Although the Borough did not make this request, I noted that, as described in the procedural history above, on September 25, 2017, petitioner failed to appear for a status telephone conference with Judge Scarola. On September 26, 2017, Luers sent a letter to Judge Scarola, apologizing for his failure to initiate the call due to an oversight on his part and asking that the conference be rescheduled. Luers then charged 0.3 hours between two dates for drafting the letter and corresponding with Judge Scarola's chambers to reschedule the conference. I **FIND** that it is not reasonable for Luers to recover fees from the Borough for the time he spent to correct his own mistake. Accordingly, the related charges by Luers of 0.3 hours will be deducted from the total award.

The Borough makes two additional requests for reductions, but without identifying specific entries of either attorney. First, the Borough alleges that petitioner's two attorneys are effectively billing the Borough twice for the same work. On review, it appears that Bermingham worked alone from February 2013, when the initial complaints were filed with the GRC, until mid-December 2013, when Luers then defended petitioner against the Borough's interlocutory appeal of the GRC's initial order in favor of petitioner and handled the case, for the most part, alone afterward. Bermingham Cert, Ex. A; Luers Cert., Ex. A. Between the two sets of bills, I found redundant charges on June 13 and 19, 2014. On June 13, 2014, Bermingham devoted 0.4 hours to "Kazar Certification," which was likely the review of the certification, given that Kazar was the Borough's employee, and on June 19, 2014, Luers devoted 0.10 hours to "Review Kazar certification and forward to client and co-counsel." Ibid. Accordingly, I **FIND**

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<sup>4</sup> Note that on July 25 and 26, 2018, Luers spent 4.8 hours to prepare for, travel to, and participate in a hearing which adjourned after a brief prehearing conference. Luers Cert., Ex. A.

that the charge by Luers of 0.10 hours on June 19, 2014, was redundant, not reasonable and should be deducted from the total award.

On November 2, 2017, the Clerk of the OAL sent Luers notice of the hearing scheduled for March 8, 2018. Luers entered three charges between November 10 and 14, 2017, (two on the same day!) for "review notice from Court and update docket." Luers Cert, Ex. A. Here too, the Borough is correct regarding redundant billing practices. Accordingly, I **FIND** that the charge by Luers of 0.2 hours on November 14, 2017, was redundant, not reasonable and will be deducted from the total award.

Second, the Borough asks that all entries by both attorneys for correspondence and/or communication with their client be reduced and the Borough objects to charges by both of petitioner's attorneys for preparing billing records because that is an administrative task. It seems both unethical and impractical for an attorney to skimp on communicating with his or her client on the risk that such communications will not be reimbursed; I **FIND** that the entries for these communications are reasonable. Finally, a central legal issue in this matter is calculating reasonable counsel fees and, therefore, I **FIND** that the entries devoted to this task were a reasonable expenditure of time. Note, however, that Bermingham devoted 0.6 hours to such a task on August 13, 2018, more than four years after his next most recent entry. He asks for a higher rate for this work; I **FIND** that it is unreasonable for the Borough to be charged this higher rate for Bermingham to calculate his bill for work he did at a lower rate four years earlier.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Petitioner's attorneys are seeking \$15,642.50 in reasonable counsel fees, paralegal fees and minor costs. The Borough strenuously objects to the total sought as "excessive and unwarranted based upon applicable law" and because the total includes charges for the same work by both attorneys. The Borough objects to the hourly rates charged by both attorneys.

OPRA's fee-shifting provision states, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Without the fee-shifting provision, "the ordinary citizen would be waging a quixotic battle against a public entity vested

with almost inexhaustible resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corr., 185 N.J. 137, 153 (2005) (NJDPM).

Under a State fee-shifting statute, such as OPRA’s N.J.S.A. 47:1A-6, the first step in the fee-setting process is to determine the “lodestar”—the number of hours reasonably expended multiplied by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 333, 334-35 (1995). The court should not passively accept the submissions of counsel in determining the lodestar amount, but rather “evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application.” Id. at 335.

The most important factor in calculating the number of hours reasonably spent is the actual results obtained by the attorney. Singer v. State, 95 N.J. 487, 499 (1984). Where a “prevailing” plaintiff has succeeded on only some of his claims for relief, “the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount” but “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” Id. at 500 [quoting Hensley v. Eckerhart, 461 U.S. 424, 435-436, 103 S. Ct. 1933, 1940-1941, 76 L. Ed. 2d 40, 52 (1983)].

