



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**

Robert A. Verry  
Complainant

Complaint No. 2015-133

v.

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

1. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The Council finds that 16 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Council Staff recommends that the Council award fees to Complainant’s Counsel in the adjusted amount of \$4,800.00, representing 16 hours of service at \$300.00 per hour, or a decrease of 2.2 hours and \$1,115.00 from the originally filed fee application.**
3. Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

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 31<sup>st</sup> 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**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Council Staff  
January 31, 2019 Council Meeting**

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

**GRC Complaint No. 2015-133**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails, attachments, and correspondence from July 1, 2013, through April 26, 2015, regarding "Tax Abatement" between the Custodian and the following parties:

- |                            |   |
|----------------------------|---|
| 1. Arlene Lih              | 10. The Planning Board and individual members     |
| 2. Tamas Ormosi            | 11. Tim White                                     |
| 3. Dennis Quinlan          | 12. James Luke                                    |
| 4. Bruce Blumenthal        | 13. Dynamic Engineering and their representatives |
| 5. Caryl Shoffner          | 14. David Fisher                                  |
| 6. August Carlton          | 15. John Moorzitz                                 |
| 7. James Holmes            | 16. John Caniglia                                 |
| 8. Anthony Timpano         | 17. Jonathan Fisher                               |
| 9. The Custodian's Counsel |   |

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

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

February 27, 2018 Council Meeting:

At its February 27, 2018 public meeting, the Council considered the February 20, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

[T]he Complainant has failed to establish in his request for reconsideration of the Council's December 19, 2017 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the GRC reasonably accepted compliance from Mr. Kazar, as he has been identified as the "Custodian of Record" throughout the pendency of this complaint. Further, the Complainant's other allegations amount to a dissatisfaction with the Order. Thus, Complainant'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). **Further, the Council's December 19, 2017 Interim Order remains in effect and the parties shall comply accordingly.**

#### Procedural History:

On March 1, 2018, the Council distributed its Interim Order to all parties. On April 4, 2018, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application.

On April 26, 2018, the Complainant's Counsel submitted a fee application. The fee application and Certification of Services ("Certification") set forth the following:

- 1) The complaint name and number: Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-133.
- 2) Counsel's law firm affiliation: N/A
- 3) A statement of client representation: Counsel certified to his services, including viewing of documents for filing with the GRC; discussing submissions with the Complainant; reviewing of e-mail correspondence to and/or from the GRC; and preparing fee application.
- 4) The hourly rate of all attorneys and support staff involved in the complaint: Counsel, the sole professional who worked on the file, certified that he charged \$325 per hour.
- 5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from February 12, 2015 through March 3, 2018 (the "Fee Period"). During the Fee Period counsel billed a total of 18.2 hours for a total fee of \$5,915.00.
- 6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that

he charges “\$325 per hour to individual clients . . . for work in OPRA matters.” Certification at ¶ 3. Counsel certified to his education, years of legal experience and representation of clients in OPRA cases before the GRC. Counsel certified that he was previously awarded \$300.00 per hour in 2014 (citing Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-228 (March 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-262 (March 2014)). Counsel requested that this rate be increased to \$325.00 because his OPRA experience had grown considerably in the last four (4) years. See Deloy v. Twp. of Lyndhurst (Bergen), GRC Complaint No. 2012-128 (November 2013); White v. Monmouth Reg’l High Sch., GRC Complaint No. 2012-218 (January 2014); Nevin v. N.J. Dep’t of Health & Senior Serv., GRC complaint No. 2013-18 (February 2014).

- 7) Detailed documentation of expenses: Counsel did not seek reimbursements for expenses.

On May 18, 2018, after receiving an extension of time, the Custodian’s Counsel submitted objections to the fee application.<sup>3</sup> Counsel requested that the GRC significantly reduce Complainant’s Counsel’s hourly rate and overall fee award because same was “both excessive and unwarranted.” As an example, Counsel argued that Complainant’s Counsel sought inconsistent with those sought by Walter M. Luers, Esq., a more established OPRA attorney that maintained an hourly rate of \$335.00. Counsel also contended that the fee application did not include certifications from other attorneys or industry standards supporting the submitted billing (citing Blum v. Stenson, 465 U.S. 886, 896 (1984)). Counsel instead contended that Complainant’s Counsel cited to cases where attorneys with more experience than himself were awarded a higher fee.

Regarding the fee application, Counsel contended that this matter was straightforward and required little work. Counsel argued that, contrary to the simplistic nature of the complaint, Complainant’s Council charged over 18 hours to address a complaint his client filed, “did research, and communicated with his client.” Counsel contended that many of the entries were “superfluous” and should be removed from consideration or pared down significantly. In further detail, Counsel disputed the three (3) hour charge for the Denial of Access Complaint, which he alleged was filed by the Complainant using a “pro-forma document.” Counsel further disputed that Complainant’s Counsel needed eight (8) hours to review the Council’s Interim Orders. Council contended that the GRC should reduce the fee, as it did in Fisher v. City of Paterson, GRC Complaint No. 2002-46 (August 2003).

## Analysis

### Compliance

At its February 27, 2018 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On March

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<sup>3</sup> The parties submitted additional arguments after Custodian Counsel’s objections that are not contemplated for in N.J.A.C. 5:105-2.13.

1, 2018, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by March 29, 2018.

