



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**February 26, 2020 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-58

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Council should accept the Honorable Patricia M. Kerins’, Administrative Law Judge, Initial Decision “**FIND[ING]** that the [C]ustodian performed an adequate search . . . [and] properly certified that the Borough did not maintain any records beyond the one already in the [C]omplainant’s possession.” *Id.* at 6. Further, the Council should accept the ALJ’s Initial Decision “**CONCLUD[ING]** that . . . the [C]ustodian’s actions do not rise to the level of ‘knowing and willful’ conduct . . . [and] that [the Complainant] is not a prevailing party and is not entitled to attorney’s fees.” *Id.* 11, 16. Finally, because the ALJ addressed all outstanding issues to conclusion, 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 26<sup>th</sup> Day of February 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: March 3, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

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

**GRC Complaint No. 2015-58**

v.

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

**Records Relevant to Complaint:** Electronic copies of subpoenas served to: the Custodian; Maria Caemmerer; Arleen Lih; Randy Bahr; Mayor Tamas Ormosi; every elected councilmember for 2013, 2014 and 2015; Barbara Flaghety; Bill Boyle; Carol Rice; Donna Alessi; Donna Piazzola; Ken Pine; every Borough of South Bound Brook (“Borough”) Public Works employee; Michael Allenovitch; Paul Kaminsky; Chief William C. King; and every Police Department employee from September 23, 2014, to February 4, 2015.

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

**Request Received by Custodian:** February 9, 2015

**Response Made by Custodian:** February 18, 2015

**GRC Complaint Received:** March 9, 2015

**Background**

May 24, 2016 Council Meeting:

At its May 24, 2016 public meeting, the Council considered the May 17, 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:

1. The Custodian failed to comply fully with the Council’s April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Also represented by Walter M. Luers, Esq. of the Law Office of Walter M. Luers, LLC (Annadale, NJ). Mr. Luers entered his appearance on October 14, 2016.

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

2. The instant complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant's possession. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Procedural History:

On May 26, 2016, the Council distributed its Interim Order to all parties. On August 3, 2016, the Government Records Council ("GRC") transmitted this complaint to the Office of Administrative Law ("OAL").

On December 13, 2019,<sup>3</sup> the Honorable Patricia M. Kerins, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter. The ALJ's Initial Decision, set forth as "Exhibit A," determined that:

With regard to the credibility of the records [C]ustodian . . . overall, I **FOUND** him to be credible in his description of the efforts he undertook to search the Borough's files. He readily admitted that he did not detail in the May 2016 certification to the GRC the full extent of the search he undertook. I **FIND** that he not only rechecked his own files, but verbally contacted the other Borough department heads and relevant employees to ascertain whether any subpoenas responsive to the records request existed.

. . .

I **FIND** that the [C]ustodian . . . performed an adequate search to locate all responsive records . . . I **FIND** that [the Custodian] properly certified that the Borough did not maintain any records beyond the one already in the [C]omplainant's possession and that he provided all responsive records that were in his possession at the time of the [C]omplainant's February 4, 2015, OPRA request.

. . .

[U]nlike [Jung, et al. v. Borough of Roselle, GRC 07137-08, Initial Decision (November 18, 2008) adopted, Council (December 10, 2008)], the record shows that [the Custodian] did, in fact, search for the documents and was responsive to

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<sup>3</sup> The GRC notes that the OAL sought fifteen (15) extensions, ultimately expiring on December 19, 2019, to file an initial decision. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8. The GRC granted each extension.

[the Complainant's OPRA request]. Rather, like [Johnson v. Borough of Oceanport (Monmouth), GRC 6746-09, Initial Decision (October 31, 2011) adopted (January 31, 2012)], while the record suggests that [the Custodian's] methods were apathetic and "haphazard," it does not prove that his passive search efforts were an intentional, deliberate, reckless, knowledgeable, or purposeful denial of [C]omplainant's rights under OPRA. See Johnson, GRC 6746-09, Initial Decision (October 31, 2011) (suggesting that there can be no presumption of willful misconduct arising simply from the failure of a public official to properly respond). Therefore, I **CONCLUDE** that based on the record before me, the [C]ustodian's actions do not rise to the level of "knowing and willful" conduct.

...

[T]here is an absence of a causal connection between [the Complainant's] complaint and the production of documents by the Borough . . . Although [the Custodian] failed to respond to the request by the expiration date of the extension, he did, in fact, complete the request prior to [the Complainant's] filing of the Denial of Access Complaint. Thus, under these circumstances, it cannot be said that [the Complainant's] complaint was a catalyst to [the Custodian's] search and compliance. Hence, there is no factual nexus between [the Complainant] bringing this action and a legal decision in his favor. Therefore, applying the catalyst-theory principles, I **CONCLUDE** that [the Complainant] is not a prevailing party and is not entitled to attorney's fees.