In addition to weighing the success of the claim, hours that are not reasonably expended should be excluded. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434, 103 S. Ct. at 1939-40, 76 L. Ed. 2d at 51. “Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” Ibid. [quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)]. Thus, no compensation is due under a fee-shifting statute for nonproductive time.

For the reasons described above, Birmingham’s total expended hours will be reduced from 28.8 hours to 25.8 hours, and Luers’s total expended hours will be reduced from 20.7 hours to 17 hours. Thus, I **CONCLUDE** that the total number of hours reasonably spent in this

litigation is 17 hours by Luers and 25.8 hours by Bermingham. Because petitioner was completely successful in obtaining the relief sought, this number does not warrant any downward adjustment.

The next step in calculating the lodestar is to determine the reasonable hourly rate. Courts look to "similar service by lawyers of reasonable comparable skill, experience and reputation in the community." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 387 (2009). The court must be satisfied that the submitted hourly rate is fair, realistic and accurate; otherwise, the court may make adjustments. Rendine, 141 N.J. at 337. Additionally, the courts are guided by the factors enumerated in the Rules of Professional Conduct 1.5(a).<sup>5</sup>

Luers charged an hourly rate of \$335.00; Bermingham charged a rate of \$300.00 per hour. Luers Cert., 1.1(1); Bermingham Cert, 1(2). The Borough argues that this rate is too high for Bermingham because he has minimal OPRA experience and has less experience than Luers. As for Luers, the Borough contends that the hourly rate of \$335.00 is "significantly higher over what [Luers] has normally and previously sought in other matters brought against [the Borough],"<sup>6</sup> and is far too high for the relevant community and should be set no greater than \$300.00/hour. Resp't Br., at 1, 5-6.

Although Bermingham certified that he opened his own law practice in 2010, the resume he provided shows him working for a series of pharmaceutical companies from 2005 to the present, including what appear to be executive-level full time positions at Johnson & Johnson and Novartis Pharmaceuticals during the years that this matter was being litigated. None of his listed responsibilities include matters related to OPRA.

Nevertheless, the GRC previously approved an hourly rate of \$300.00 as reasonable for Bermingham. See, Carter v. Franklin Fire Dist. No. 2, OAL Docket No. 13327-13, GRC

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<sup>5</sup> The factors considered: (1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill required to perform the legal service; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved and the result obtained; (6) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the service; (8) whether the fee is fixed or contingent.

<sup>6</sup> Petitioner failed to provide proof of this claim.



Complaint Number 2011-382, Initial Decision (September 24, 2014) Final Decision (December 17, 2014) (awarding \$300.00/hour to Bermingham). More significant is that in a companion case decided earlier that same year, the GRC noted that Bermingham acknowledged that he then had limited OPRA experience and required greater detail from him on the “nature of the work performed” to prevent him from charging his client (and the public entity) for “mastering the learning curve.” Carter v. Franklin Fire Dist. No. 2, GRC Complaint No. 2011-228, Supplemental Findings and Recommendations of the Exec. Director (August 20, 2013), at 6-7. After reviewing Bermingham’s amended time log, the GRC found “that \$300 is a reasonable fee for attorneys of [Bermingham’s] experience representing clients before the GRC.” Carter v. Franklin Fire Dist. No. 2, GRC Complaint No. 2011-228, Final Decision (March 27, 2014), p. 1, citing John Paff v. Bordentown Fire District No. 2 (Burlington), GRC Complaint No. 2012-153 (2013) (“The rate of \$300 is reasonable for a[n] [OPRA] practitioner . . . in this geographical area.”). Given that Bermingham performed most of his work in this matter in 2013, around the time when the above GRC decisions were issued, there is no reason to deviate from the guidance provided in those decisions. I **CONCLUDE** that Bermingham’s rate of \$300.00 per hour comports with the fee charged by other attorneys with similar experience and skill in the community performing similar legal services and is therefore reasonable.