On April 4, 2018, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant's Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On April 26, 2018, still within the time frame, the Complainant's Counsel submitted his fee application.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.

### **Prevailing Party Attorney Fee Award**

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 (“[b]y making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005))).]

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian's conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus existed between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney's fee, and ordered the parties

to cooperate in an effort to reach an agreement on fees. Absent the parties' ability to reach an agreement, the Council provided the Complainant's Counsel an opportunity to file an application for fees.

### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm't, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney's fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor's Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4)

the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent. [Id. at 11 (applying R.P.C. 1.5(a)).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter, Counsel is seeking a fee award of \$5,915.00, representing 18.2 hours at \$325.00 per hour. In support of this hourly rate, Counsel certified that the GRC should increase the typical rate of \$300 based on his eight (8) years of OPRA experience. Custodian’s Counsel objected to any increase, citing Walter M. Luers, Esq. as an example of an attorney receiving a lesser fee with more experience.

The rate of \$325.00 is not reasonable for a practitioner with Counsel’s experience and skill level in this geographical area. Specifically, the Counsel has not provided, nor has the GRC located, any evidence to support that the typical OPRA fee award of \$300.00 should be increased. In fact, the cases Counsel cited to support an hourly rate of \$300.00.

The GRC looks to Nevin, GRC 2013-18 as an appropriate comparison for viewing the \$300.00 fee as reasonable here. There, the Council identified an hourly rate of \$300.00 an hour as reasonable for Mr. Luers based on his thirteen (13) year experience, which included over “thirty (30) published and unpublished decisions in Supreme Court, Appellate and Law Divisions as well as the numerous GRC cases wherein Mr. Luers appeared. See also Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Paff v. Cnty. Of Salem, GRC Complaint No. 2015-342 (June 2017). Complainant’s Counsel here cannot boast a similar range of experience in his eight (8) years.

For these reasons, the Council should find that the hourly rate of \$300.00 is the appropriate hourly fee rate for Complainant’s Counsel.

## **b. Time Expended**

In support of his request for fees, Counsel submitted a log of his time spent working on this complaint. For the period from February 12, 2015 through March 3, 2018, Counsel billed a total of 18.2 hours for work on the file. This included drafting the Denial of Access Complaint, e-mailing the parties, reviewing submissions, and preparing a fee application.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel's time sheet provided basic descriptions of the work performed in the required tenths of an hour with the minimum entry of 0.2. N.J.A.C. 105-2.13(b)(5). The time entries identify the type of submission composed or reviewed (e-mail, Interim Order, certifications) and the parties involved. The log does not contain any detailed descriptions of the work performed, leaving the Council to review the complaint file to see if Complainant's Counsel was actively composing or simply reviewing the submission in question.

The Custodian's Counsel objected to several the entries on the time log. Specifically, Counsel argued that many of the entries were superfluous and should be either pared down or altogether removed from consideration. Counsel further argued that Complainant's Counsel inflated his billing in a number of places, including charging for a number of hours not conducive to the composing of an otherwise "pro-forma" Denial of Access Complaint.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) in its most basic form but provides the Council with enough detailed information from which to conduct its analysis.

The GRC finds that the accounting of charges is excessive in a number of places and should be reduced accordingly. As to the dispute over the Denial of Access Complaint entry, the GRC notes that Complainant's Counsel did file the complaint and only charged two (2) hours, not three (3) as asserted by Custodian's Counsel. Further, although a portion of the filing appeared to be taken from past complaint filings, the GRC accepts that 2 hours is reasonable to ensure the filing was accurate to the instant complaint.

The GRC further finds that an accounting of .2 for several entries to be excessive. In each instance, Complainant's Counsel provided a .2 for basic procedural e-mails that in many instances did not exceed a few sentences. For example, Complainant's Counsel charged a .2 to review the Custodian's request for an extension to submit an SOI and the GRC's response on May 28, 2015. He further charged a .2 for each of the GRC's meeting notification e-mails. Counsel also charged .2 to review extension e-mails between the Complainant and GRC. Such a charge for these types of basic e-mails is not reasonable. Thus, the GRC finds that several entries should be reduced from .2 to .1 as follows:

- E-mail from the Custodian to the GRC dated May 28, 2015 seeking extension to submit a Statement of Information ("SOI").
- E-mail from the GRC to the Custodian dated May 28, 2015 granting extension.

- E-mail from the GRC (meeting notification) dated December 6, 2016.<sup>4</sup>
- E-mail from the GRC (meeting notification) dated January 24, 2017.<sup>5</sup>
- E-mail from the Complainant to the GRC dated February 14, 2017 seeking extension to submit a request for reconsideration.
- E-mail from the GRC to the Complainant dated February 15, 2017 granting extension.
- E-mail from the GRC (meeting notification) dated October 24, 2017.
- E-mail from the Custodian to the GRC dated November 7, 2017 seeking extension to comply with Council's October 31, 2017 Interim Order.
- E-mail from the GRC to the Custodian dated November 9, 2017 granting extension.
- E-mail from the GRC (meeting notification) dated December 12, 2017.
- E-mail from the Complainant to the GRC dated January 5, 2018 seeking extension to submit a request for reconsideration.
- E-mail from the GRC to the Complainant dated January 5, 2018 granting extension.
- E-mail from the GRC (meeting notification) dated February 20, 2018.