[Id. at 4, 6, 10-11, and 15-16.]

The ALJ's Initial Decision provided the parties thirteen (13) days from mailing to submit exceptions to the decision to the GRC. The GRC did not receive any exceptions within the applicable time frame.

### **Analysis**

#### **Administrative Law Judge's Initial Decision**

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the

record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

I **FIND** that the [C]ustodian . . . performed an adequate search to locate all responsive records . . . I **FIND** that [the Custodian] properly certified that the Borough did not maintain any records beyond the one already in the [C]omplainant’s possession and that he provided all responsive records that were in his possession at the time of the [C]omplainant’s February 4, 2015, OPRA request.

. . .

[W]hile the record suggests that [the Custodian’s] methods were apathetic and “haphazard,” it does not prove that his passive search efforts were an intentional, deliberate, reckless, knowledgeable, or purposeful denial of [C]omplainant’s rights under OPRA. See Johnson, GRC 6746-09, Initial Decision (October 31, 2011) (suggesting that there can be no presumption of willful misconduct arising simply from the failure of a public official to properly respond). Therefore, I **CONCLUDE** that based on the record before me, the [C]ustodian’s actions do not rise to the level of “knowing and willful” conduct.

. . .

[T]here is no factual nexus between [the Complainant] bringing this action and a legal decision in his favor. Therefore, applying the catalyst-theory principles, I **CONCLUDE** that [the Complainant] is not a prevailing party and is not entitled to attorney’s fees.

[Id. at 6, 10-11, and 15-16.]

Here, the ALJ fairly summarized the Custodian’s testimony and evidence before her, explaining how she weighed the proofs and why she credited certain testimony. The ALJ’s conclusions are aligned and consistent with those credibility determinations. As such, the GRC is

satisfied that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Accordingly, the Council should accept the ALJ's Initial Decision "**FIND[ING]** that the [C]ustodian performed an adequate search . . . [and] properly certified that the Borough did not maintain any records beyond the one already in the [C]omplainant's possession." Id. at 6. Further, the Council should accept the ALJ's Initial Decision "**CONCLUD[ING]** that . . . the [C]ustodian's actions do not rise to the level of 'knowing and willful' conduct . . . [and] that [the Complainant] is not a prevailing party and is not entitled to attorney's fees." Id. 11, 16. Finally, because the ALJ addressed all outstanding issues to conclusion, no further adjudication is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council should accept the Honorable Patricia M. Kerins', Administrative Law Judge, Initial Decision "**FIND[ING]** that the [C]ustodian performed an adequate search . . . [and] properly certified that the Borough did not maintain any records beyond the one already in the [C]omplainant's possession." Id. at 6. Further, the Council should accept the ALJ's Initial Decision "**CONCLUD[ING]** that . . . the [C]ustodian's actions do not rise to the level of 'knowing and willful' conduct . . . [and] that [the Complainant] is not a prevailing party and is not entitled to attorney's fees." Id. 11, 16. Finally, because the ALJ addressed all outstanding issues to conclusion, no further adjudication is required.

Prepared By: Frank F. Caruso  
Executive Director

January 21, 2020<sup>4</sup>

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<sup>4</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



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

**INITIAL DECISION**

OAL DKT. NO. GRC 11819-16

AGENCY DKT. NO. 2015-58

**ROBERT VERRY,**

Petitioner,

v.

**BOROUGH OF SOUTH BOUND BROOK**

**(SOMERSET),**

Respondent.

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**Walter Luers, Esq.,** for petitioner

**Francesco Taddeo, Esq.,** for respondent

Record Closed: December 22, 2017

Decided: December 13, 2019

BEFORE **PATRICIA M. KERINS, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner Robert Verry (Verry) seeks a ruling whether Donald Kazar (Kazar) the records custodian and borough clerk of the Borough of South Bound Brook (Borough), performed an adequate search for records and whether he properly certified that the Borough did not maintain any records beyond the one already in petitioner's possession. Verry further requests a determination as to whether the custodian and/or any other



Borough official knowingly and willfully violated the Open Public Records Act (OPRA) and whether petitioner is a prevailing party entitled to an award of reasonable attorney's fees.

On March 9, 2015, Verry filed a Denial of Access Complaint with the Government Records Council (GRC) regarding his OPRA request to the Borough for subpoenas served upon the Borough during the period September 23, 2014, to February 4, 2015. At its April 26, 2016, meeting, the GRC issued an Interim Order directing respondent to conduct a thorough search for the requested records and to execute a certification as to his efforts and results. At its May 24, 2016, meeting, the GRC then determined that respondent failed to comply with its Interim Order, as he failed to prove that he performed a search more thorough than his initial attempt.