With respect to the fee requested by Luers, he cites a number of cases in his brief (with copies of two) as proof of his extensive experience in OPRA matters and to support that reasonable hourly rates for attorneys in OPRA matters generally in New Jersey may range from \$300.00 to over \$400.00/hour. Carter v. Borough of Paramus, Docket No. BER-L-761-17 (Bergen Cty. L.D., May 22, 2017); Renna v. Cty. of Union, Civ. Action No. 11-3328 (KM) (D.N.J. January 7, 2015); see also, Luers Cert., ¶ 7 (citations omitted). In Gensch v. Hunterdon County Clerk’s Office, A-3578-10T3, 2012 N.J. Super. Unpub. LEXIS 1630, \*8 (App. Div. July 9, 2012), a consolidation of three OPRA cases brought in Hudson, Hunterdon and Bergen Counties, the Appellate Division affirmed each trial court’s finding that the rate of \$350.00 per hour was reasonable for a partner.

Luers is a solo practitioner with specialization in OPRA and he has practiced law in New Jersey for more than ten years. His experience and expertise are more commensurate with that of a partner than an associate. Accordingly, I **CONCLUDE** that Luers’s rate of

\$335.00 per hour comports with the fee charged by other attorneys with similar experience and skill in the community performing similar legal services and is therefore reasonable.

Based on the above, the total lodestar amount may be calculated as follows:

\$300.00 x 25.8 = \$7,740.00

\$335.00 x 17.0 = \$5,695.00

\$13,435.00

Subtract Borough's fees of \$1,017.50= \$12,417.50;

Subtract expenses related

to April 12, 2018 hearing (\$0.50) = \$12,417.00.

For the foregoing reasons, I **CONCLUDE** that the petitioner's request for attorney fees in the amount of \$12,417.00 is reasonable.

**ORDER**

Based on the briefs, exhibits and certifications submitted, I hereby **ORDER** that Petitioner Verry is entitled to an award of attorneys' fees in the amount of \$12,417.00.

This order may be reviewed by **GOVERNMENT RECORDS COUNCIL** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

April 17, 2019

DATE

TMC/nd

c: OAL Clerk-T

  
TRICIA M. CALIGUIRE, ALJ



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**March 25, 2014 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint Nos. 2013-43 & 2013-53

v.

Borough of South Bound Brook (Somerset)  
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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian is in contempt of the Council’s September 24, 2013 Interim Order because he failed to comply with the terms of said Order within the prescribed time frame.
2. “The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s September 24, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to OPRA requests that the Council determined to be valid in accordance with precedential case law. The Council rejected Custodian Counsel’s request for reconsideration and the Appellate Division denied a motion for leave to appeal the Council’s September 24, 2013 Interim Order; thus, the Custodian was required to comply with the Council’s Order. Having failed to comply, the Custodian is in contempt of said Order. Therefore, based on the evidence of record, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the OAL for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



4. Pursuant to the Council's September 24, 2013, Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that both OPRA requests were valid and ordered disclosure of any responsive records or a certification to the disclosability or existence of same. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the amount of the award of reasonable attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> 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**

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

**GRC Complaint No. 2013-43 & 2013-53<sup>2</sup>**

v.

**Borough of South Bound Brook (Somerset)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 11, 2012 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence between any agent for the Borough of South Bound Brook (“Borough”) including but not limited to Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, any police department employee, the Custodian and Joseph Danielsen regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 11, 2012.

February 3, 2013 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence from Joseph Danielsen to any agent for the Borough including but not limited to the Custodian, Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, and any police department employee regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 31, 2012.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** December 11, 2012 and February 3, 2013

**Response Made by Custodian:** December 19, 2012 and February 12, 2013

**GRC Complaint Received:** February 7, 2013 and February 19, 2013

**Background**

November 19, 2013 Council Meeting:

At its November 19, 2013 public meeting, the Council considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related

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<sup>1</sup> 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).

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

<sup>3</sup> Represented by Robert G. Wilson, Esq., of Kovacs & Wilson (Somerville, NJ).

documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

[T]he Custodian has failed to establish in his request for reconsideration of the Council's September 24, 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 failed to establish that the complaint should be reconsidered based on a mistake. Specifically, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.*, (September 2013), the GRC highlighted what would be deemed a reasonable search and further noted that a custodian is not required to conduct research. *Id.* at 5-6. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian submitted arguments previously presented in the Statement of Information already considered by the Council and provides no new arguments supporting that the GRC made a mistake. Thus, the Custodian'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). Thus, the Council's September 24, 2013 Interim Order remains in effect and the Custodian must comply with same as ordered.