Additionally, Complainant's Counsel charged for two (2) additional submissions that were not considered as part of this complaint. Specifically, after receiving the GRC's meeting notification e-mail<sup>6</sup> on December 12, 2017, Counsel attempted to submit a certification from the Complainant on December 14, 2017. The GRC e-mailed the Complainant acknowledging receipt and advising that it would not consider the submission, as the parties were alerted to in its meeting notification. The Complainant responded via e-mail confirming that the GRC would not consider the certification. Thus, these two (2) entries did not impact this complaint in any way and are not appropriate to include in the final fee calculation.

Counsel also charged for the e-mail that contained a second (2<sup>nd</sup>) reconsideration dated January 21, 2017. The Council rejected that reconsideration in its February 27, 2018 Interim Order. It is curious that Complainant's Counsel would include this e-mail in the billing log but would omit preparation of the reconsideration. Notwithstanding, Counsel improperly included the e-mail in his total fee calculation.

Accordingly, the Council finds that 16 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Council Staff recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$4,800.00, representing 16 hours of service at \$300.00 per hour, or a decrease of 2.2 hours and \$1,115.00 from the originally filed fee application.**

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<sup>4</sup> The Complainant identifies this date as "6-Dec-15" in the billing log; however, the correspondence appears to correspond with the January 31, 2017 Interim Order. Thus, the GRC has determined that the actual submission was its meeting notification sent to the parties via e-mail on December 6, 2016

<sup>5</sup> Complainant's Counsel identifies this date as "24-Jan-16" in the billing log. As noted in FN No. 4, it appears that the actual submission was its meeting notification sent to the parties via e-mail on January 24, 2017.

<sup>6</sup> Each notification e-mail, sent seven (7) calendar days in advance of a monthly meeting, advises the parties that their complaint is tentatively scheduled for the upcoming monthly meeting and that "the GRC will not accept any additional submissions beyond this date."

## 2. Enhancement Analysis

Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The Council finds that 16 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Council Staff recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$4,800.00, representing 16 hours of service at \$300.00 per hour, or a decrease of 2.2 hours and \$1,115.00 from the originally filed fee application.**
3. Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

Prepared By: Frank F. Caruso  
Acting Executive Director

January 22, 2019



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**February 27, 2018 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-133

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Borough of South Bound Brook (Somerset)  
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Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of February, 2018

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 1, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Council Staff**  
**February 27, 2018 Council Meeting**

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

**GRC Complaint No. 2015-133**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>**  
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**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails, attachments, and correspondence from July 1, 2013, through April 26, 2015, regarding “Tax Abatement” between the Custodian and the following parties:

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| 8. Anthony Timpano         | 17. Jonathan Fisher                               |
| 9. The Custodian’s Counsel |   |

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

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

**December 19, 2017 Council Meeting:**

At its December 19, 2017 public meeting, the Council considered the December 12, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

1. The Custodian complied with the Council's October 31, 2017 Interim Order because he responded in the extended time frame by providing the requested supplemental certification and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond in the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request, and compliance revealed that he unlawfully denied access to responsive records. Further, the Custodian failed to comply fully with the Council's September 29, 2016 Interim Order. However, the Custodian complied with the Council's October 31, 2017 Interim Order and has definitively certified that he provided all records that 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. Pursuant to the Council's September 29, 2016 and October 31, 2017 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Moreover, the Council granted the Complainant request for reconsideration and required further compliance from the Custodian. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On December 20, 2017, the Council distributed its Interim Order to all parties. On January 5, 2017, the Complainant requested additional time to submit a request for reconsideration, which the GRC granted through January 23, 2018.

On January 21, 2018, the Complainant filed a request for reconsideration of the Council's December 19, 2017 Interim Order based on a mistake. Therein, the Complainant argued that the Borough failed to comply with the Council's Order. Specifically, the Complainant contended that the Custodian could not lawfully provide a compliance response because he was no longer the Borough's "Custodian of Record." The Complainant noted that the Custodian was removed from that functional position as of April 12, 2016. The Complainant thus objected to the Custodian's

response because the Council's Order explicitly required the new "Custodian of Record" to respond. Next, the Complainant contended that this complaint be referred to the Office of Administrative Law ("OAL") for an independent fact-finding hearing to resolve alleged contested facts. See Conley v. N.J. Dep't of Corr., \_\_\_ N.J. Super. \_\_\_ (App. Div. 2018); N.J.A.C. 1:1-4.1. Finally, the Complainant alleged that the Custodian was "hopelessly conflicted" and could not conduct an independent search here. Counsel argued that the current "Custodian of Record" should have complied with the order.

### Analysis

#### Reconsideration

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order December 19, 2017 on January 21, 2017, prior to the expiration of the extended time frame to do so.

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).]

The Complainant has now asserted that the Borough failed to comply because the Custodian (identified throughout the pendency of this complaint as Mr. Kazar) was removed from this functional position on April 12, 2016. Further, the Complainant alleged that contested facts existed here warranting a fact-finding hearing and cited to the recent decision in Conley, \_\_\_ N.J.

Super. \_\_. Finally, the Complainant alleged that the Custodian was somehow “hopelessly conflicted” in performing a search for the records at issue here.