On August 3, 2016, the GRC transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case to determine whether the custodian performed an adequate search to locate all responsive records, and whether the custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the complainant's possession. Further, and if necessary, the hearing was to determine whether the custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, the issue of whether the petitioner is a prevailing party entitled to an award of reasonable attorney's fees was to be determined.

Telephone status conferences were held with the parties on November 3, 2016, and January 24, 2017. The matter was heard on May 26, 2017, and the record remained open for post-hearing submissions by the parties. After the receipt of those submissions a telephone conference was scheduled on December 13, 2017, and respondent was provided with an opportunity to object to any of petitioner's exhibits going into evidence. When no objection was received the record closed on December 22, 2017, and extensions of time were granted for the filing of the Initial Decision.

## **FACTUAL DISCUSSION**

As set forth above, the initial matter to be determined in this case is whether Kazar conducted a thorough search for the records requested by Verry as required by the GRC's Interim Order. The only witness to provide testimony on this issue at the hearing was Kazar. Subpoenaed by petitioner, Kazar initially testified under questioning by petitioner's counsel. He stated that he is retired from his position as borough clerk. At various points in his testimony he alluded to the numerous OPRA requests propounded upon the Borough by petitioner, noting that he would sometimes receive nine or ten a day. While he did not recall specifically all of his actions when he received the request at issue here, he described his usual response to an OPRA request.

Kazar described the Borough offices as small, essentially an old house with about seven rooms. His own office was about six by eight feet and located such that he had to pass other offices to get to it. The entire Borough staff consisted of approximately five or six administrative staff, four Public Works staff, and twelve officers in the Police Department. He testified that when he received a request he would check his own files located in his office. He then would either call or walk down to see the department head(s) or staff either listed on the request or in whose offices the relevant records would be located. With regard to Police Department files, he said he was dependent on the police chief to produce files, since under Attorney General Guidelines he did not have access to those files. It was not his practice to email or write a memo to Borough staff requesting documents responsive to an OPRA request. If a department head or staff did not respond to his request he assumed no records existed. According to Kazar, during his tenure the Borough did not have a written policy or procedure for the handling of OPRA requests.

With regard to the request at issue, Kazar was questioned regarding his original search and then his search efforts in response to the GRC's Interim Order. The request was for subpoenas received by the Borough for a number of officials and staff during the period September 23, 2014, to February 4, 2015. He testified that he would have handled the initial search as he always did, searching his own files and then seeking out other staff in person or by phone. He said he found no subpoenas in his own files and was not advised by any of the other department heads of any subpoenas responsive to the OPRA

request. He responded with a handwritten note on the bottom of the request to that effect (P-C), and emails were exchanged with Verry (P-D).

After Verry filed a Denial of Access Complaint with the GRC upon receiving the above response, Kazar completed a custodian's Statement of Information (SOI) stating: "Respondent does not maintain anything in its records responsive to Complainant's request." P-H. After reviewing Kazar's SOI, petitioner submitted a response, enclosing records from the Borough's outside counsel showing work on a subpoena during the period at issue that had been sent to the outside counsel's office for an appearance by Kazar in unrelated litigation brought by Verry (P-I).

After Kazar's SOI response to the GRC, he received the agency's Interim Order requiring him to conduct a more thorough search and to document it in a certification. He stated that he did the same search as he had previously done, checking his office and reaching out to other Borough employees and department heads. However, he did admit that he failed to provide much detail in his resulting certification of May 11, 2016, omitting that he had verbally followed up with requests to staff and department heads.

In the hearing in this matter no further testimony was presented. With regard to the credibility of the records custodian, Donald Kazar, overall, I **FOUND** him to be credible in his description of the efforts he undertook to search the Borough's files. He readily admitted that he did not detail in the May 2016 certification to the GRC the full extent of the search he undertook. I **FIND** that he not only rechecked his own files, but verbally contacted the other Borough department heads and relevant employees to ascertain whether any subpoenas responsive to the records request existed.

The task here is to determine whether Kazar performed an adequate search, properly certified that the Borough did not maintain any records beyond the one already in complainant's possession, and "knowingly and willfully" violated OPRA.

The facts deemed relevant to make these determinations are as follows:

1. The Borough did not have written procedures for the handling of OPRA requests.
2. Typically, when the Borough received OPRA requests, Kazar checked his files and then either called or walked to the office of the staff person listed on the request; it was not his practice to email or write a memo to Borough staff requesting documents.
3. Verry requested subpoena records dated September 23, 2014, through February 4, 2015, for named individuals.
4. Kazar received Verry's OPRA request, he searched his files, and then he sought files from other staff and department heads via phone or in person.
5. The department heads did not affirmatively respond to the request, and Kazar unilaterally concluded that they were not in possession of the requested records.
6. Kazar communicated with Verry by writing a note on the bottom of Verry's request form and sent emails stating that the Borough was not in possession of any subpoenas.
7. Verry was in possession of a subpoena issued within the relevant dates, thus, he believed that Kazar's search was insufficient.
8. Verry filed a Denial of Access Complaint with the GRC.
9. Kazar completed a Statement of Information (SOI) indicating that respondent was not in possession of the responsive subpoenas.
10. The GRC ordered Kazar to perform a more thorough search and to document his search efforts in a certification.

