



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 7, 2020 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-192

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss the complaint because the Complainant’s Counsel withdrew the matter via letter to the Office of Administrative Law on November 19, 2019. Therefore, no further adjudication is required.

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 7th Day of January 2020

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: January 9, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-192

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic Copies of:

1. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Tamas (“Tom”) Ormosi regarding the Family Dollar from January 1, 2014, to April 18, 2015.
2. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Dennis Quinlan regarding the Family Dollar from January 1, 2014, to April 18, 2015.
3. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Bruce Blumenthal regarding the Family Dollar from January 1, 2014, to April 18, 2015.
4. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Carol Shoffner regarding the Family Dollar from January 1, 2014, to April 18, 2015.
5. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and August Carlton regarding the Family Dollar from January 1, 2014, to April 18, 2015.
6. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and James Holmes regarding the Family Dollar from January 1, 2014, to April 18, 2015.
7. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Anthony Timpano regarding the Family Dollar from January 1, 2014, to April 18, 2015.
8. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Francesco Taddeo regarding the Family Dollar from January 1, 2014, to April 18, 2015.
9. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and the planning board and their individual members regarding the Family Dollar from January 1, 2014, to April 18, 2015.
10. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Arleen Lih regarding the Family Dollar from January 1, 2014, to April 18, 2015.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Annandale, NJ). Previously represented by John A. Birmingham, Esq. (Mt. Bethel, PA).

² Represented by Francesco Taddeo, Esq., of Francesco Taddeo, LLC (Somerville, NJ).

Custodian of Record: Donald E. Kazar

Request Received by Custodian: April 18, 2015

Response Made by Custodian: April 26, 2015; June 7, 2015; June 10, 2015

GRC Complaint Received: June 22, 2015

Background

October 31, 2017 Council Meeting:

At its October 31, 2017 public meeting, the Council considered the October 24, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear 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, and his failure to respond within the extended deadline 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because there are issues of contested facts, specifically whether the Custodian produced all responsive correspondence and included attachments to the Complainant, this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested correspondence and attachments.
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the results of a fact-finding hearing from OAL.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the results of a fact-finding hearing from OAL.

Procedural History:

On November 1, 2017, the Council distributed its October 31, 2017 Interim Order to all parties. On April 5, 2018, the complaint was transmitted to the Office of Administrative Law ("OAL"). On November 19, 2019, the Complainant's Counsel submitted a letter via mail and facsimile to the OAL withdrawing the complaint. On December 2, 2019, the OAL returned the complaint back to the Government Records Council marked "WITHDRAWAL."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant's Counsel withdrew the matter via letter to the Office of Administrative Law on November 19, 2019. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

December 10, 2019



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. 2015-192

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 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, and his failure to respond within the extended deadline 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because there are issues of contested facts, specifically whether the Custodian produced all responsive correspondence and included attachments to the Complainant, this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested correspondence and attachments.
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the results of a fact-finding hearing from OAL.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the results of a fact-finding hearing from OAL.



Interim Order Rendered by the
Government Records Council
On The 31st 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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-192

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic Copies of:

1. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Tamas (“Tom”) Ormosi regarding the Family Dollar from January 1, 2014, to April 18, 2015.
2. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Dennis Quinlan regarding the Family Dollar from January 1, 2014, to April 18, 2015.
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8. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Francesco Taddeo regarding the Family Dollar from January 1, 2014, to April 18, 2015.
9. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and the planning board and their individual members regarding the Family Dollar from January 1, 2014, to April 18, 2015.

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

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

10. Any and all e-mails, e-mail attachments, and/or correspondences between Donald E. Kazar and Arleen Lih regarding the *Family Dollar* from January 1, 2014, to April 18, 2015.

Custodian of Record: Donald E. Kazar

Request Received by Custodian: April 18, 2015

Response Made by Custodian: April 26, 2015; June 7, 2015; June 10, 2015

GRC Complaint Received: June 22, 2015

Background³

Request and Response:

On April 18, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 26, 2015, the Custodian responded via e-mail, asserting that the Complainant had received all relevant e-mails as requested but sought an extension until May 15, 2015, to speak with counsel. The Complainant replied that day, stating he has not received any records responsive to the OPRA request at issue and that a thirteen (13) business day extension of time is unreasonable if it is needed only for the Custodian to confer with counsel.

On April 26, 2015, the Custodian responded to the Complainant by e-mail with attachments containing approximately seventy-five (75) responsive documents. The Custodian also asked the Complainant whether he was receiving the e-mails, but the Complainant did not respond. There is no evidence in the record indicating that the Custodian confirmed in writing whether he had provided all responsive records prior to the May 15, 2015 extension deadline.

On June 7, 2015, the Complainant e-mailed the Custodian, seeking confirmation of whether there was any written correspondence that was responsive to the OPRA request. The Custodian responded that day, stating that he required additional time to fulfill the request. The Complainant replied, stating that he would give the Custodian until noon on June 10, 2015, to provide any responsive records.

On June 10, 2015, the Custodian responded to the Complainant, stating that he would not be able to provide a response by noon that day. The Custodian also stated that the OPRA request is overly broad and required additional time and research.