Upon review, the Complainant’s arguments do not establish that the Council made a mistake in its Interim Order; thus, the GRC rejects them. Regarding the “Custodian” issue raised, there has been no change to the “Custodian of Record” during the pendency of this complaint. That Mr. Kazar is no longer the Borough’s official “Custodian of Record” is of no moment: he was the custodian at the time of the initial OPRA request and has been identified as the “Custodian of Record” throughout this complaint. In requiring the “Custodian” to comply with the Council’s Order, the Complainant only need look to the Council’s prior decisions to determine who should have complied.

Regarding the “contested facts” and “hopelessly conflicted” allegations, the Complainant offers no evidence to corroborate these statements. Each allegation essentially amounts to Complainant’s disagreement with the Council’s decision. In addition, the Complainant’s reliance on Conley, \_\_ N.J. Super. \_\_, in arguing that a hearing is needed here is misplaced. In Conley, the Appellate Division found that the custodian’s denial of the complainant’s request for records he was able to produce previously under a former database was not substantiated under OPRA. In contrast here, no similar denial of access occurred. The evidence of record sufficiently demonstrated that the Custodian located the responsive records and provided them to the Complainant. Further, the Complainant has failed to support his repeated allegations that the Custodian is “hopelessly conflicted” or “unable to perform a search” with evidence. Thus, no hearing is needed.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings, 295 N.J. Super. at 384.* The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D’Atria, 242 N.J. Super. at 401.* Specifically, the GRC reasonably accepted compliance from Mr. Kazar, as he has been identified as the “Custodian of Record” throughout the pendency of this complaint. Further, the Complainant’s other allegations amount to a dissatisfaction with the Order. Thus, Complainant’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. **Further, the Council’s December 19, 2017 Interim Order remains in effect and the parties shall comply accordingly.**

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council’s December 19, 2017 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the GRC reasonably accepted compliance from Mr. Kazar, as he

has been identified as the “Custodian of Record” throughout the pendency of this complaint. Further, the Complainant’s other allegations amount to a dissatisfaction with the Order. Thus, Complainant’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). **Further, the Council’s December 19, 2017 Interim Order remains in effect and the parties shall comply accordingly.**

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

February 20, 2018



**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**

**December 19, 2017 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-133

v.

Borough of South Bound Brook  
Custodian of Record

At the December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s October 31, 2017 Interim Order because he responded in the extended time frame by providing the requested supplemental certification and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in the statutorily mandated time frame resulted in a “deemed” denial of the Complainant’s OPRA request, and compliance revealed that he unlawfully denied access to responsive records. Further, the Custodian failed to comply fully with the Council’s September 29, 2016 Interim Order. However, the Custodian complied with the Council’s October 31, 2017 Interim Order and has definitively certified that he provided all records that 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. Pursuant to the Council’s September 29, 2016 and October 31, 2017 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Moreover, the Council granted



the Complainant request for reconsideration and required further compliance from the Custodian. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the  
Government Records Council  
On The 19<sup>th</sup> Day of December, 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: December 20, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 19, 2017 Council Meeting**

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

**GRC Complaint No. 2015-133**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails, attachments, and correspondence from July 1, 2013, through April 26, 2015, regarding “Tax Abatement” between the Custodian and the following parties:

- |                            |   |
|----------------------------|---|
| 1. Arlene Lih              | 10. The Planning Board and individual members     |
| 2. Tamas Ormosi            | 11. Tim White                                     |
| 3. Dennis Quinlan          | 12. James Luke                                    |
| 4. Bruce Blumenthal        | 13. Dynamic Engineering and their representatives |
| 5. Caryl Shoffner          | 14. David Fisher                                  |
| 6. August Carlton          | 15. John Moorzitz                                 |
| 7. James Holmes            | 16. John Caniglia                                 |
| 8. Anthony Timpano         | 17. Jonathan Fisher                               |
| 9. The Custodian’s Counsel |   |

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

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

**October 31, 2017 Council Meeting:**

At its October 31, 2017 public meeting, the Council considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Complainant has established in his request for reconsideration of the Council’s January 31, 2017 Final Decision that: 1) the Council's decision is based upon a

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

“palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant established that the complaint should be reconsidered based on a mistake. The Complainant has also shown that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Council mistakenly accepted the Custodian’s certification inclusive of a non-committal response on whether he provided all records that existed. Thus, the Complainant’s request for reconsideration should be granted. 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).

2. The Council should rescind its January 31, 2017 Final Decision conclusion No. 1 and find that the Custodian failed to comply fully with its September 29, 2016 Interim Order. Specifically, the Custodian failed to certify definitively whether he provided all responsive records as required in the Order.
3. In order to cure the compliance issue, the Custodian must provide additional details regarding his search for responsive records. Further, the Custodian must certify whether he provided all records that existed at the time of the Complainant’s OPRA request.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
5. The Council should rescind its January 31, 2017 Final Decision conclusion Nos. 2 and 3. Further, the Council should defer the knowing and willful analysis, as well as the prevailing party analysis, pending the Custodian’s compliance with this Order.

#### Procedural History:

On November 1, 2017, the Council distributed its Interim Order to all parties. On November 7, 2017, the Custodian sought a five (5) business day extension of time to comply with the Order, which the Government Records Council (“GRC”) granted.

On November 16, 2017, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that he personally reviewed all files again and ensured that he provided all

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

<sup>4</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

records as requested. The Custodian further affirmed that he provided all responsive records to the Complainant and that no other records exist.