#### Procedural History:

On November 20, 2013, the Council distributed its Interim Order to all parties. On November 25, 2013, the Custodian's Counsel requested a stay of the Council's Interim Order pending an appeal. On December 4, 2013, the GRC denied Counsel's request because it had not received a motion for leave to appeal. On December 10, 2013, Counsel filed a motion for leave to appeal with the Appellate Division and renewed his request for a stay. On December 11, 2013, the GRC granted Counsel's request for a stay. On January 29, 2014, the Appellate Division denied Custodian Counsel's motion for leave to appeal the Council's decision.

On February 4, 2014, the GRC advised the Custodian's Counsel that the stay has been lifted and that the Custodian must comply with the Council's Order in accordance with the language set forth therein. On February 18, 2014, the Complainant's Counsel stated the Custodian failed to comply with the Council's Order.

#### Analysis

#### Compliance

At its September 24, 2013 meeting, the Council ordered the Custodian to provide records reasonably responsive to the Complainant's two (2) 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 September 25, 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 November 19, 2013, the GRC granted Custodian Counsel's request for a stay of the September 24, 2013 Order to allow the Appellate Division to rule on Custodian Counsel's motion for leave to appeal. On January 29, 2014, the Appellate Division denied the motion. On February 4, 2014, the GRC lifted the stay and stated that the Custodian must comply with the Council's Order. Therefore, the last day for the Custodian to comply with the Council's Order was February 11, 2014.

The Custodian did not respond within that time frame. On February 18, 2014, the Complainant's Counsel advised that he received no response, thus corroborating the Custodian's failure to respond to the Order.

Therefore, the Custodian is in contempt of the Council's September 24, 2013 Interim Order because he failed to comply with the terms of said Order within the prescribed time frame.

### **Council's September 24, 2013 Interim Order is Enforceable**

"The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's September 24, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law ("OAL"), for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the OAL.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent

conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian may have failed to bear his burden of proving a lawful denial of access to OPRA requests that the Council determined to be valid in accordance with precedential case law. The Council rejected Custodian Counsel's request for reconsideration and the Appellate Division denied a motion for leave to appeal the Council's September 24, 2013 Interim Order; thus, the Custodian was required to comply with the Council's Order. Having failed to comply, the Custodian is in contempt of said Order. Therefore, based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the OAL for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary



change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties," Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

In this matter, the Custodian denied access to the Complainant's two (2) OPRA requests stating that same were overly broad. The Complainant filed this complaint arguing that his requests were valid. The Council, in its September 24, 2013 Interim Order, held that the OPRA

requests were valid and that the Custodian may have unlawfully denied access to the responsive records. The Council thus ordered the Custodian to provide to the Complainant readily identifiable records or legal certify to the disclosability or existence of same. Thereafter, the Custodian failed to comply with the Council's Order. Thus, notwithstanding the Custodian's failure to comply, the Complainant is a prevailing party.

Therefore, pursuant to the Council's September 24, 2013, Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that both OPRA requests were valid and ordered disclosure of any responsive records or a certification to the disclosability or existence of same. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the OAL should determine the amount of the award of reasonable attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian is in contempt of the Council's September 24, 2013 Interim Order because he failed to comply with the terms of said Order within the prescribed time frame.
2. "The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's September 24, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to OPRA requests that the Council determined to be valid in accordance with precedential case law. The Council rejected Custodian Counsel's request for reconsideration and the Appellate Division denied a motion for leave to appeal the Council's September 24, 2013 Interim Order; thus, the Custodian was required to comply with the Council's Order. Having failed to comply, the Custodian is in contempt of said Order. Therefore, based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the OAL for determination of whether the Custodian

knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

4. Pursuant to the Council's September 24, 2013, Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council determined that both OPRA requests were valid and ordered disclosure of any responsive records or a certification to the disclosability or existence of same. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the amount of the award of reasonable attorney's fees.

