



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

July 30, 2019 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2015-104

v.

Borough of Paramus (Bergen)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that Complainant’s Counsel has failed to establish in his request for reconsideration of the Council’s January 31, 2019 Final Decision 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. Complainant’s Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Complainant’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Complainant’s Counsel failed to prove that the Council was required to reopen the ALJ’s “deemed” adopted decision. Further, although the Complainant sustained his status as a citizen of New Jersey, no factual causal nexus existed because the issue did not bring about the desired relief. Thus, Complainant Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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



Final Decision Rendered by the
Government Records Council
On The 30th Day of July 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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2015-104

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

Records Relevant to Complaint: All pleadings in the matter Ian I. Shore v. Borough of Paramus, 2011 N.J. Super. Unpub. LEXIS 1827 (App. Div. 2012).

Custodian of Record: Annemarie Krusznis

Request Received by Custodian: April 10, 2014

Response Made by Custodian: April 25, 2014; May 1, 2014; May 2, 2014

GRC Complaint Received: April 9, 2015

Background

January 31, 2019 Council Meeting:

At its January 31, 2019 public meeting, the Council considered the January 24, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. In accordance with N.J.S.A. 52:14B-10(c), the Honorable Elissa Mizzone Testa's, Administrative Law Judge, Initial Decision is "deemed adopted" by operation of law as of January 17, 2019. Specifically, the GRC was prevented from taking action because it did not receive unanimous consent to obtain a second (2nd) extension of time. The GRC will thus address the remaining issues previously deferred by the Council's March 28, 2017 Interim Order.
2. The Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However,

¹ Represented by John A. Birmingham, Jr., Esq. (Mt. Bethel, PA). Also represented by Walter M. Luers, Esq. of the Law Office of Walter Luers (Clinton, NJ) (collectively "Complainant's Counsel"). Mr. Luers entered his appearance to the Office of Administrative Law on April 4, 2017.

² Represented by Justin D. Santagata, Esq. (Fort Lee, NJ).

the Custodian lawfully denied access to the record withheld from disclosure under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. Further, the Custodian performed a sufficient search to obtain any additional records that may have existed. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, while the Custodian committed a timeliness violation of OPRA, the Custodian lawfully denied access to the single withheld record and this complaint did not result in any additional disclosures. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Procedural History:

On February 5, 2019, the Council distributed its Final Decision to all parties.

On February 19, 2019, Complainant's Counsel filed a request for reconsideration of the Council's Final Decision based on a mistake and illegality. Counsel contended that "unusual calendar dates" did not allow the Government Records Council ("GRC") to adopt, reject, or modify the Administrative Law Judge's ("ALJ") Initial Decision. Counsel thus argued that the Complainant was "deprived of learning [the] Council's position" on said decision.

Counsel argued that the GRC has broad authority to reopen this complaint on the basis that "reconsideration is required to correct the record." In re Trantino, 89 N.J. 347, 364 (1982); in re Adamar of N.J., 222 N.J. Super. 464, 474 (App. Div. 1988); Glukowski v. Equity One, Inc., 180 N.J. 49, 65-66 (2004); Moore v. Bd. Of Trs. Of the State Police Ret. Sys., 382 N.J. Super. 347, 352 (App. Div. 2006) (rev'd on other grounds *sub nom* Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29 (2008)). Complainant's Counsel argued that this complaint provided a perfect example of one that should be reopened and reversed based on a mistake and plain error.

Counsel argued that the Council's decision in Chester v. Pleasantville Hous. Auth. (Atlantic), GRC Complaint No. 2015-50 (Interim Order dated March 28, 2019), decided on the same day that this complaint was referred to the Office of Administrative Law ("OAL"), validated the Complainant's OPRA request in this matter. Council argued that the Borough's ability to locate and disclose records "belies any assertion that" the subject OPRA request was invalid. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012). Counsel argued that the Custodian had an obligation to obtain responsive records, regardless of location, and provide them to the Complainant. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).

Counsel contended that the ALJ erred by citing Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005) while failing to address Complainant's arguments regarding Burnett and O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 14 (2012). Counsel asserted that despite the O'Boyle court's reaffirmation that custodians were required to obtain records from third parties, the ALJ never touched on this binding precedent. Counsel argued that the Complainant was entitled to the ALJ's evaluation of these cases and their applicability. Counsel asserted that the ALJ instead erroneously concluded that the Borough performed a reasonable search. Counsel argued that this was in error because Custodian's Counsel did not send a letter regarding the records to the former attorney until after the filing of this complaint.

Additionally, Counsel contended that the Complainant's argument questioning the authenticity of records present on a third-party website was not addressed. Counsel argued that this issue "begs for Council's input . . . on this . . . disputed material fact."

Finally, Counsel argued that the Complainant prevailed on the citizenship issue and was thus entitled to prevailing party attorney's fees. Counsel argued that the Borough continued to push this issue notwithstanding its knowledge of past case law on anonymous requests and the citizenship issue. Scheeler v. Office of the Gov., 448 N.J. Super. 333, 341 (App. Div. 2017) (holding that OPRA allows for anonymous requests); Carter v. Borough of Paramus, Docket No. BER-L-761-17 (March 31, 2017) (holding that anyone can submit an OPRA request, regardless of whether they are a non-state resident). Counsel also stated that the New Jersey Superior Court, Appellate Division similarly held that non-state residents had standing to submit OPRA requests just four (4) months after the plenary hearing in this case. Scheeler v. Atl. Cnty. Joint Muni. Ins. Fund, 454 N.J. Super. 621, 627 (App. Div. 2018).

Counsel argued that notwithstanding the foregoing, the Council ordered OAL to make a determination on this issue, thus requiring the Complainant to disclose personal information about himself on the record. Counsel argued that because the Complainant prevailed on this issue, he is a prevailing party entitled to attorney's fees incurred to defend himself. Counsel also argued that by requiring the Complainant to prove his citizenship, the first and only time a complainant has been forced to do so, the Council owed him an apology.

On February 26, 2019, Custodian's Counsel sought an extension to submit objections based on an "emergency." On February 27, 2019, the GRC granted an extension through March 8, 2019. On March 6, 2019, Custodian's Counsel submitted objections to the request for reconsideration. Therein, Counsel argued that the GRC had no authority to reconsider an Initial Decision after it was deemed adopted by operation of law. Further, Counsel contended that even if the GRC had such authority, Complainant's Counsel failed to submit any evidence justifying reconsideration.

Counsel first argued that N.J.S.A. 52:14B-10(c) was amended in 2014 to include an "automatic approval" provision. Counsel stated that this provision allowed administrative agencies one forty-five (45) day extension to adopt, reject, or modify an initial decision with no further extensions unless agreed to unanimously by the parties. Matter of Hendrickson, 235 N.J. 145, 158 (2018).

Counsel next argued that Complainant’s Counsel attempted to argue for reconsideration on the validity of Complainant’s OPRA request; a “legal error that the [ALJ] never made.” Counsel contended that the validity of the request was not at issue; rather, the ALJ’s decision rested on whether the Custodian performed a sufficient search. Counsel noted that the Counsel asserted that the ALJ determined a sufficient search was conducted based on the credibility of the Custodian. Counsel argued that the Complainant proffered no arguments warranting the GRC’s rejection under N.J.A.C. 52:14B-10(c).

Counsel also contended that there was no established precedent requiring custodians to search beyond an agency’s public records for anything other than settlements. Compare Bent, 381 N.J. Super. 30 with Burnett, 415 N.J. Super. 506. Counsel further argued that any reliance on O’Boyle, 426 N.J. Super. 1, was misplaced because that court declined to adopt the Burnett language in its analysis. Counsel contended that in Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 303 (2017), the Supreme Court drew a clear line between “*any record* and ‘basic documents relating to . . .’” Id. (emphasis in original). Counsel contended that the distinction here is that the Borough never argued against a requirement to obtain and disclose records in the possession of current attorneys or professionals. Counsel argued that instead Complainant Counsel’s argument would “make custodians the virtual possessor of any record” ever possessed by any attorney or professional it no longer retained or controlled.

Counsel finally argued that the Complainant was not a prevailing party because this complaint was not the catalyst for any achievement. Counsel rejected that the non-citizen question led to any additional disclosures: the Borough never denied access because of residency. Counsel noted that he only brought this issue up based on Scheeler, Jr. v. Burlington Twp. (Burlington), GRC Complaint No. 2015-93 (April 2016) (holding that out-of-state residents did not have standing to submit OPRA requests), which was decided during the pendency of this complaint. Counsel contended that the Complainant’s residency was “ultimately meaningless.”

Additional Submissions:

On March 8, 2019, Complainant’s Counsel submitted a letter brief asserting “new authority” in support of his request for reconsideration. Therein, Counsel stated that in McNally v. City of Bayonne (Hudson), GRC Complaint No. 2018-16 (Interim Order dated February 26, 2019), the Council ordered the custodian to obtain records from a third party. Counsel argued that said decision was relevant here. Counsel reiterated his request that the Council reconsider this complaint and provide all relief set forth in the pending reconsideration application.