## Analysis

### Compliance

At its October 31, 2017 meeting, the Council ordered the Custodian to certify whether he provided all records that existed and to provide additional details about his search. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 1, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 9, 2017.

On November 7, 2017, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, the Custodian sought a five (5) business day extension, which the GRC granted. On November 16, 2017, within the extended time frame, the Custodian responded to the Council's Order. Therein, the Custodian certified that he personally reviewed all records and confirmed that he disclosed to the Complainant all records responsive to the request. The Custodian also affirmed that no other records existed.

Therefore, the Custodian complied with the Council's October 31, 2017 Interim Order because he responded in the extended time frame by providing the requested supplemental certification and simultaneously providing certified confirmation of compliance to the Executive Director.

### Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed,

knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant complaint, the Custodian's failure to respond in the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request, and compliance revealed that he unlawfully denied access to responsive records. Further, the Custodian failed to comply fully with the Council's September 29, 2016 Interim Order. However, the Custodian complied with the Council's October 31, 2017 Interim Order and has definitively certified that he provided all records that 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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." *Id.* at 605, 121 S. Ct. at 1840, 149 L.

Ed. 2d at 863. 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.

In the instant complaint, the Complainant requested that the GRC order the Custodian to disclose all responsive records. At its September 29, 2016 meeting, the Council found that the Custodian may have unlawfully denied access to responsive records and ordered disclosure of same. The Council originally found that the Custodian complied with the Council’s Order on October 14, 2016, but rescinded this conclusion in granting the Complainant’s request for reconsideration. Thereafter, the Council’s October 31, 2017 Order required the Custodian to provide additional certifications clarifying whether he provided all records that existed, which he

did in a timely manner. Thus, the Complainant prevailed in this complaint and is entitled to an award of reasonable attorney's fees.<sup>5</sup>

Therefore, pursuant to the Council's September 29, 2016 and October 31, 2017 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Moreover, the Council granted the Complainant request for reconsideration and required further compliance from the Custodian. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 31, 2017 Interim Order because he responded in the extended time frame by providing the requested supplemental certification and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond in the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request, and compliance revealed that he unlawfully denied access to responsive records. Further, the Custodian failed to comply fully with the Council's September 29, 2016 Interim Order. However, the Custodian complied with the Council's October 31, 2017 Interim Order and has definitively certified that he provided all records that 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. Pursuant to the Council's September 29, 2016 and October 31, 2017 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between

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<sup>5</sup> The GRC notes that its January 31, 2017 Interim Order directed this complaint to the Office of Administrative Law for a determination of reasonable fees. However, subsequent to that decision, the GRC now permits parties in most cases twenty (20) business days to reach an agreement on fees.

the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Moreover, the Council granted the Complainant request for reconsideration and required further compliance from the Custodian. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

December 12, 2017



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**

**October 31, 2017 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-133

v.

Borough of South Bound Brook  
(Somerset)  
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant has established in his request for reconsideration of the Council’s January 31, 2017 Final Decision that 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant established that the complaint should be reconsidered based on a mistake. The Complainant has also shown that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Council mistakenly accepted the Custodian’s certification inclusive of a non-committal response on whether he provided all records that existed. Thus, the Complainant’s request for reconsideration should be granted. 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).
2. The Council should rescind its January 31, 2017 Final Decision conclusion No. 1 and find that the Custodian failed to comply fully with its September 29, 2016 Interim Order. Specifically, the Custodian failed to certify definitively whether he provided all responsive records as required in the Order.
3. In order to cure the compliance issue, the Custodian must provide additional details regarding his search for responsive records. Further, the Custodian must certify whether he provided all records that existed at the time of the Complainant’s OPRA request.



4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
5. The Council should rescind its January 31, 2017 Final Decision conclusion Nos. 2 and 3. Further, the Council should defer the knowing and willful analysis, as well as the prevailing party analysis, pending the Custodian's compliance with this Order.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of October, 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: November 1, 2017**

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

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**October 31, 2017 Council Meeting**

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

**GRC Complaint No. 2015-133**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails, attachments, and correspondence from July 1, 2013, through April 26, 2015, regarding “Tax Abatement” between the Custodian and the following parties:

- |                            |   |
|----------------------------|---|
| 1. Arlene Lih              | 10. The Planning Board and individual members     |
| 2. Tamas Ormosi            | 11. Tim White                                     |
| 3. Dennis Quinlan          | 12. James Luke                                    |
| 4. Bruce Blumenthal        | 13. Dynamic Engineering and their representatives |
| 5. Caryl Shoffner          | 14. David Fisher                                  |
| 6. August Carlton          | 15. John Moorzitz                                 |
| 7. James Holmes            | 16. John Caniglia                                 |
| 8. Anthony Timpano         | 17. Jonathan Fisher                               |
| 9. The Custodian’s Counsel |   |

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

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the December 6, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

1. The Custodian complied with the Council's September 29, 2016 Interim Order because he responded in the extended time frame providing responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond in the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request and compliance revealed that he unlawfully denied access to responsive records. However, the Custodian timely complied with the Council's September 29, 2016 Interim Order. 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. Pursuant to the Council's September 29, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Thus, this complaint should be referred to the Office of Administrative Law for the limited purpose of determining reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

#### Procedural History:

On February 2, 2017, the Council distributed its Interim Order to all parties. On February 14, 2017, the Complainant requested additional time until March 3, 2017, to submit a request for reconsideration. On February 15, 2017, the GRC granted the Complainant's request for an extension.