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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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**November 19, 2013 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint Nos. 2013-43 and 2013-53

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has failed to establish in his request for reconsideration of the Council’s September 24, 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 failed to establish that the complaint should be reconsidered based on a mistake. Specifically, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.*, (September 2013), the GRC highlighted what would be deemed a reasonable search and further noted that a custodian is not required to conduct research. Id. at 5-6. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian submitted arguments previously presented in the Statement of Information already considered by the Council and provides no new arguments supporting that the GRC made a mistake. Thus, the Custodian’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). Thus, the Council’s September 24, 2013 Interim Order remains in effect and the Custodian must comply with same as ordered.



Interim Order Rendered by the  
Government Records Council  
On The 19th Day of November, 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: November 20, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**November 19, 2013 Council Meeting**

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

**GRC Complaint No. 2013-43 & 2013-53<sup>2</sup>**

**v.**

**Borough of South Bound Brook (Somerset)<sup>3</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:**

December 11, 2012 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence between any agent for the Borough of South Bound Brook (“Borough”) including but not limited to Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, any police department employee, the Custodian and Joseph Danielsen regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 11, 2012.

February 3, 2013 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence from Joseph Danielsen to any agent for the Borough including but not limited to the Custodian, Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, and any police department employee regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 31, 2012.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** December 11, 2012 and February 3, 2013

**Response Made by Custodian:** December 19, 2012 and February 12, 2013

**GRC Complaint Received:** February 7, 2013 and February 19, 2013

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

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

<sup>3</sup> Represented by Robert G. Wilson, Esq., of Kovacs & Wilson (Somerville, NJ).

## Background

### September 24, 2013 Council Meeting:

At its September 24, 2013 public meeting, the Council considered the September 17, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian may have failed to bear his 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 two (2) 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. The GRC notes that because the time frames contained in the OPRA requests overlap, there is no need for the Custodian to provide the Complainant duplicate copies of records responsive to both requests.
2. **The Custodian shall comply with item No. 1 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,<sup>4</sup> to the Executive Director.<sup>5</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. 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 September 25, 2013, the Council distributed its Interim Order to all parties. On October 1, 2013, the Custodian requested five (5) additional business days to submit a request for reconsideration. On October 2, 2013, the GRC granted the Custodian's request for an extension until October 9, 2013.

On October 4, 2013, the Custodian filed a request for reconsideration of the Council's September 24, 2013 Interim Order based on a mistake. The Custodian argues that the Council

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

erred by not invalidating the Complainant's portion of the request referring to nicknames and seeking e-mails to or from any "agent" of the Borough.

On October 8, 2013, the Complainant's Counsel submitted objections to the request for reconsideration. Counsel contended that the Custodian failed to prove the Council made a mistake and merely reargued his position from the Statement of Information.

### 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 filed the request for reconsideration of the Council's September 24, 2013 Order on October 4, 2013, three (3) business days prior to 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 ... 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).

As the moving party, the Custodian 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 failed to establish that the complaint should be reconsidered based on a mistake. Specifically, in Verry,



GRC 2013-43 *et seq.*, the GRC highlighted what would be deemed a reasonable search and further noted that a custodian is not required to conduct research. Id. at 5-6. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Custodian submitted arguments previously presented in the Statement of Information already considered by the Council and provides no new arguments supporting that the GRC made a mistake. Thus, the Custodian'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 LEXIS at 5-6. Thus, the Council's September 24, 2013 Interim Order remains in effect and the Custodian must comply with same as ordered.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has failed to establish in his request for reconsideration of the Council's September 24, 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 failed to establish that the complaint should be reconsidered based on a mistake. Specifically, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.*, (September 2013), the GRC highlighted what would be deemed a reasonable search and further noted that a custodian is not required to conduct research. Id. at 5-6. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian submitted arguments previously presented in the Statement of Information already considered by the Council and provides no new arguments supporting that the GRC made a mistake. Thus, the Custodian'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). Thus, the Council's September 24, 2013 Interim Order remains in effect and the Custodian must comply with same as ordered.

Prepared By: Frank F. Caruso  
Senior Case Manager

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

November 12, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

September 24, 2013 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint Nos. 2013-43 & 2013-53

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council ("Council") considered the September 17, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian may have failed to bear his 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 two (2) 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. The GRC notes that because the time frames contained in the OPRA requests overlap, there is no need for the Custodian to provide the Complainant duplicate copies of records responsive to both requests.
2. **The Custodian shall comply with item No. 1 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the 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 Rendered by the  
Government Records Council  
On The 24th Day of September, 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: September 25, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2013 Council Meeting**

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

**GRC Complaint No. 2013-43 & 2013-53**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 11, 2012 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence between any agent for the Borough of South Bound Brook (“Borough”) including but not limited to Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, any police department employee, the Custodian and Joseph Danielsen regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 11, 2012.