On March 10, 2019, Custodian’s Counsel submitted a letter brief. Counsel contended that Complainant’s Counsel’s reliance on McNally was erroneous. Counsel argued that in McNally, the Council required a custodian to obtain records from an appointed official which said official was still appointed. Counsel argued that such was not the case here. Counsel reiterated that the Borough did not have control of the outside law firm potentially possessing responsive records here at the time of the Complainant’s OPRA request. Counsel further reiterated that the Custodian and himself attempted to obtain the records and were ignored.

On March 11, 2019, Complainant's Counsel e-mailed the GRC arguing that the Borough had the responsibility to obtain the responsive records from a previous attorney because they were the Borough's property. See ACPE Opinion 692 on R.P.C. 1.15 *et seq.* Counsel further contended that the Complainant had no obligation to "chase down records;" the Custodian bore a burden of obtaining them from the previous attorney regardless of whether said attorney ignored their attempts. Finally, Counsel asserted that the Complainant asked that he enter for the record their concerns on Custodian Counsel's "antagonistic language." Counsel noted that both the Custodian and Custodian's Counsel were reminded of the R.P.C. requirements involving decorum.

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, Complainant's Counsel filed the request for reconsideration of the Council's Order January 31, 2019 Final Decision on February 19, 2019, nine (9) business days from the issuance of the Council's Order.

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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

After review of the submissions, the GRC is inclined to recommend that Complainant Counsel's request for reconsideration be denied for the following reasons:

ALJ's Initial Decision:

The authority of the GRC to reconsider its decisions extends to deemed adopted decisions. See Mastro v. Bd. of Trustees, PERS, 266 N.J. Super. 445, 452 (App. Div. 1993). However, the power to reopen the matter after a deemed adoption must be exercised reasonably. To this end, the Supreme Court in Matter of Kallen, 92 N.J. 14 (1983) set forth the elements that courts have generally considered in reopening final orders as:

(1) the burden on the individual the reopening would impose, (2) the reason for the reopening, and (3) the public interest served by the reopening. Skulski v. Nolan, 68 N.J. at 195-201; Ruvolt v. Nolan, 63 N.J. at 183-84; Burlington County Evergreen Pk. Mental Hosp. v. Cooper, 56 N.J. at 600; Hanlon v. Town of Belleville, 4 N.J. at 106-07.

[Id. at 27.]

In applying the above elements here, the GRC finds that reopening this matter would not be reasonable. As to the first factor, the burden on the individuals for reopening this case are significant given that the result likely will not change. The Custodian's testimony supports the Borough's attempts to obtain records from former counsel, without success. As to the second factor, Complainant Counsel's reason for reopening this complaint argues a point that was never at issue: the validity of the Complainant's OPRA request was never in question. Finally, no public interest would be served by reopening this complaint.

Prevailing Party Attorney's Fees

The Council correctly determined that the Complainant was not entitled to attorney's fees. The citizenship issue did not result in a causal nexus between the filing of this complaint and the relief achieved. Initially, the Borough did not deny access based on the citizenship issue; rather, it came to light well after the filing of this complaint. Further, the introduction of this issue and its ensuing referral to the OAL was a direct result of the uncertain status of out-of-state requestors at the time of the Council's March 28, 2017 Order. See Lawyers Committee v. Atlantic City Bd. of Educ., Docket No. ATL-L-832-15 (Law Div. Feb. 19, 2016), Scheeler v. City of Cape May, et al., Docket No. CPM-L-444-15 (Law Div. Feb. 19, 2016), and Twp. of Wantage v. Caggiano, Docket No. SSX-C-21-15 (Law Div. February 19, 2016); Scheeler, Jr., GRC 2015-93; as opposed to Scheeler v. Atlantic Cnty. Muni. Joint Ins. Fund, et al., Docket No. BURL-990-15 (Law Div. Oct. 2, 2015); Scheeler v. Ocean Cnty. Prosecutor's Office, et al., Docket No. OCN-L-3295-15 (Law Div. Apr. 14, 2016). Notwithstanding, that controversy was laid to rest in Scheeler, 454 N.J. Super. 621., while this complaint was pending adjudication at the OAL. Thus, the citizenship issue ultimately had no impact on the outcome of this complaint.

As the moving party, Complainant's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously or

unreasonably. See D'Atria, 242 N.J. Super. at 401. Complainant's Counsel failed prove that the Council was required to reopen the ALJ's "deemed" adopted decision. Further, although the Complainant sustained his status as a citizen of New Jersey, no factual causal nexus existed because the issue did not bring about the desired relief. Thus, Complainant Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that Complainant's Counsel has failed to establish in his request for reconsideration of the Council's January 31, 2019 Final Decision 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. Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Complainant's Counsel failed prove that the Council was required to reopen the ALJ's "deemed" adopted decision. Further, although the Complainant sustained his status as a citizen of New Jersey, no factual causal nexus existed because the issue did not bring about the desired relief. Thus, Complainant Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Acting Executive Director

July 23, 2019



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

January 31, 2019 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2015-104

v.

Borough of Paramus (Bergen)
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. In accordance with N.J.S.A. 52:14B-10(c), the Honorable Elissa Mizzone Testa’s, Administrative Law Judge, Initial Decision is “deemed adopted” by operation of law as of January 17, 2019. Specifically, the GRC was prevented from taking action because it did not receive unanimous consent to obtain a second (2nd) extension of time. The GRC will thus address the remaining issues previously deferred by the Council’s March 28, 2017 Interim Order.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the record withheld from disclosure under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. Further, the Custodian performed a sufficient search to obtain any additional records that may have existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, while the Custodian committed a timeliness violation of OPRA, the Custodian lawfully denied access to the single withheld record and this complaint did not result in any additional disclosures. Therefore, the Complainant is



not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 31st Day of January, 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: February 5, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2015-104

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

Records Relevant to Complaint: All pleadings in the matter Ian I. Shore v. Borough of Paramus, 2011 N.J. Super. Unpub. LEXIS 1827 (App. Div. 2012).

Custodian of Record: Annemarie Krusznis

Request Received by Custodian: April 10, 2014

Response Made by Custodian: April 25, 2014; May 1, 2014; May 2, 2014

GRC Complaint Received: April 9, 2015

Background

March 28, 2017 Council Meeting:

At its March 28, 2017 public meeting, the Council considered the March 21, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Based on the conflicting evidence in the matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this

¹ Represented by John A. Bermingham, Jr., Esq. (Mt. Bethel, PA). Also represented by Walter M. Luers, Esq. of the Law Office of Walter Luers (Clinton, NJ). Mr. Luers entered his appearance to the Office of Administrative Law on April 4, 2017.

² Represented by Justin D. Santagata, Esq. (Fort Lee, NJ).

complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts on:

- Whether the Custodian performed a sufficient search and obtained all records responsive to the request, whether in her possession or via third party;
 - Whether the Custodian lawfully denied access to the one (1) record to which she withheld access; and
 - Whether the Complainant is a citizen of the State.
3. The knowing and willful and prevailing party analyses are deferred pending the Office of Administrative Law’s disposition of the matter.

Procedural History:

On March 30, 2017, the Council distributed its Interim Order to all parties. On April 17, and April 27, 2017, both Complainant’s Counsel and Custodian’s Counsel filed motions for interlocutory appeal with the New Jersey Superior Court, Appellate Division. On May 25, 2017, the Appellate Division denied both motions. On July 31, 2017, the Government Records Council (“GRC”) transmitted this complaint to the Office of Administrative Law (“OAL”).

On October 18, 2018,³ the Honorable Elissa Mizzone Testa, Administrative Law Judge (“ALJ”), issued an Initial Decision in this matter. The ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

I reviewed said document by way of an *in camera* review and I **FIND** that said document is attorney work product and covered under the Attorney-Client Privilege. I further **FIND** it contained the attorney’s thoughts and mental impressions on a potential settlement of a case. The document was clearly marked “Confidential: Attorney-Client Privileged” and had attached an unexecuted Stipulation of Settlement.

...

I **FIND** that [the Complainant] is currently a Citizen of the State of New Jersey and was a Citizen of the State of New Jersey at the time the OPRA request was made to the [Borough of Paramus (“Borough”)].

...

I **CONCLUDE** that said document is attorney work product and covered under the Attorney-Client Privilege and thus, not deemed a government record. [The Custodian] lawfully denied access to the one (1) record. This was also the clear intent of the creator of the document by marking it as “Confidential: Attorney-Client Privileged.”

³ The GRC notes that the OAL sought two (2) extensions, ultimately expiring on October 19, 2018, to file an initial decision. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8. The GRC granted both extensions.

. . .

The Stipulated Facts, as well as, the credible testimony presented by both [the Custodian] and [the Complainant] in the within matter compel me to **CONCLUDE** that the [Custodian] . . . performed a sufficient search and obtained all records responsive to the request, whether in her possession or via a third party.

I further **CONCLUDE** that the Complainant . . . is a citizen of the State of New Jersey, was a Citizen of the State of New Jersey at the time the OPRA request was made to [the Borough] and was a citizen of the State of New Jersey at all times relevant to these proceedings.

[Id. at 6, 8, and 13-14.]

The ALJ's Initial Decision provided the parties thirteen (13) days from mailing to submit to the GRC exceptions to the decision.