On March 1, 2017, the Complainant filed a request for reconsideration of the Council's Interim Order based on a mistake and included a letter brief from Complainant's Counsel.

Therein, Counsel contended that the Council's decision was based on a palpably incorrect and/or irrational basis. Specifically, Counsel argued that the GRC made a mistake by accepting the Custodian's compliance certification that he "cannot [c]onfirm or deny that additional records exist[.]" Counsel contended that the GRC's acceptance of this response signals that every custodian could provide a similar response to conceal existent responsive records. Counsel further alleged that additional records exposing the Custodian's wrongdoings exist, which would explain his "non-committal assertion." Counsel argued that the Custodian had an obligation to certify to whether any additional records existed and failed to do so.

Counsel further argued that the Custodian never contended that acknowledgement of the responsive records would create a security issue or cause harm, as was the case in North Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182, 189 (App. Div. 2016). Counsel contended that, to the contrary, the Custodian disclosed records in accordance with the Council's September 29, 2016 Interim Order. Counsel argued that the Custodian's response has no legal basis and further argued that the Custodian's "remaining deliberately evasive" does not satisfy the Complainant's "unfettered right to access under OPRA."

Counsel also contended that the totality of the circumstances prove that the Custodian "is hopelessly conflicted and cannot conduct an independent search for responsive records, considering those records may very well inculcate him." Counsel argued that the Custodian's alleged conflict constrained the Council to require an independent party to conduct a search and certify to the existence of additional records. Counsel asserted that, until the Council orders such an action, it could not successfully adjudicate the complaint. Counsel noted that the Custodian is no longer designated as the Borough of South Bound Brook's custodian of record and should not be performing a duty falling on the newly designated custodian.

Counsel accused the GRC of having "an obvious mindset of defending *obstructionist . . . custodians*" (emphasis in original) and must send the instant complaint to the Office of Administrative Law ("OAL") because it is a contested case. Specifically, Counsel argued that the non-committal response created contested facts on the Custodian's search and the possibility of a knowing and willful violation. Counsel thus requested that the Council: 1) order immediate disclosure of e-mails, correspondence, and attachments as originally requested; 2) order the Custodian to certify to the existence of any additional records; and 3) refer the matter to the OAL for a hearing to resolve the contested facts.

### Analysis

#### Reconsideration

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's January 31, 2017 Interim Order on March 1, 2017, two (2) business days prior to the expiration of the extended time frame to do so.

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).

In his October 14, 2016 compliance submission, the Custodian certified that he “searched all [of his] files” and provided to the Complainant multiple records. The Custodian further certified that he conducted a search using the term “Tax Abatement.” The Custodian finally certified that he “cannot [c]onfirm or deny that additional records exist.” At its January 31, 2017 meeting, the Council found that the Custodian complied with the Council's Order, that he did not knowingly and willfully violate OPRA, and that the complaint should be referred to the Office of Administrative Law to determine the prevailing party attorney's fees issue. The Complainant now seeks reconsideration challenging the Council's acceptance of the Custodian's compliance. The Complainant argued that such a statement did not apply because the responsive records would not create a security issue or cause harm, as is required for this type of response per NJMG, 447 N.J. Super. at 189.

The Custodian's statement that he could “neither [c]onfirm [nor] deny” that additional records existed is typically referred to as a “Glomar” response, which was addressed by the Appellate Division in NJMG. As noted by the Complainant in his request for reconsideration, the Appellate Division allows an agency to proffer a “Glomar” response when: 1) it relies upon an exemption that would itself preclude the agency from acknowledging the existence of such records; and 2) presents a sufficient basis for the courts/GRC to determine that the claimed exemption applies. Id. After a review of the Custodian's compliance submission and the Court's decision in NJMG, 447 N.J. Super. 182, which predated the compliance submission by one (1) month, the GRC agrees that the complaint should be reconsidered based on a mistake. The Custodian's response did not fit within the framework created by the recently decided NJMG case, and thus the GRC should not have accepted his non-committal response as a sufficient

compliance response. The Council should therefore reconsider the complaint for the limited purpose of addressing the question of whether the Custodian provided all records that existed at the time of the Complainant's OPRA request.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant has established that the complaint should be reconsidered based on a mistake. The Complainant has also shown that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Council mistakenly accepted the Custodian's certification inclusive of a non-committal response on whether he provided all records that existed. Thus, the Council should grant the Complainant's request for reconsideration based on a mistake. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

Based on the foregoing, the Council should rescind its January 31, 2017 Final Decision conclusion No. 1 and find that the Custodian failed to comply fully with its September 29, 2016 Interim Order. Specifically, the Custodian failed to certify definitively whether he provided all responsive records as required in the Order.

In order to cure the compliance issue, the Custodian must provide additional details regarding his search for responsive records. Further, the Custodian must certify whether he provided all records that existed at the time of the Complainant's OPRA request.

Finally, the Council should rescind its January 31, 2017 Final Decision conclusion Nos. 2 and 3. Further, the Council should defer the knowing and willful analysis, as well as the prevailing party analysis, pending the Custodian's compliance with this Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant has established in his request for reconsideration of the Council's January 31, 2017 Final Decision that 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant established that the complaint should be reconsidered based on a mistake. The Complainant has also shown that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Council mistakenly accepted the Custodian's certification inclusive of a non-committal response on whether he provided all records that existed. Thus, the Complainant's request for reconsideration should be granted. *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).