February 3, 2013 OPRA request: Electronic copies via e-mail of any and all e-mails and/or correspondence from Joseph Danielsen to any agent for the Borough including but not limited to the Custodian, Maria Caemmerer, Arleen Lih, Randy Bahr, Francis Linnus, Francesco Taddeo, Mayor Tama Ormosi, Councilpersons Blumenthal, Quinlan, Shoffner, Duh, Dykes and Conner, and any police department employee regarding the Complainant and any variation of his name, including but not limited to nicknames, between January 1, 2012 and December 31, 2012.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** December 11, 2012 and February 3, 2013

**Response Made by Custodian:** December 19, 2012 and February 12, 2013

**GRC Complaint Received:** February 7, 2013 and February 19, 2013

**Background<sup>3</sup>**

**Request and Response:**

On December 11, 2012, the Complainant submitted an Open Public Records Act

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Robert G. Wilson, Esq., of Kovacs & Wilson (Somerville, NJ).

<sup>3</sup> 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.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2013-43 & 2013-53 – Findings and Recommendations of the Executive Director

("OPRA") request to the Custodian seeking the above-mentioned records. On December 19, 2012, the Custodian responded in writing requesting an extension of time until January 11, 2013 to respond. On January 11, 2013, the Custodian's Counsel responded denying access to the Complainant's OPRA request as overly broad. On February 3, 2013, the Complainant disputed the denial based on the Custodian's previous responses to similar OPRA requests and gave him until February 5, 2013, to disclose responsive records.

On February 3, 2013, the Complainant submitted a second (2<sup>nd</sup>) OPRA request to the Custodian seeking the above-mentioned records. On February 12, 2013, the Custodian responded in writing denying access to the Complainant's OPRA request as overly broad.

#### Denial of Access Complaint:

On February 7, 2013, the Complainant filed GRC Complaint No. 2013-43 with the Government Records Council ("GRC"). On February 14, 2013, the Complainant filed GRC Complaint No. 2013-53 with the GRC.

The Complainant disputed the Custodian's denial based on the Custodian's previous responses to four (4) similarly worded OPRA requests for e-mails and correspondence wherein the Custodian responded providing access to records. The Complainant contends that the Custodian's previous responses prove that he did not find those requests invalid and thus should have provided access to the responsive records here. The Complainant further contends that the Custodian's request for an extension of time to locate records responsive to the December 11, 2012 OPRA request further proves that at least that request is valid.

The Complainant requests that the Council: (1) determine that the Custodian violated OPRA by failing to provide the responsive records; (2) order immediate disclosure of same; (3) determine that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances warranting an imposition of civil penalties under N.J.S.A. 47:1A-11; and (4) determine that the Complainant is a prevailing party subject to an award of reasonable attorney's fees.

#### Statement of Information:

On April 5, 2013, the Custodian filed a Statement of Information ("SOI") for GRC Complaint No. 2013-43. The Custodian certifies that he received the Complainant's first (1<sup>st</sup>) OPRA request on December 11, 2012 and Counsel responded on January 11, 2013, denying access to the Complainant's OPRA request as overly broad. On April 12, 2013, the Custodian filed an SOI for GRC Complaint No. 2013-53. The Custodian certifies that he received the Complainant's second (2<sup>nd</sup>) OPRA request on February 3, 2013 and responded on February 12, 2013, denying access to the Complainant's OPRA request as overly broad.

The Custodian contends that the Complainant's OPRA requests were invalid for a number of reasons. The Custodian argues that the requests failed to specifically name all individual senders and recipients. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 and 2009-08 (April 2010); Wolosky v. Town of Boonton (Morris), GRC Complaint No.

2010-207 (November 2011). The Custodian further argues that, not taking into account any possible non-electronic correspondence, the requests would require the Custodian to search 20 computers for responsive e-mails. Finally, the Custodian argues that the requests require him to determine any possible nicknames used for the Complainant. The Custodian asserts that the Complainant's requests are clearly invalid and would disrupt the Borough's operations.