Complainant's Exceptions:

On October 31, 2018, Complainant's Counsel filed exceptions to the ALJ's Initial Decision. Therein, Counsel disputed the ALJ's finding that the Custodian performed a sufficient search. Counsel contended that the Custodian only made one (1) attempt to contact previous counsel to obtain responsive records. Counsel thus requested that the Council modify the ALJ's order to find that a denial of access occurred.

On November 12, 2018, Custodian's Counsel submitted an objection to the exceptions. Therein, Counsel argued that the ALJ's decision was entitled to substantial deference in accordance with N.J.S.A. 52:14B-10.

Extensions of Time:

On November 30, 2018, the GRC requested a forty-five (45) day extension of the statutory time period, or until January 17, 2019, to accept, reject, or modify the ALJ's Initial Decision. On December 4, 2018, the OAL granted said extension.

On January 16, 2019, the GRC contacted the parties advising that it would need a second (2nd) extension of time to accept, reject, or modify the ALJ's Initial Decision. The GRC, citing an excessive workload, sought unanimous consent for said extension as was required under N.J.S.A. 52:14B-10(c). On the same day, Complainant's Counsel advised that the Complainant consented to the extension. On January 17, 2019, notwithstanding not receiving a response from Custodian's Counsel,⁴ the GRC requested a second (2nd) extension of time through March 4, 2019.

⁴ The GRC notes that Custodian's Counsel averred in brief phone conversation on January 17, 2019 that he did not believe the Borough would consent to an extension. However, Counsel advised that he would submit a written response once he heard from the Borough. Thereafter, Counsel e-mailed the GRC on January 23, 2019 advising that the Borough did not consent to an extension. Notwithstanding, the OAL had already rejected the request based on the lack of unanimous consent prior to the January 17, 2019 deadline expiration.

On January 22, 2019, the OAL rejected the request for an extension in accordance with N.J.S.A. 52:14B-10(c) because the GRC had not received unanimous consent from the parties. Thus, the ALJ's Initial Decision became final by operation of law at that time. N.J.S.A. 52:14B-10.

Analysis

Administrative Law Judge's Initial Decision

The Administrative Procedures Act ("APA") provides that:

The head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the [Initial Decision] no later than 45 days after receipt of such recommendations . . . Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

[N.J.S.A. 52:14B-10(c).]

Further, the APA provides that:

For good cause shown, upon certification by the director and the agency head, the time limits established herein may be subject to a single extension of not more than 45 days. Any additional extension of time shall be subject to, and contingent upon, the unanimous agreement of the parties.

[Id.]

Here, the ALJ's Initial Decision, set forth as "Exhibit A," determined that:

I reviewed said document by way of an *in camera* review and I **FIND** that said document is attorney work product and covered under the Attorney-Client Privilege. I further **FIND** it contained the attorney's thoughts and mental impressions on a potential settlement of a case. The document was clearly marked "Confidential: Attorney-Client Privileged" and had attached an unexecuted Stipulation of Settlement.

. . .

I **FIND** that [the Complainant] is currently a Citizen of the State of New Jersey and was a Citizen of the State of New Jersey at the time the OPRA request was made to the [Borough of Paramus ("Borough")].

[Id. at 6, 8.]

The ALJ therefore held the following:

I **CONCLUDE** that said document is attorney work product and covered under the Attorney-Client Privilege and thus, not deemed a government record. [The Custodian] lawfully denied access to the one (1) record. This was also the clear intent of the creator of the document by marking it as “Confidential: Attorney-Client Privileged.”

...

The Stipulated Facts, as well as, the credible testimony presented by both [the Custodian] and [the Complainant] in the within matter compel me to **CONCLUDE** that the [Custodian] . . . performed a sufficient search and obtained all records responsive to the request, whether in her possession or via a third party.

I further **CONCLUDE** that the Complainant . . . is a citizen of the State of New Jersey, was a Citizen of the State of New Jersey at the time the OPRA request was made to [the Borough] and was a citizen of the State of New Jersey at all times relevant to these proceedings.⁵

[Id. at 13-14.]

Following receipt of Complainant Counsel’s exceptions, the GRC sought an extension of time to accept, reject, or modify the ALJ’s Initial Decision. The GRC sought this extension to attempt an adjudication at the Council’s December 18, 2018 meeting. The extended time frame, which the OAL granted, expired on January 17, 2019. Unfortunately, due to the excessive workload currently engulfing the GRC, it was unable to prepare findings and recommendations for the December 2018 meeting. Thereafter, the GRC prepared findings and recommendations for the January 29, 2019 meeting. However, because that meeting fell beyond the extended time frame, the GRC needed another extension. Thus, in accordance with N.J.A.C. 52:14B-10(c), the GRC sought unanimous consent for a second (2nd) extension. Unfortunately, the GRC did not receive unanimous consent and the OAL rejected the GRC’s request for a second (2nd) extension.

Therefore, in accordance with N.J.S.A. 52:14B-10(c), the ALJ’s Initial Decision is “deemed adopted” by operation of law as of January 17, 2019. Specifically, the GRC was prevented from taking action because it did not receive unanimous consent to obtain a second (2nd) extension of time. The GRC will thus address the remaining issues previously deferred by the Council’s March 28, 2017 Interim Order.

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

⁵ Subsequent to this complaint being referred to the OAL, the Appellate Division determined that out-of-state requestors had standing to utilize OPRA. See Scheeler v. Atlantic Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018).

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)).

In the instant complaint, the Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the record withheld from disclosure under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. Further, the Custodian performed a sufficient search to obtain any additional records that may have existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he 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 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed 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.]

The Complainant filed the instant complaint disputing the Custodian’s response for a number of reasons. At the OAL, the ALJ performed an *in camera* review and determined the withheld record was properly denied. Additionally, the ALJ concluded that the Custodian performed a sufficient search to locate any other potentially responsive records. Ultimately, this complaint did not bring about a change in the Custodian’s conduct, whether voluntarily or otherwise. For this reason, the Complainant is not a prevailing party.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no 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, while the Custodian committed a timeliness violation of OPRA, the Custodian lawfully denied access to the single withheld record and this complaint did not result in any additional disclosures. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. In accordance with N.J.S.A. 52:14B-10(c), the Honorable Elissa Mizzone Testa’s, Administrative Law Judge, Initial Decision is “deemed adopted” by operation of law as of January 17, 2019. Specifically, the GRC was prevented from taking action because it did not receive unanimous consent to obtain a second (2nd) extension of time. The GRC will thus address the remaining issues previously deferred by the Council’s March 28, 2017 Interim Order.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the record withheld from disclosure under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. Further, the Custodian performed a sufficient search to obtain any additional records that may have existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus

exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, while the Custodian committed a timeliness violation of OPRA, the Custodian lawfully denied access to the single withheld record and this complaint did not result in any additional disclosures. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Acting Executive Director

January 22, 2019



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 11086-17

AGENCY DKT. NO. 2015-104

JEFF CARTER,

Petitioner,

v.

BOROUGH OF PARAMUS (BERGEN),

Respondent.

Walter M. Luers, Esq., for Petitioner (Law Offices of Walter M. Luers, attorneys)

Justin D. Santagata, Esq. for respondent (Kaufman, Semeraro, Leibman, attorneys)

Record Closed: July 6, 2018

Decided: October 18, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Petitioner, Jeff Carter, (Petitioner or Carter) seeks a determination whether the Custodian of Records for Respondent the Borough of Paramus (Paramus or Respondent), violated the Open Public Records Act (OPRA), or unlawfully denied access to documents requested by Petitioner under the totality of the circumstances.

The Government Records Council (GRC) transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on August 3, 2017.

Petitioner filed a Motion in limine, dated January 10, 2018. The Motion was resolved on the record at the hearing held on January 11, 2018. The record was kept open to allow the parties time to submit written summations. The last responsive pleading was received on July 6, 2018, at which time the record was closed. An extension was granted until October 19, 2018, for filing this Initial Decision.

Pursuant to the GRC's March 28, 2017, Findings and Recommendations and Interim Order (J-3), the matter was referred to the OAL for a hearing to resolve the facts on:

1. Whether the Custodian performed a sufficient search and obtained all records responsive to the request, whether in her possession or via a third party;
2. Whether the Custodian lawfully denied access to the one (1) record to which she withheld access; and
3. Whether the Complainant is a citizen of the State.

All remaining issues raised by the Petitioner and Respondent before the OAL were either previously addressed by the GRC¹ or deferred pending the disposition of the above issues before the OAL², and therefore, the Initial Decision by the undersigned will only contain that which is needed to decide the above referred issues.

¹ The Council previously found that the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). (J-3).

² Any testimony presented at the hearing and any arguments raised in post-summation briefs as to the untimely filing of Petitioner's GRC Complaint, i.e. laches, and as to potential fee shifting are outside the scope of the GRC referral and will not be addressed in this Initial Decision. In particular, the knowing and willful and prevailing party analyses are deferred pending the Office of Administrative Law's disposition of the matter. (J-3).

FINDINGS OF FACTS

The Stipulated Facts in this case are as follows:

1. Carter filed an OPRA request with Respondent on April 10, 2014. It sought:

All pleadings sent by or received by the Borough Records Custodian/Clerk, including any Borough agents . . . in the matter of Shore v. Borough of Paramus, 2011 N.J. Super. Unpub. Lexis 1827 (App. Div. 2012).