Denial of Access Complaint:

On June 22, 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 his OPRA request in full. Specifically, the Complainant contended that the Custodian failed either to provide any written correspondence between the Custodian and the agents with

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

Family Dollar, or to confirm that no such correspondence exists. The Complainant stated that no response or confirmation was given before the extended deadline of May 15, 2015, and June 10, 2015, thus resulting in a deemed denial of access. Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

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) find that the Custodian violated OPRA by failing to provide all responsive records and order immediate disclosure of same; 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 4) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty.

Statement of Information:

On July 30, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on approximately April 19, 2015. The Custodian then certified that he responded in writing on April 26, 2015, providing responsive records via e-mail attachments.

The Custodian argued that all responsive records were provided on April 26, 2015, and that the May 15, 2015 extension was sought to gain more time to confirm that all responsive records were located. The Custodian contended that the Complainant's arguments are specious and that there was no unlawful denial of access. The Custodian conceded that there was a misunderstanding as to the records sought in the OPRA request but maintained that he provided all responsive records on April 26, 2015.

Additional Submissions:

On September 8, 2015, the Complainant submitted a response to the Custodian's SOI. The Complainant objected to the Custodian's assertion that all responsive records were provided on April 26, 2015. The Complainant stated that it was not until the Custodian submitted his SOI on July 30, 2015, that he received seventeen (17) pages of responsive e-mails pertaining to Item No. 9 of the Custodian's OPRA request. Additionally, the Complainant noted that one of the provided e-mails referenced attached documents and were not included as part of the production.

As evidence, the Complainant pointed to a handwritten notation from the Custodian saying, "See Attached" on a copy of the Complainant's OPRA request attached to the SOI. Additionally, the Custodian also made a notation of "None" on the request, suggesting that the Custodian conducted a search for additional records after receiving the complaint, rather than during the extended period. The Complainant alleged further that the Custodian's request for

additional time to reach out to the planning board suggested that he did not make contact with the planning board at all prior to requesting an extension. Moreover, the Complainant included evidence suggesting that members of the planning board use non-official e-mails to conduct business.

The Complainant also noted that the Complainant's June 7, 2015 correspondence stated that the Custodian needed to "contact all those people to see what information they have" regarding the Complainant's OPRA request. This, according to the Complainant, is further evidence that the Custodian failed to perform an adequate search for responsive records throughout the standard and extended deadline, and it was not until the Complainant filed this complaint did the Custodian ask counsel to search for responsive records he may have in his possession.

To conclude, the Complainant restated his request for relief as communicated in his complaint and added that the GRC should refer the complaint to the Office of Administrative Law for a fact-finding hearing.

On April 10, 2017, the GRC submitted a request for additional information to the Custodian. The GRC asked the Custodian how many of the responsive e-mails numbered 65-80 from the submitted SOI were provided in his April 26, 2015 response and whether the Custodian provided attachments, if any, contained within responsive e-mails. On April 20, 2017, the Custodian responded to the GRC's request. The Custodian recertified that all records were provided on April 26, 2015, including any attachments contained within responsive e-mails. Additionally, the Custodian stated that the extension was needed for clarification of the Complainant's request.

On May 15, 2017, the Complainant submitted a reply brief to the GRC. The Complainant argued that the record contradicts the Custodian's SOI and April 20, 2017 certification, in that responsive e-mails between the Custodian and counsel were not provided until after the complaint was filed. The Complainant included a cropped snapshot of the Custodian's July 30, 2015 e-mail message containing his completed SOI and document production. Additionally, the Complainant included an additional snapshot of a provided e-mail which referenced attached documents the Complainant alleged were not produced along with the e-mail. The Complainant reiterated his request for relief as previously communicated and added that the GRC should find that the Custodian filed a false SOI and certification.

Analysis

Timeliness

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

N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension 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 dated October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's OPRA request by seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

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

[Id.]

In the present case, the Custodian certified that his office received the OPRA request on April 18, 2015, and that he responded to the request on April 26, 2015, providing responsive records via e-mail, but also sought an extension of time to May 15, 2015, in order to confirm that all responsive records had been located. However, the Custodian failed to respond within the extended period. Instead, the Custodian did not correspond with the Complainant until the Complainant reached out to him on June 7, 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, and his failure to respond within the extended deadline 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), Kelley, GRC 2007-11, and Kohn, GRC 2007-124. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

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

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 Custodian maintains that all responsive records were provided on April 26, 2015 in his SOI and subsequent certification to the GRC. The Complainant counters that attachments referenced in an e-mail produced on July 30, 2015, were not provided. Although the Custodian certified that all responsive records were provided on April 26, 2015, the evidence in record suggests that the Custodian provided responsive records as part of his SOI that were not part of the April 26, 2015 production, contrary to his certifications.

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). Accordingly, because there are issues of contested facts, specifically whether the Custodian produced all responsive correspondence and included attachments to the Complainant, this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested correspondence and attachments.

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 results of a fact-finding hearing from OAL.

Prevailing Party

The Council defers analysis of whether the Complainant is a prevailing party pending the results of a fact-finding hearing from OAL.

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, and his failure to respond within the extended deadline 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Kohn v.

Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

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4. The Council defers analysis of whether the Complainant is a prevailing party pending the results of a fact-finding hearing from OAL.

Prepared By: Samuel A. Rosado
Staff Attorney

October 24, 2017