The Custodian disputes the Complainant's argument that he must disclose records responsive to these requests because he has done so for similar requests in the past. The Custodian contends that a custodian is not obligated to continue to respond to invalid requests just because he has responded to them in the past. The Custodian further asserts that those previous requests were not as broad as the requests at issue here.

Additional Submissions:

On April 26, 2013, the Complainant disputes the SOI and contends that it proves the Custodian knowingly and willfully violated OPRA.

The Complainant asserts that his OPRA requests are consistent with the criteria set forth in Elcavage, GRC 2009-07 and 2009-08. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2011-114 *et seq.* (Interim Order dated May 29, 2012). The Complainant further disputes that the requests at issue here are more overly broad than previous requests for e-mails. The Complainant contends that he included all possible nicknames because he received an e-mail in which he was referred to as "BV" and he did not want the Custodian to deny e-mails that exist because he referred to the Complainant by some unknown nickname. The Complainant contends that if requesting nicknames is invalid, there is nothing to stop a public agency from referring to programs or topics by an irrelevant nickname in order to prevent disclosure. The Complainant contends that to invalidate the term "nicknames" would have severe consequences to the plain language as well as the spirit of OPRA.

The Complainant certifies that the Borough only has 12 computers and not 20 as the Custodian certified. The Complainant contends that even if the Borough had 20 computers, the Custodian does not physically search each computer; rather, he contacts the identified individuals asking them to provide him responsive records. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-385 (Interim Order dated February 26, 2013).<sup>4</sup>

The Complainant also disputes the Custodian's contention that responding to these OPRA requests would have disrupted agency operations. The Complainant contends that the Custodian was able to respond to the previous similarly worded OPRA requests in eleven (11) hours or less while still completing all regular business. The Complainant asserts that this excuse was concocted to support their unlawful denial of access. The Complainant asserts that even if the requests substantially disrupted agency operations, the Custodian could not deny access on this basis without first attempting to reach a reasonable accommodation. N.J.S.A. 47:1A-5(g).

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<sup>4</sup> The Complainant cites to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-22 (March 2013); however, this complaint was administratively disposed of as a duplicate complaint concurrently being adjudicated as GRC Complaint No. 2011-385.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2013-43 & 2013-53 – Findings and Recommendations of the Executive Director

## Analysis<sup>5</sup>

### 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.

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>6</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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<sup>5</sup> 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.

<sup>6</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2013-43 & 2013-53 – Findings and Recommendations of the Executive Director

Moreover, the test under MAG is whether a requested record is a specifically identifiable government record. If it is, the record is disclosable barring any exemptions to disclosure contained in OPRA. The Council established criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). In Sandoval, the complainant requested “e-mail ... between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The custodian denied the request, claiming that it was overly broad. The Council held that “[t]he Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” Id. at 16 (emphasis added).

In Elcavage, GRC 2009-07, the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

*In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (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) a valid e-mail request must identify the sender and/or the recipient thereof.*

Id. at 5 (emphasis in original).

The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville BOE (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Moreover, in Verry, GRC 2011-114 *et seq.*, the Council determined that the complainant’s OPRA requests seeking e-mails for a specific time period regarding specific subjects received by the custodian, Mr. Danielsen and Network Blade were valid under Elcavage. The Council thus ordered disclosure of the responsive records.

Here, the Complainant’s OPRA requests are similar to those in Verry. 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-mails or correspondence, (2) the specific date or range of dates during which the e-mails or correspondence 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 or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed “subject” or “regarding” 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 and correspondence to determine if same is responsive: in other words, conduct research.

Therefore, the Custodian may have failed to bear his 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 two (2) 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. The GRC notes that because the time frames contained in the OPRA requests overlap, there is no need for the Custodian to provide the Complainant duplicate copies of records responsive to both requests.

### **Knowing & Willful**

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

### **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 may have failed to bear his 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 two (2) 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. The GRC notes that because the time frames contained in the OPRA requests overlap, there is no need for the Custodian to provide the Complainant duplicate copies of records responsive to both requests.
2. **The Custodian shall comply with item No. 1 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,<sup>7</sup> to the Executive Director.<sup>8</sup>**

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>8</sup> 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.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2013-43 & 2013-53 – Findings and Recommendations of the Executive Director

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. 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

September 17, 2013