[J-2.]

In a footnote, the request expanded “pleadings” to:

Including, for example, all court filings, motions, decisions, opinions, orders, letters, briefs, memos, fax transmittals, transcripts, etc.

. . .

Including Judge Doyne’s decision and trial [sic] transcripts . .

..

[J-2.]

2. The Shore case referred to in the Request pre-dated Paramus’ Clerk, Annemarie Krusznis (Krusznis). It dates back to 2008 and involved two attorneys no longer retained by Paramus and who were not retained at the time of the Request.

3. When Krusznis received the Request, she did not know which attorney(s) handled the case for Paramus. She could not have figured out which attorneys handled Shore without conferring with her counsel; she was initially wrong about who handled the case for Paramus. In consultation with her counsel, she eventually determined that Brian Giblin, Esq. (Giblin) and Eric Bernstein, Esq. (Bernstein) were involved in some way in the case for Paramus.

4. Sometime between the Request and May 1, 2014, when the Request was concluded (J-7), Krusznis called Giblin about any records he might possess responsive to the Request. She left a voicemail.

5. Krusznis did not call Bernstein, but her counsel did. That call was not returned either.

6. On May 1, 2014, Krusznis provided Carter with what she could find that was seemingly related to Shore. She withheld one document under attorney-client privilege. The same day, Carter responded to Krsuznis, stating she had not provided what he wanted.

7. Krusznis asked her counsel to respond to Carter. On May 2, 2014, her counsel responded, provided “pleadings” from Shore that were available on the internet, stated that Krusznis had no further obligation, and reiterated that one document had been withheld under attorney-client privilege. (See Ex. P of J-4.) Carter was given the internet site to assist him in retrieving the Court documents not in the possession of Paramus.

8. Carter filed a complaint with the GRC on April 9, 2015. (J-4.)

9. Carter’s initial brief to the GRC contained the following citation: “O’Boyle v. Borough of Longport, 426 N.J. Super. 1, 14 (App. Div. 2012), certif. granted, 212 N.J. 431 (2012).” (J-4.)

10. O’Boyle was certified to the Supreme Court on October 24, 2012, and decided July 21, 2014. (J-4.)

11. On April 25, 2015, Paramus’ counsel wrote to Giblin and Bernstein and requested that they provide Paramus with the entire file on Shore so Paramus would have it if the GRC ordered Paramus to try to retrieve it (J- 1). Paramus received no response. (J-11.)

Based upon the evidence presented at the hearing, the stipulated facts above, and having had the opportunity to observe the witnesses and assess their credibility, I make the following **FINDINGS of FACT**:

Krusznis credibly testified on behalf of the Respondent. She is currently the Municipal Clerk for the Borough of Paramus. One of her duties in this position is to respond to OPRA requests. Her office handled approximately 4,000 OPRA requests in 2014. Krusznis identified the OPRA request that was received by Petitioner and stated that it came to her via email. The request sought “pleadings in the matter of Shore v.

Borough of Paramus” from “January 2010 to present.” (J-2.) In a footnote on the request, the Petitioner defined pleadings as “all court filings, motions, decisions, opinions, orders, letters, briefs, memos, fax transmittals, transcripts, etc.” Mr. Shore had left the Borough of Paramus several years before Carter’s request. Krusznis was not familiar with the specific case stated in the request but, stated that she did know who Ian Shore was because he was a former Clerk in Paramus. She also stated that she had heard there was a case with Ian Shore. She testified that she had met Mr. Shore before, but never worked for Paramus contemporaneously with him.

Krusznis testified that she did not understand what the word “pleadings” meant in the request. She indicated that the footnote did not help her understand what the requestor sought. Further, she did not know who the attorneys were who handled the Shore case. Krusznis did not ask the requestor to clarify or explain what exactly it was that they were looking for. Once the request came in, Krusznis proceeded to search the physical records in Paramus for documents germane to the request. She stated that it was a big and very broad request, and that she understood it as asking her to compile all physical documents available in Paramus that were related to the Shore case. Ms. Krusznis then tried to determine who the attorney was that handled the Shore case. At first, she believed John Ten Hoeve was the attorney who handled the Shore case because he was the Borough attorney at the time. She went on to explain that the Borough attorneys handle the day-to-day tasks and have a lot of interaction with staff. Other attorneys are appointed for specific reasons, such as litigation. Krusznis later discovered Giblin and Bernstein handled the case. After reviewing some of the documents, Krusznis found it necessary to ask Mr. Santagata, the then Acting Borough Attorney, for help with the request. It is routine for her to ask respective agencies for clarification on a request regarding that agency. After receiving communication from counsel, Krusznis began to compile documents responsive to the request. However, she stated that she was not supposed to ask Borough attorneys for help with the retrieval of documents.

Sometime between April 10, 2014 and May 1, 2014, Krusznis left a voicemail for Giblin to see if he had records responsive to the request. Giblin did not return the call and sent no records. Giblin and Bernstein were not retained by the Borough of Paramus

at the time of Carter's OPRA request of the request. Krusznis testified that she did not attempt to reach Bernstein. She stated that she has never had to argue with appointed professionals of Paramus about providing documents for an OPRA request. Krusznis stated that contacting these attorneys is not something that she should be doing because she felt she was in an awkward position by contacting attorneys who had not been re-appointed. She further explained that when a new administration comes in that is a different political party than the last administration, they generally do not re-appoint the old attorneys and appoint new ones. Krusznis also stated that she had no means for forcing these attorneys to comply with her request.

On May 1, 2014, Krusznis sent all documents that she could locate in the possession of Respondent to Carter via email; except for one. See "Vaughn Index" at J-8). She reasoned that she could not release the one document due to attorney/client privilege. This document was titled "May 11, 2010 letter from Brian Giblin to Paramus Mayor and Council with enclosure of an executed Settlement Agreement, three pages." (J-10). I reviewed said document by way of an *in camera* review and I **FIND** that said document is attorney work product and covered under the Attorney-Client Privilege. I further **FIND** it contained the attorney's thoughts and mental impressions on a potential settlement of a case. The document was clearly marked "Confidential: Attorney-Client Privileged" and had attached an unexecuted Stipulation of Settlement.

Krusznis also testified that in her response to Carter she provided a link to two sites in order for him to research and retrieve the documents.

Carter responded to Krusznis' email and stated that he did not receive all the information requested. Krusznis explained that, in her experience as a Clerk, there was no way for her to know if her response was deficient simply by Carter stating that to be the case. To her knowledge, she provided all the documents of the request. She did not respond to Carter because she did not want to provoke further argument and instead asked Mr. Santagata to respond to Carter on her behalf. (See Exh. P at J-4.) There was no further interaction with Carter until she received his GRC complaint one (1) year later on April 9, 2015. (J-4.)

Krusznis went on to testify that it was unusual to receive a GRC complaint so long after an OPRA request because usually the requestor is more timely with their grievances. She stated that she has never had to file her own OPRA request to respond to one received; she has never had to travel to a non-Paramus building to retrieve documents for an OPRA request; and has never had to travel to a courthouse to retrieve documents for an OPRA request. All of these demands would be unreasonable and outside the scope of her duty. Even if she did look beyond the scope of the records available to her, she would not have any way of knowing what she was looking for in order to respond to Carter's request.

On cross-examination, Krusznis testified that in handling OPRA requests, she generally will delegate the tasks of processing and compiling the documents for the requests to others on her staff or will refer the request to the Department who has the requested records.³

Krusznis did acknowledge that records of outside counsel for Paramus are records that belong to Paramus. She further stated that if she received a request for records regarding Paramus that were in the files of current counsel she would have a responsibility to respond to that request. She stated that her responsibility as Clerk would require her to reach out to current counsel in order to respond to the request. Krusznis stated that she would feel comfortable doing this because the firm is the current Borough attorney. She stated that if an appointed professional of Paramus refused to provide records in an OPRA request, she would refer it to the Borough attorney. Krusznis has had problems in the past with employees not cooperating with OPRA requests correctly, such as not doing so in a timely manner or forgetting to copy certain parties. She stated that new procedures of sending the requests to the specific departments of Paramus has streamlined the process in responding to OPRA requests. Krusznis stated that if a department failed to respond to an OPRA request, she would follow up with the department.

³ In accordance with advice from the GRC, the Borough of Paramus is allowed to designate certain departments to handle their own OPRA requests. Those departments are then custodians of their own records.

Carter testified on his own behalf. His testimony began with questions regarding his Citizenship with the State of New Jersey. It is not disputed that Carter is an Associate Professor of Criminal Justice and Public Administration at Centenary University located in New Jersey. He is also the Chair of the Department of Social Sciences. Carter currently does consulting work for 911 dispatchers. He is a Retired Police Officer of Franklin Township, New Jersey. He was elected Fire Commissioner of Franklin Township and has lived in Franklin Township for most of his life. Both Carter's Passport and driver's license listed his Franklin Township address, Carter is registered to vote in Franklin Township, and he receives a pension from the State of New Jersey. It is further undisputed that at the time Carter made his OPRA request, he resided in Franklin Township. I **FIND** that Petitioner is currently a Citizen of the State of New Jersey and was a Citizen of the State of New Jersey at the time the OPRA request was made to the Respondent. Counsel for Respondent did not dispute that Carter was a citizen of the State of New Jersey, but simply wanted the opportunity to have Carter confirm his residency on the record at the hearing. This became necessary because when the OPRA request was initially made to the Respondent, his citizenship was not established.