2. The Council should rescind its January 31, 2017 Final Decision conclusion No. 1 and find that the Custodian failed to comply fully with its September 29, 2016 Interim Order. Specifically, the Custodian failed to certify definitively whether he provided all responsive records as required in the Order.
3. In order to cure the compliance issue, the Custodian must provide additional details regarding his search for responsive records. Further, the Custodian must certify whether he provided all records that existed at the time of the Complainant's OPRA request.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
5. The Council should rescind its January 31, 2017 Final Decision conclusion Nos. 2 and 3. Further, the Council should defer the knowing and willful analysis, as well as the prevailing party analysis, pending the Custodian's compliance with this Order.

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

October 24, 2017

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

<sup>4</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
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CHARLES A. RICHMAN  
*Commissioner*

**INTERIM ORDER**

**January 31, 2017 Government Records Council Meeting**

Robert Verry  
Complainant

Complaint No. 2015-133

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s September 29, 2016 Interim Order because he responded in the extended time frame providing responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in the statutorily mandated time frame resulted in a “deemed” denial of the Complainant’s OPRA request and compliance revealed that he unlawfully denied access to responsive records. However, the Custodian timely complied with the Council’s September 29, 2016 Interim Order. 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. Pursuant to the Council’s September 29, 2016 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Thus, this complaint should be referred to the Office of Administrative



Law for the limited purpose of determining reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of January, 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: February 2, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 31, 2017 Council Meeting**

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

**GRC Complaint No. 2015-133**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails, attachments, and correspondence from July 1, 2013, through April 26, 2015, regarding “Tax Abatement” between the Custodian and the following parties:

- |                            |   |
|----------------------------|---|
| 1. Arlene Lih              | 10. The Planning Board and individual members     |
| 2. Tamas Ormosi            | 11. Tim White                                     |
| 3. Dennis Quinlan          | 12. James Luke                                    |
| 4. Bruce Blumenthal        | 13. Dynamic Engineering and their representatives |
| 5. Caryl Shoffner          | 14. David Fisher                                  |
| 6. August Carlton          | 15. John Moorzitz                                 |
| 7. James Holmes            | 16. John Caniglia                                 |
| 8. Anthony Timpano         | 17. Jonathan Fisher                               |
| 9. The Custodian’s Counsel |   |

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

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

**September 29, 2016 Council Meeting:**

At its September 29, 2016 public meeting, the Council considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

- 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. The Custodian may have unlawfully denied access to any responsive records. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-311 (Interim Order dated September 30, 2014). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to those facts.
  3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
  4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
  5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On October 3, 2016, the Council distributed its Interim Order to all parties. On October 6, 2016, the Complainant sought an extension of time until October 14, 2016 to respond to the Interim Order. On October 7, 2016, the Government Records Council ("GRC") granted said extension.

On October 14, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that he searched files in his office and located several sets of minutes (which were not at issue here) and multiple e-mails concerning "Tax Abatement." The Custodian

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

<sup>4</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

certified that Family Dollar was the only business in the Borough receiving tax abatement during the identified time frame. The Custodian further certified that he conducted a search using the term “Tax Abatement” and could neither confirm nor deny that any additional records existed.

The Custodian noted that on April 26, 2015, two (2) days before he received the subject OPRA request, he disclosed multiple records regarding Family Dollar to the Complainant in sixteen (16) separate e-mails. The Custodian certified that it is likely that the Complainant already received the records responsive to this request as part of that disclosure.

### **Analysis**

#### **Compliance**

At its September 29, 2016 meeting, the Council ordered the Custodian either to locate and disclose responsive records or certify that no responsive records exist. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 3, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on October 11, 2016.

On October 6, 2016, the third (3<sup>rd</sup>) business day after receipt of the Council’s Order, the Custodian sought an extension of time until October 14, 2016, which the GRC granted. On October 14, 2016, the Custodian responded to the Council’s Order and copied the Complainant. Therein, the Custodian disclosed to the Complainant 114 pages of correspondence and several other records not expressly sought. Further, the Custodian submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council’s September 29, 2016 Interim Order because he responded in the extended time frame by providing responsive records to the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.

#### **Knowing & Willful**

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian's failure to respond in the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request, and compliance revealed that he unlawfully denied access to responsive records. However, the Custodian timely complied with the Council's September 29, 2016 Interim Order. 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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

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

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

In the instant complaint, the Complainant requested that the GRC order the Custodian to disclose all responsive records. At its September 29, 2016 meeting, the Council found that the Custodian may have unlawfully denied access to responsive records and ordered disclosure of same. The Custodian complied with the Council's Order on October 14, 2016 by disclosing a number of responsive records to the Complainant. Thus, the Complainant prevailed in this complaint and is entitled to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's September 29, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Thus, this complaint should be referred to the Office of Administrative Law for the limited purpose of determining reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 29, 2016 Interim Order because he responded in the extended time frame providing responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond in the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request and compliance revealed that he unlawfully denied access to responsive records. However, the Custodian timely complied with the Council's September 29, 2016 Interim Order. 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. Pursuant to the Council’s September 29, 2016 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council ordered the Custodian to disclose records, which he did on October 14, 2016. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. Thus, this complaint should be referred to the Office of Administrative Law for the limited purpose of determining reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of “unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

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

December 6, 2016<sup>5</sup>

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<sup>5</sup> This complaint was prepared for adjudication at the Council’s December 13, 2016 meeting but could not be adjudicated due to lack of quorum.