Carter testified that what he was seeking from his OPRA request were pleadings which he defined as primarily the briefs and decisions of the courts on the Shore matter. Carter was unaware that he could receive these documents from the courts if he were to directly request the documents from them. He did not request these documents from any entity other than the Borough of Paramus. He attempted to explain the reason for the delay in filing an appeal with the GRC approximately one (1) year post the response to his OPRA request. Carter testified that he thought what he had received from Respondent was the entire case file on the Shore matter because he assumed that it was understood what he meant by "pleadings" when he requested the file from them. Carter further clarified that what he was seeking in his OPRA request to the Borough of Paramus was the entire case file. However, approximately one (1) year later he found the documents on his desk and realized he had not received everything that he requested and immediately took action to file a Complaint with the GRC. Carter stated he was not setting up the timing of his complaint for any strategic advantage and that he is aware that there is no statute of limitations for a GRC complaint. Carter stated that when he received the records from the Borough of Paramus and noticed that he did not receive

the documents he was looking for, he expected to receive more records at a later date. He further stated that he understood Mr. Santagata's letter of May 2, 2014 (see Exh. P of J-4), as a definitive closure of the matter of his OPRA request. It should be noted that any testimony regarding the late filing of the GRC Complaint is not germane to the issues which need to be addressed in this Initial Decision.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

Krusznis, testified in a straightforward and direct matter. She readily admitted to facts that did not necessarily cast her in the best light, in particular, that she did not understand what the word "pleadings" meant in Carter's OPRA request. She was also candid in her admission that politics changed attorney appointments and thus, made getting documents more difficult in prior cases. This makes her more credible, not less credible. When she did not recall something, she freely admitted it. Her answers did not

appear contrived or rehearsed. I deem her credible. Carter testified and answered questions directly and without hesitation. I deem him credible.

LEGAL DISCUSSION AND CONCLUSION

The Open Public Records Act (Act), N.J.S.A. 47:1A-1 et seq., known as “OPRA,” provides that it is the public policy in this State that government records shall be readily accessible for inspection, copying, or examination, with certain exceptions for the protection of the public. N.J.S.A. 47:1A-1. Or, as the New Jersey Supreme Court succinctly stated in Mason v. Hoboken, 196 N.J. 51, 65 (2008), “OPRA calls for the prompt disclosure of government records.” N.J.S.A. 47:1A-1.1 defines “Government record” or “record” as

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

To this end, custodians of government records must grant access to them or deny a request for them as soon as possible, but no later than seven business days after receiving the request, provided that the records are available and not in storage or archived. N.J.S.A. 47:1A-5(i). Failure to respond shall be deemed a denial. Ibid. If the records are in storage or archived, then the custodian must advise the requestor within those seven days when they will be made available. Ibid. Failure to make them available by that time shall also be deemed a denial. Ibid.

Consequently, a person who is denied access to public records may file a complaint in the Superior Court or with the GRC. N.J.S.A. 47:1A-6. Moreover, a

custodian who is found to have knowingly and willfully violated the Act 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 public official, officer, employee or custodian who knowingly and willfully violates P.L. 1963, c. 73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L. 1999, c. 274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

[N.J.S.A. 47:1A-11(a).]

A knowing and willful violation, however, requires actual knowledge that the actions were wrongful and a positive element of conscious wrongdoing. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008) (citing Fielder v. Stonack, 141 N.J. 101, 124 (1995); Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)). Willful misconduct requires "much more" than mere negligence. Fielder, 141 N.J. at 124. Willful misconduct falls somewhere on the continuum between simple negligence and the intentional infliction of harm. Id. at 123 (citing Foldi v. Jeffries, 93 N.J. 533, 549 (1983)).

In the instant case, The Council previously found that the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i) and Kelly v. Township of Rockaway, GRC Complaint No. 2007-11

(Interim Order October 31, 2007). (J-3.) It was further found that the knowing and willful and prevailing party analyses were to be deferred pending the OAL's disposition of this matter. Therefore, the knowing and willful violation analysis, as it pertains to this case will not be addressed by the undersigned in this Initial Decision.

As to the one document withheld by Krusznis from the response to Carter's OPRA request, the undersigned conducted an "*in camera*" review of the document. Said document was marked as Exh. J-10. The May 11, 2010, document is a memo from the Paramus' former attorney, Brian T. Giblin, to the Mayor and Members of Council of Paramus and related to the Shore matter. More specifically, it contained the attorney's thoughts and mental impressions on a potential settlement of a case. The document was clearly marked "Confidential: Attorney-Client Privileged" and had attached an unexecuted Stipulation of Settlement. As per N.J.S.A. 47:1A-1.1,

a government record shall not include the following information which is deemed to be confidential for the purposes of P.L. 1963, c. 73 (C.47:1A et seq.) as amended and supplemented . . . any record within the attorney-client privilege.

Paramus provided a "Vaughn Index" to Carter setting forth the one withheld document, with attached unexecuted Settlement Agreement, and the legal basis for withholding the document. (J-9.) This document was not hidden from Mr. Carter, but rather identified with as much information as legally permissible. See e.g., Fisher v. Div. of Law, 400 N.J. Super. 61, 76 (App. Div. 2008), which holds that the purpose of a "Vaughn Index" is to "provide the party seeking disclosure with as much information as possible to use in presenting his case." As stated above, the document is a letter from Mr. Giblin containing the attorney's thoughts and mental impressions on a potential settlement of a case related to the one referenced in the OPRA request by Carter. Both the letter and the unexecuted Settlement Agreement were properly withheld under the attorney-client privilege. See e.g. United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 562, 567 n.3 (App. Div. 1984).

Further, it is uncontested that after Carter responded to Krusznis' production of documents (J-6), indicating that all documents had not been produced, Krusznis asked

her counsel to respond to Carter; and On May 2, 2014, counsel responded and reiterated once again the reason why the one document was withheld. (J-7.) Thus, Krusznis' counsel validated her action of withholding the document.

After an *in camera* review of the document, I **CONCLUDE** that said document is attorney work product and covered under the Attorney-Client Privilege and thus, not deemed a government record. Krusznis lawfully denied access to the one (1) record. This was also the clear intent of the creator of the document by marking it as "Confidential: Attorney-Client Privileged."

It is not disputed that certain records were not in the possession of Paramus at the time of the OPRA request and may have been in the possession of Paramus' former counsel. It is further undisputed that Kursznis attempted to obtain this information by calling Paramus' former counsel, Mr. Giblin, and by obtaining the assistance of Paramus' present counsel, Mr. Santagata, in obtaining the documents. Mr. Santagata attempted to call Mr. Bernstein, also prior counsel to Paramus, and wrote a letter to both Mr. Giblin and Mr. Bernstein. All attempts/requests to obtain documents from former counsel went unanswered. Kursznis further attempted to decipher what documents Carter was in fact seeking and responded to the best of her ability. Krusznis and Mr. Santagata also advised Carter that he may be able to find some of the documents he was looking for by going to certain sites on the internet or by contacting the court directly. Carter testified that he was unaware that these options were available to him in order to seek the documents he was looking for.

It is Respondent's position that they do not have any further responsive records in their possession other than the records already turned over to Carter. Further, that it does not have an obligation to go "beyond the [public's entity's] files" to obtain records from un-retained professionals. Branin v. Collingswood Borough Custodian, 2012 WL 3205525 at 5 (App. Div. Aug. 9, 2012).⁴ Petitioner's position is that Kursznis had an obligation to track down the "pleadings," as defined by Carter, under OPRA wherever they may be located, especially those records in the possession of former counsel.

⁴ This unpublished opinion was included as an Appendix to Respondent's post-summation brief.

The Appellate Division in Bent v. Township of Stafford Police Department, Custodian of Records, 381 N.J. Super. 30, 38 (App. Div. 2005), held that where the “records . . . did not exist or were not in the custodian’s possession, there was, of necessity, no denial of access at all . . . even if the requested documents did exist, the custodian was under no obligation to search for them beyond the public entity’s files.”

Even assuming Krusznis had an obligation to seek and retrieve records from former counsel, she took reasonable steps to obtain them and was met with no response. This is further evidenced by the fact that it was not known to Krusznis that she had not fully responded to the OPRA request to Carter’s liking, until approximately one (1) year later when he filed his grievance with the GRC. As soon as the grievance was filed, Mr. Santagata once again attempted to contact Giblin and Bernstein to retrieve the requested records. (J-1). He was met with no response.

The Stipulated Facts, as well as, the credible testimony presented by both Krusznis and Carter in the within matter compel me to **CONCLUDE** that the custodian of records for the Borough of Paramus, performed a sufficient search and obtained all records responsive to the request, whether in her possession or via a third party.

I further **CONCLUDE** that the Complainant/Petitioner, is a citizen of the State of New Jersey, was a Citizen of the State of New Jersey at the time the OPRA request was made to the Respondent and was a citizen of the State of New Jersey at all times relevant to these proceedings.

I hereby **FILE** my Initial Decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, P.O. Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 18, 2018



DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

October 18, 2018

Date Mailed to Parties:
sej

APPENDIX

WITNESSES

For Petitioner:

Jeff Carter

For Respondent:

Annemarie Krusznis

LIST OF EXHIBITS IN EVIDENCE

All Joint Exhibits were originally marked as R-1 through R-11. They have been Identified for the record and moved into evidence.

Joint:

- J-1 4/22/15 Letter from Mr. Santagata, Esq. to former counsel
- J-2 OPRA Requests
- J-3 GRC's 3/28/17 Findings and Recommendations and Interim Order
- J-4 Mr. Carter's Complaint to the GRC
- J-5 Mr. Santagata's letter, 4/25/14 to then anonymous requester
- J-6 Email chain of 4/25/14
- J-7 Ms. Krusznis' 5/1/14 response to Mr. Carter
- J-8 Complete Statement of Information
- J-9 Bond Index
- J-10 Privileged Document – "*In-camera*" Review
- J-11 Email of 1/5/17 and accompanying response

For Petitioner:

See Joint Exhibits above

For Respondent:

R-12 Supplemental Findings and Recommendations of the Executive Director of
12/13/16 (I.D.)

R-13 John A. Birmingham's brief, 4/6/15, 105 (I.D.)

R-14 Decision for Martin v. Borough of Longport Clerk, 212 N.J. 431(2012)



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

March 28, 2017 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2015-104

v.

Borough of Paramus (Bergen)
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Based on the conflicting evidence in the matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts on:
 - Whether the Custodian performed a sufficient search and obtained all records responsive to the request, whether in her possession or via third party;
 - Whether the Custodian lawfully denied access to the one (1) record to which she withheld access; and
 - Whether the Complainant is a citizen of the State.
3. The knowing and willful and prevailing party analyses are deferred pending the Office of Administrative Law’s disposition of the matter.



Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 2017

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 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2015-104

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

Records Relevant to Complaint: All pleadings in the matter Ian I. Shore v. Borough of Paramus, 2011 N.J. Super. Unpub. LEXIS 1827 (App. Div. 2012).

Custodian of Record: Annemarie Krusznis

Request Received by Custodian: April 10, 2014

Response Made by Custodian: April 25, 2014; May 1, 2014; May 2, 2014

GRC Complaint Received: April 9, 2015

Background³

Request and Response:

On April 10, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 25, 2014, the tenth (10th) business day following the Custodian’s receipt, the Custodian’s Counsel responded in writing, advising that the Custodian believed that any responsive records, if in the Borough of Paramus (“Borough”)’s possession, were archived within the meaning of N.J.S.A. 47:1A-5(i). He thereafter advised that the Custodian would respond within seven (7) business days, after conducting a search.

That same day, the Complainant responded, advising the Custodian that she had violated OPRA because her response was not generated until the tenth (10th) business day following receipt, which therefore constituted a “deemed denial” of his request. The Complainant further argued that the Custodian’s response was “insufficient” under OPRA because she failed to identify a potential return date and whether or not responsive records would be provided. He additionally argued “you cannot request an extension of time, which in this case is already beyond the [seventh (7th)] business day, only to later deny access to records.” The Complainant

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

² Represented by Justin D. Santagata, Esq. (Fort Lee, NJ).

³ 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.

Jeff Carter v. Borough of Paramus (Bergen), 2015-104 – Findings and Recommendations of the Executive Director

also wrote, "I will accept the responsive records [via] my preferred method of delivery of e-mail at fffd1resident@gmail.com, by close of business on Wednesday, April 30, 2014."

Later that same day, the Custodian's Counsel responded to the Complainant's e-mail, stating that if the Borough possessed the requested records, they would be provided to the Complainant. He wrote, "The Clerk set a response date of next Friday. You don't set the response date. You are free to try to explain the difference [between] April 30 and May 2 and why one is reasonable and one is not." The Custodian's Counsel additionally informed the Complainant that if the responsive records "do not exist, there is no denial; the Borough cannot determine whether the records exist without an extension of time" That same day, the Complainant responded, advising that a requestor is "in no way obligated to accept" a request for an extension and noted that he awaited a response from the Custodian.

On May 1, 2014, the Custodian responded to the Complainant's OPRA request, attaching two (2) .pdf files, which she stated contained records responsive to his request. That same day, the Complainant replied to the Custodian's e-mail, disputing that the records provided contained all of the requested information. On May 2, 2014, the Custodian's Counsel responded to the Complainant's May 1 letter. He advised the Complainant that the Custodian had provided "all responsive records that she could find" following a search of the Borough's records. He noted that one record was withheld based on attorney-client privilege, consisting of a memo from the Borough's former attorney to Borough Council, dated May 11, 2010, and related to the Shore case. The Custodian's Counsel additionally included an Internet link, noting "at least some of what you request is available via a simple google search" (*sic*).

Denial of Access Complaint:

On April 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that he filed his OPRA request on April 10, 2014, and received on that same day an automated e-mail message from the Custodian stating, "[y]our message was delivered to the recipient." The Complainant's Counsel argued that it is therefore "factually undisputed" that "delivery/receipt of the OPRA request" occurred on that day.

The Complainant asserted that the Custodian's Counsel did not reply to his OPRA request until the tenth (10th) business day after receipt. He argued that the response sent on May 1, 2014, contained two (2) PDF files with a "few (but certainly not all) responsive records." He also noted that while the Internet link provided in the Custodian's Counsel's May 2, 2014 e-mail "did provide 'at least some' records," it did not contain all of the pleadings.

The Complainant argued that the Custodian's failure to respond in writing within seven (7) business days as mandated by OPRA resulted in a "deemed" denial of the request, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant further argued that the GRC had previously established that records custodians are obligated to locate and provide responsive records from wherever they are located and that the Borough's response in this instance was legally insufficient. *See O'Boyle v.*

Borough of Longport, 426 N.J. Super. 1, 14 (App. Div. 2012); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (Final Decision dated December 8, 2005); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007); Burdick v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012). The Complainant argued that the aforementioned decisions involved responsive records stored in locations other than the records custodian's office, and the Council ruled that the location of such records does not inhibit the records custodian from obtaining and providing such records wherever they are located. He then suggested that the law firm that represented the Borough in the Shore case, which is referenced in the request, "would certainly have access" to responsive records. The Complainant argued that the Custodian's response was therefore legally insufficient because she provided no evidence as to whether she contacted law firm handling the Shore appeal in order to obtain records that are the property of the Borough.

Further, the Complainant argued that the Custodian's Counsel did not provide a date certain upon which the requested records would be provided when he requested an extension of time to respond. The Complainant argued that prevailing case law supported this as unlawful, pursuant to Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (Final Decision February 27, 2008). *See also* Verry v. Borough of South Bound Brook, GRC Complaint No. 2008-48 (Interim Order March 25, 2009).

The Complainant also requested that the Council examine the Custodian's Counsel's "non-compromising stance" in reaching "an amicable solution" with the Complainant. He noted that in Komuves v. Twp. of Edison, 2006 N.J. Super. Unpub. LEXIS 1418 (App. Div. 2006), the Court held that municipal attorneys who act as records custodians can be sanctioned in OPRA cases.

Additionally, the Complainant noted that in claiming attorney-client privilege to a responsive May 11, 2010 memo, the Custodian did not provide a Vaughn Index. The Complainant thereafter requested that the Council conduct an *in camera* review of this record, pursuant to Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007), to determine whether or not the claimed privilege is valid.

Statement of Information:

On May 6, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on April 10, 2015. The Custodian certified that she reviewed the request, was aware of a case called "Paramus v. Ian Shore," but did not know if the Borough had responsive "pleadings." The Custodian affirmed that the Shore case pre-dated her employment with the Borough. She certified that she conferred with Custodian's Counsel and determined that it was handled in the Law Division by Eric Bernstein, Esq., and at the Appellate Division by Brian Giblin, Esq. The Custodian certified that the Borough no longer retained the services of either Mr. Bernstein and Mr. Giblin. She averred that the Borough did have a file on the Shore case but no longer possessed the "pleadings." The Custodian affirmed that Custodian's Counsel responded in writing on her behalf on April 25, 2014, seeking a seven (7) business day extension, as whatever responsive records existed would have to be located in the Borough's archives. The Custodian averred that throughout the request

she received multiple e-mails from the Complainant, which she characterized as “haggling,” and stated that she “had to ask [the Borough’s attorney] to deal, in part,” with the Complainant.

The Custodian certified that on May 1, 2014, she responded in writing by providing responsive records. The Custodian affirmed that she could not specifically recall why it took her ten (10) business days to respond, as the request in question had been filed more than a year before the GRC complaint was filed. The Custodian affirmed that in her May 1, 2014 response, she “inadvertently” neglected to state that she withheld one (1) responsive document. She certified that after receipt of this complaint, she again searched the Borough’s records but found no additional responsive records.