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

September 29, 2016 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2015-133

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he 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. The Custodian may have unlawfully denied access to any responsive records. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-311 (Interim Order dated September 30, 2014). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant’s OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to those facts.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



**redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of September, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: October 3, 2016**

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

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

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

**GRC Complaint No. 2015-133**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails, attachments, and correspondence from July 1, 2013, through April 26, 2015, regarding “Tax Abatement” between the Custodian and the following parties:

- |                            |   |
|----------------------------|---|
| 1. Arlene Lih              | 10. The Planning Board and individual members     |
| 2. Tamas Ormosi            | 11. Tim White                                     |
| 3. Dennis Quinlan          | 12. James Luke                                    |
| 4. Bruce Blumenthal        | 13. Dynamic Engineering and their representatives |
| 5. Caryl Shoffner          | 14. David Fisher                                  |
| 6. August Carlton          | 15. John Moorzitz                                 |
| 7. James Holmes            | 16. John Caniglia                                 |
| 8. Anthony Timpano         | 17. Jonathan Fisher                               |
| 9. The Custodian’s Counsel |   |

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

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

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

**Request and Response:**

On April 27, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

### Denial of Access Complaint:

On May 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request in a timely manner. Specifically, the Complainant contended that the Custodian had not yet responded by May 6, 2015, which the Complainant calculated to be the seventh (7<sup>th</sup>) business day. The Complainant contended that the Custodian, who is well-versed in the statutory response time based on numerous prior GRC decisions against him, knowingly and willfully failed to respond timely to the subject OPRA requests. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160 *et seq.* (Final Decision dated September 25, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-161 *et seq.* (Interim Order dated August 28, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013).

The Complainant stated that given the Custodian’s twenty-five (25) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

The Complainant thus requested that the GRC: 1) determine that the Custodian’s responses resulted in a “deemed” denial; 2) order disclosure of all records responsive to the Complainant’s “validly submitted OPRA request;” 3) determine that the Custodian knowingly and willfully violated OPRA, warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees; and 5) order any further relief deemed appropriate.

### Statement of Information:

On June 4, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 28, 2015. The Custodian certified that the Complainant filed the instant complaint before he could formally respond.

The Custodian asserted that a cursory review of the Complainant’s OPRA request indicated that same was invalid. The Custodian argued that the request is one in a long line of open-ended requests that fail to specify the records sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).<sup>4</sup>

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<sup>4</sup> The Custodian requested that the GRC explore the possibility of allowing the Borough to seek fees and costs from the Complainant for frivolous litigation. The GRC notes that OPRA’s fee shifting provision only applies to complainants. N.J.S.A. 47:1A-6.

## 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).<sup>5</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant caused his complaint to be sent on May 12, 2015 and the GRC received same on May 13, 2015. Therein, he contended that the Custodian failed to respond timely to his April 27, 2015 OPRA request. In the SOI, the Custodian certified that he received the Complainant's OPRA request on April 28, 2015. Further, the Custodian contended that the Complainant filed this complaint before he could formally respond.

The evidence of record, however, supports that a "deemed" denial occurred in the instant complaint. Specifically, the Custodian's last business day to respond, based on his SOI certification, was May 7, 2015. Further, the Complainant waited until after the tenth (10<sup>th</sup>) business day before submitting his complaint. Thus, the OPRA request was "deemed" denied as of May 8, 2015.

Therefore, the Custodian did not bear his burden of proof that he 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.

### Unlawful Denial of Access

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

The New Jersey Appellate Division has held that:

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<sup>5</sup> 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.

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

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

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

Id. at 549 (emphasis added).

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

The GRC has established criteria deemed necessary under OPRA to request an e-mail communication. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also Sandoval v. NJ State Parole Bd.*, GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. *See Armenti v. Robbinsville Bd. of Educ. (Mercer)*, GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

Additionally, the Court has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and]

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

was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013), the GRC provided that:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis.

Id., at 5.

Here, the Custodian contended in the SOI that the subject OPRA request was one in a long line of open-ended requests failing to specify the records sought. However, the Council’s decision in Verry, GRC 2013-43, *et seq.* squarely applies herein. Specifically, the Complainant identified all requisite criteria required under Elcavage, GRC 2009-07, and its progeny. Further, although the Custodian argued that said request was invalid, a plain review of the request reveals that it conformed to the Elcavage criteria. The GRC is thus satisfied that the Custodian should have responded to same by providing records, if any, in accordance with a reasonably conducted search.

Accordingly, the Custodian may have unlawfully denied access to any responsive records. N.J.S.A. 47:1A-6; Elcavage, GRC 2009-07; Verry, GRC 2013-43 and 2013-53. Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant’s OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to those facts.

### **Knowing & Willful**

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

### **Prevailing Party Attorney’s Fees**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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. The Custodian may have unlawfully denied access to any responsive records. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-311 (Interim Order dated September 30, 2014). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to those facts.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

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

September 22, 2016

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

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.