The Custodian certified that records responsive to the OPRA request, and provided to the Complainant, consisted of the following: (1) July 8, 2011 letter from B. Giblin to “Paramus M/C” with enclosure of Appellate Division opinion (5 pages); (2) August 4, 2010 letter from I. Shore to T. Falato with enclosure of Law Division opinion (6 pages); (3) June 9, 2010 letter from I. Shore to T. Falato with subpoena (3 pages); and (4) complaint with exhibits in Paramus v. Shore (15 pages). She certified that one (1) responsive document, consisting of a May 11, 2010 letter from B. Giblin with enclosure of unexecuted settlement agreement (3 pages), was not provided and withheld pursuant to N.J.S.A. 47:1A-1.1 (attorney-client privilege); *See also United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 562, 567 (App. Div. 1984).

The Custodian’s Counsel submitted a letter brief arguing the Borough’s position. Therein, the Custodian’s Counsel characterized the Complainant’s response as “threats and haggling.” The Custodian’s Counsel certified that a “final letter” regarding the request was sent to the Complainant, containing an Internet link to some of the “pleadings” from the case. This letter further clarified that the Custodian had withheld one (1) document in her response, a May 10, 2010 letter from the Borough’s former attorney, for a different but related case to the one referenced in the Complainant’s request.

The Custodian’s Counsel argued that this complaint, filed more than a year after the request/response in question, was a “test [of] how far a custodian . . . can be pushed to track down records outside of a public agency’s actual possession.” He additionally argued that the Complainant failed to file this complaint “within a reasonable period of time”; thus, it is “overwhelmingly barred by laches. . .” *See Mason v. City of Hoboken*, 196 N.J. 51, 68 (2008).

The Custodian’s Counsel further contended that the Complainant’s request was clearly overbroad, required research, and “could easily have been denied.” He asserted that the Custodian fulfilled her duties by responding to the request “with what she had,” and that “as a courtesy,” on May 2, 2014, the Borough provided the Complainant with an Internet link to additional records no longer in the Borough’s actual possession.

The Custodian’s Counsel also argued that the Complainant’s request sought “every paper submitted during” Shore and asserted that the Complainant should have made a “direct request to the Law or Appellate Division” instead of to the Borough. He requested that the GRC take note of a recent Appellate Division decision, which found that “no violation of OPRA occur[s] where one cannot withhold from disclosure that which one does not possess.” Kuehnappel v. Chintall, 2014 N.J. Super. Unpub. LEXIS 1723 (App. Div. 2014). The Custodian’s Counsel further

contended that a custodian generally has no obligation to search for records beyond a public agency's files, other than records requests for specific settlement agreements. The Custodian's Counsel argued that the Complainant's reliance on Burnett, 415 N.J. Super. 506, ignored that that case was an exception to the general rule in Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). He argued that the request in the present manner sought "pleadings" which are easily available through requests to New Jersey Courts, unlike the settlement agreements sought in Burnett. The Custodian's Counsel further stated that, following receipt of this complaint, the Borough contacted the attorneys who had handled the "pleadings" in Shore, and received no response.

The Custodian's Counsel also stated that the one (1) responsive record withheld by the Custodian consisted of a letter from the Borough's former attorney, which contained that attorney's thoughts and mental impressions on a potential settlement of a case related to the case referenced in the Complainant's OPRA request. The Custodian's Counsel advised that the letter also contained an unexecuted settlement agreement. See Wolosoff, 196 N.J. Super. at 562, 567.

The Custodian's Counsel argued that the Custodian had not violated OPRA because she was not required to engage in an ongoing conversation with Complainant simply because he thought she "could have done more" pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Custodian's Counsel also included a separate certification from himself, in which he reiterated the Custodian's assertions regarding the request, the correspondence with the Complainant, and the second attempt to retrieve responsive records from the former attorneys. He certified that he sent a letter to Mr. Bernstein and Mr. Giblin on April 22, 2015, asking for the "pleadings" sought by the Complainant, and that he had received no response as of the date of the SOI.

Additional Submissions:

On May 13, 2015, the Complainant's Counsel responded to the Custodian's SOI. Therein, he disputed the SOI's argument that characterized the OPRA request as overbroad and requiring research "for the first time" and argued that it was an "after-the-fact assertion." He further argued that if his OPRA request was indeed overbroad, the Custodian was required to attempt to compromise. The Complainant's Counsel asserted that instead of compromise, the Custodian's Counsel e-mails included dismissive language, such as "this conversation is over" and "[y]ou are free to continue this conversation, but we will not be participating." He further argued that the Borough could have sought clarification if it was unsure of what the Complainant specifically requested. He further argued that there is no statute of limitations to initiate Denial of Access Complaints before the GRC. Kneher v. Twp. of Franklin (Somerset), GRC Complaint No. 2012-38 (December 2012).

The Complainant reiterated arguments from his Complaint, namely that the records sought are the property of the Borough, regardless of where they may be stored, and requested the GRC order the Borough to identify "pleadings" it has not yet secured, regardless of where located. The Complainant further argued that the Borough's claim that the Complainant was in possession of some responsive records was not true. He also questioned the authenticity of the

Internet link provided by the Custodian's Counsel, stating there was no way of knowing if the records found at the link were true and correct copies of the originals.

That same day, the Custodian's Counsel responded, arguing that the Complainant's submission should be stricken, pursuant to N.J.A.C. 5:105-2.3, 2.4, or the Custodian should be permitted a "sur-rebuttal." The Complainant's Counsel responded that same day, noting that the GRC routinely accepts rebuttals.

On May 20, 2015, the Custodian's Counsel submitted a response to the Complainant's May 13, 2015 submission. The Custodian's Counsel reiterated his objection to the additional submission by the Complainant. He argued that the Custodian was not required to "compromise" with the Complainant on his OPRA request, because she provided him with the records in the Borough's possession. The Custodian additionally reiterated the legal arguments from the SOI. He further argued that the GRC has no jurisdiction over the former attorneys related to the Shore matter. He also contended that the Complainant was not a "prevailing party" under OPRA. On May 21, 2015, the Complainant's Counsel advised the GRC that he did not believe the Borough's "sur-reply" was "appropriate or worth a response."

On April 28, 2016, the Custodian's Counsel wrote to the GRC. He argued that in a recent decision, Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016), the Appellate Division reaffirmed the essential holding of Bent, that a records custodian was not required to create or recreate records in response to an OPRA request. He contended that the Complainant is "forc[ing] the records custodian to recreate a litigation file that spanned roughly four years, two attorneys, and went through both the Law and Appellate Divisions." He argued that the Borough did not possess the records needed to recreate the litigation file and would have to retrieve them from third parties, "who have still not provided any records in response to our request when this complaint was initially filed."

On May 5, 2016, the Complainant's Counsel responded to the Custodian's Counsel's April 28, 2016 submission. He argued that Paff, 444 N.J. Super. 495, was irrelevant to the present case, as the Court there addressed the creation of new records and "not records that (a) already existed, and (b) were within the records custodian's reach." He disputed the Custodian's characterization that Paff controlled here. He noted that his arguments were grounded in previous Council decisions where it held that the physical location of records does not inhibit the records custodian from obtaining and providing such records. *See* Meyers, GRC 2005-127; Schuler, GRC 2007-151; and Burdick, GRC 2010-99. He also noted that while the Custodian's Counsel previously mentioned sending a letter to the Borough's former legal counsel, the Borough had not "produced that letter."

On July 31, 2016, the Complainant's Counsel wrote to the GRC, presenting "new evidence." He stated that in May and June 2016, the Council issued two orders that directly addressed the facts of the present complaint. He noted that in Henry v. Twp. of Hamilton Police Dep't (Atlantic), GRC Complaint No. 2015-155 (Interim Order dated May 24, 2016), the Council found that the "custodian may not deny access simply because the requestor could obtain the records from other and perhaps more convenient sources." He also noted that in Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2015-206 (June 2016), custodians were required to provide a date certain by which records would be disclosed.

On August 1, 2016, the Custodian's Counsel wrote to the GRC, dismissing the Complainant's introduction of "new evidence" as merely a "billing exercise" because "the GRC is aware of its own decisions and can read them itself" He further argued that the Henry case was irrelevant to the present complaint, because the Custodian here, unlike in Henry, attempted to get the requested records from outside counsel, "to no avail." He then argued that the GRC may be "misreading a custodian's obligation" to obtain records outside their possession. He argued that the Appellate Division has limited such an obligation to settlement agreements. *See Bent*, 381 N.J. Super. 30, 38 (App. Div. 2005); Kuehnappel, 2014 N.J. Super. Unpub. LEXIS 1723; Branin v. Collingswood Borough Custodian, 2012 N.J. Super. Unpub. LEXIS 1938 (App. Div. 2012). He reiterated his earlier argument that the records in the instant matter "would have to be recreated" and that the Appellate Division has held that a custodian has no obligation to recreate records. Paff v. Galloway Twp., 444 N.J. Super. at 505. He also disputed the Complainant's argument that the Custodian did not provide a date certain in her response, noting that she stated "seven days" and "May 2, 2014."

On December 1, 2016, the Custodian's Counsel wrote to the GRC, noting the Appellate Division's decision in Lagerkvist v. Office of Governor of State, 443 N.J. Super. 230, 236 (App. Div. 2015), which he believed addressed an argument made by the Complainant that the Borough had a duty to negotiate any OPRA request, "even one that did not substantially disrupt agency operations." He noted that the Appellate Division in that case found that "no efforts at accommodation were necessary because the custodian's objection was that the request was unclear and overbroad."

On December 2, 2016, the Complainant's Counsel wrote to the GRC in response to the Custodian's December 1, 2016 submission. He disputed the Custodian's characterization of Lagerkvist as controlling authority in the present matter and argued that the Appellate Division's holding in Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012) was more on point. He noted that the Custodian here, similar to the custodian in Burke, actually performed a search and was able to locate, identify, and disclose some (but not all) responsive records. He reiterated earlier arguments that the Custodian had yet to secure the remaining records from other agents who possess Borough records.

On January 5, 2017, the GRC sent a request for additional information to the Custodian, seeking clarification as to whether a first attempt to contact the Borough's previous attorneys was made in writing (and seeking a copy of such correspondence) and whether any other attempts were made to contact said attorneys.

On January 10, 2017, the Custodian's Counsel responded to the GRC's request. He argued that the GRC was focusing on "a wrong and irrelevant issue: the custodian's efforts to track down multiple files that the Borough does not possess, and likely has never possessed." He reiterated earlier arguments that "the only document" OPRA requires custodians to "attempt to track down is a settlement agreement." He reiterated earlier arguments that the Complainant seeks to have the Custodian "research and compile a now-six-year-old litigation file that was handled by two different attorneys at the Law and Appellate Divisions." He asserted that the GRC "may not exceed the boundaries of OPRA, its enabling statute." He argued that there was nothing "necessary" about the information requested by the GRC on January 5, 2017.

Notwithstanding that argument, the Custodian's Counsel did attach to his January 10, 2017 submission a letter dated April 22, 2015, requesting that Mr. Giblin and Mr. Bernstein provide the Borough copies of the litigation files for the referenced Shore matter. He additionally certified his belief that he called "at least Mr. Bernstein" regarding the request and left his number with staff. The Custodian additionally certified that she called Mr. Giblin regarding the file but "does not remember exactly when." Both the Custodian and the Custodian's Counsel certified that they received no response to their inquiries.

On January 16, 2017, the Complainant's Counsel responded to the Custodian's Counsel's January 10 submission. He reiterated the following arguments: (1) there is not a statute of limitations to filing the instant complaint before the GRC, rendering the Borough's repeated arguments on the subject to be moot; and (2) the Borough's argument that the Complainant's request was overly broad is belied by the fact that the Borough was able to identify and disclose some records. The Complainant's Counsel additionally noted that, other than the few records originally disclosed by the Borough, the Complainant does not otherwise possess any records requested here (emphasis original). He additionally noted that the letter attached to the Complainant's certification was dated April 22, 2015, whereas the instant OPRA request was submitted on April 10, 2014. He requested that the GRC require certifications from Mr. Giblin and Mr. Bernstein regarding whether phone conversations with the Custodian and Custodian's Counsel actually took place, as the two "have become fact witnesses to this matter." He then argued that the recent submission by the Custodian presented *prima facie* evidence of a "contested case" with disputed questions of fact, law, or disposition, that could only be resolved via an independent fact-finding hearing before the Office of Administrative Law ("OAL"). N.J.A.C. 1:1-3.2(a).

On January 20, 2017, the Custodian's Counsel responded to the Complainant's January 16, 2017 submission. He stated that the GRC "obviously has no power" to assert jurisdiction over the previous attorneys. The Custodian's Counsel additionally reiterated previous arguments. On January 22, 2017, the Complainant's Counsel responded, reiterating his earlier arguments.

On February 6, 2017, the Custodian's Counsel wrote to the Complainant regarding the case. The Custodian's Counsel raised a "separate and distinct" issue with the GRC: whether Complainant is a "citizen" of New Jersey, as required under OPRA to have standing to file a records request. *See* Scheeler v. Burlington Twp. (Burlington), GRC Complaint No. 2015-193 (November 2016). The Custodian's Counsel asserted that the Complainant had recently filed a separate order to show cause against the Borough, where he refused to confirm that he was a "citizen" of the state. The Custodian's Counsel attached an excerpt from the Order, which stated that Complainant was a "taxpayer who resides in Somerset, New Jersey" and listed his mailing address as a P.O. Box in Somerset. The Custodian's Counsel thereafter argued that "citizenship and residency are not synonymous." *See* Gosschalk v. Gosschalk, 48 N.J. Super. 566, 573 (App. Div. 1958); Wolff v. Baldwin, 9 N.J. Tax 11, 20 (Tax 1986); Borden v. Lafferty, 233 N.J. Super. 634, 639 (Law Div. 1989); Matter of Unanue, 255 N.J. Super. 362, 376 (Law Div. 1991). While the Custodian's Counsel acknowledged that the GRC had not yet decided the Scheeler case at the time the Complainant filed the underlying complaint in the present matter, he argued that the GRC must apply the law in effect at the time of its decision in this case. Maragliano v. Land Use Bd. of Twp. of Wantage, 403 N.J. Super. 80, 83 (App. Div. 2008). He asserted that Scheeler

therefore governs, and the GRC should require the Complainant to certify to all his residences, the amount of time he spends at each, where he votes, and other indicia of domicile.

On February 12, 2017, the Complainant's Counsel wrote to the GRC in response to the Custodian's Counsel's most recent submission. He noted that the Custodian had never raised the Complainant's citizenship as a basis for denial prior to February 6, 2017. He additionally asked that the Council take "judicial notice" of the Complainant's residency within Franklin Township, Somerset County, New Jersey, and specifically Fire District No. 1, as "evidenced in the substantive adjudicative record" before the Council. He argued that the Council had "erroneously restricted OPRA" to citizens of New Jersey in the Scheeler case because that decision could not be "reconciled" with the Appellate Division's affirmation in Scheeler v. Office of the Governor, 2017 N.J. Super. LEXIS 9 (App. Div. 2017) that "anonymous" requests are permitted via OPRA. The Complainant's Counsel noted that the underlying OPRA request in this matter was submitted anonymously and that the Complainant did not identify himself until he filed the Denial of Access Complaint. He argued that requestors have a right to file and remain anonymous. He suggested that the Custodian's Counsel's effort to invoke the provisions of Scheeler, GRC 2015-93, were a "bad faith effort to continue stonewalling disclosure of responsive records here"

On February 15, 2017, the Custodian's Counsel responded, asking the GRC to dismiss the complaint because the Complainant "refuses to provide sufficient information to determine whether he is a citizen of New Jersey." He argued that the GRC is bound by Scheeler. On February 20, 2017, the Complainant's Counsel responded, noting that the Council could reopen and reverse its decision in Scheeler. On February 22, 2017, the Custodian's Counsel responded, reiterating his argument that the Complainant had yet to provide competent evidence of his citizenship. On February 27, 2017, the Complainant's Counsel responded, affirming that the Complainant was a New Jersey citizen at the time of the instant OPRA request and has remained one throughout the proceedings. He characterized the Custodian's recent arguments as "bullying and harassment" and reiterated his own arguments. On March 3, 2017, the Custodian's Counsel wrote a one sentence letter to the GRC, stating, "'[Carter] doth protest too much . . .' William Shakespeare, *The Tragedy of Hamlet* 151 (Act 3, Scene 2, Line 254) (Barbara Mowat/Paul Werstine eds., Folger Shakespeare Library 2010)."

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension

⁴ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Custodian certified that she received the Complainant’s OPRA request on April 10, 2014, thereby making the statutory deadline for response April 22, 2014.⁵ However, the Custodian admitted in her certification that, for reasons that she cannot recall, she did not respond until April 25, 2014, the tenth (10th) business days after receipt of the request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

The GRC notes that it does not reach the extension issue because the Complainant’s OPRA request was already “deemed” denied at the time that the Custodian sought said extension.

Unlawful Denial of Access

Furthermore, “OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act.” N.J.S.A. 47:1A-7(e). Moreover, the Administrative Procedure Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a).

Here, the Custodian certified in the SOI that all records in her possession, save one (1) record that the Borough determined was exempt under N.J.S.A. 47:1A-1.1. Subsequent to the SOI, the Complainant continually disputed that he was in receipt of all requested records. Additionally, both parties have raised varying legal arguments concerning what records are in fact in the Borough’s possession. The Custodian has questioned whether the Complainant is in fact a citizen of New Jersey giving him standing to submit requests under OPRA, pursuant to Scheeler, 2015-193.

Accordingly, based on the conflicting evidence in the matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts on:

⁵ The Good Friday holiday fell on April 18, 2014.

- Whether the Custodian performed a sufficient search and obtained and provided all records responsive to the request, whether in her possession or via third party;
- Whether the Custodian lawfully denied access to the one (1) record to which she withheld access; and
- Whether the Complainant is a citizen of the State.

The knowing and willful and prevailing party analyses are deferred pending the Office of Administrative Law's disposition of the matter.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Based on the conflicting evidence in the matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to resolve the facts on:
 - Whether the Custodian performed a sufficient search and obtained all records responsive to the request, whether in her possession or via third party;
 - Whether the Custodian lawfully denied access to the one (1) record to which she withheld access; and
 - Whether the Complainant is a citizen of the State.
3. The knowing and willful and prevailing party analyses are deferred pending the Office of Administrative Law's disposition of the matter.

Prepared By: Frank F. Caruso
 Communications Specialist/Resource Manager

March 21, 2017