11. Kazar repeated his initial search but failed to fully detail his search efforts in his certification.

12. Kazar presented credible testimony describing his search efforts and certified that respondent did not possess additional responsive subpoenas. No evidence was presented by either party that refuted Kazar's certification.

Here, Verry requested subpoenas for specific individuals. Kazar searched all records in his possession for the responsive subpoenas. Kazar then inquired with the department heads responsible for preserving subpoena records for the named individuals. After Verry filed a Denial of Access Complaint, the GRC ordered Kazar to conduct another search. In the second search, Kazar searched his records again and followed up with the department heads by asking them for a second time about the responsive subpoenas. Thus, I **FIND** that the custodian, Kazar, performed an adequate search to locate all responsive records.

Kazar presented descriptive and credible testimony regarding the efforts he undertook to search the Borough's files and how he contacted the other Borough department heads to ascertain whether any responsive subpoenas existed. Kazar certified that "Respondent does not maintain anything in its records responsive to Complainant's request." Furthermore, at the hearing, no evidence was presented by either party proving that the Borough possessed additional responsive subpoenas. Thus, I **FIND** that Kazar properly certified that the Borough did not maintain any records beyond the one already in the complainant's possession and that he provided all responsive records that were in his possession at the time of the complainant's February 4, 2015, OPRA request.

### **LEGAL DISCUSSION**

Under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1. The act "defines 'government record' broadly to include all documents and

similar materials, and all information and data, including electronically stored data, that have been made or received by government in its official business.”<sup>1</sup> Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 7 (App. Div. 2009), aff’d, 201 N.J. 5 (2010).

Generally, “a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.”<sup>2</sup> N.J.S.A. 47:1A-5(i). A custodian’s failure to timely respond to a request “shall be deemed a denial of the request.” Ibid.

A requestor whose access to a government record is denied by a custodian may file a complaint with the Government Records Council (GRC), which has a statutory power to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian.” N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7. If the GRC determines that “the complaint is within its jurisdiction and is neither frivolous nor without factual basis, [it] shall proceed with the adjudication process.” N.J.A.C. 5:105-2.1; N.J.S.A. 47:1A-7(e).

If so, the custodian shall provide the GRC and the complainant with a “statement of information,” which is “a written response to a complaint, and all attachments thereto, submitted to the [GRC] by a custodian or his or her representative.” N.J.S.A. 47:1A-7(e);

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<sup>1</sup> Specifically, a “government record” is defined as:

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

[N.J.S.A. 47:1A-1.1; N.J.A.C. 5:105-1.3.]

<sup>2</sup> “Custodian of a Government Record” or “Custodian” is “in the case of a municipality clerk and in the case of any other public agency, the officer officially designated by formal action of that agency’s director or governing body, as the case may be.” N.J.A.C. 5:105-1.3.

N.J.A.C. 5:105-2.1; N.J.A.C. 5:105-1.3. If the GRC “is unable to make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto,” the GRC may transmit the matter to the OAL for a contested-case hearing. N.J.S.A. 47:1A-7(e); N.J.S.A. 52:14B-1 to 1 to -15; N.J.A.C. 5:105-2.7. After a hearing, if it is determined that a custodian “knowingly and willfully violated” OPRA and “is found to have unreasonably denied access under the totality of the circumstances,” the GRC may impose a civil penalty on the custodian. N.J.S.A. 47:1A-7(e); N.J.S.A. 47:1A-11; N.J.A.C. 5:105-2.14. The statutory penalties include “\$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation and \$5,000 for a third violation that occurs within 10 years of an initial violation.” N.J.S.A. 47:1A-11.

In addition, OPRA entitles a prevailing requestor to reasonable attorney’s fees. N.J.S.A. 47:1A-7(f); N.J.A.C. 5:105-2.13(a). Specifically, such fees “shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the [GRC], access was improperly denied and the requested records are disclosed pursuant to a determination of the [GRC] or voluntary settlement agreement between the parties.” N.J.A.C. 5:105-2.13(a).

While the phrase “knowingly and willfully” is not specifically defined in OPRA, “a knowing and willful violation of the statute would require that the custodian must have had actual knowledge that his actions were wrongful, and that there had to be positive element of conscious wrongdoing.” Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div.2008).

The GRC has, however, used a “definition formulated through several court decisions involving other statutes.” See Jung, et al. v. Borough of Roselle, GRC 07137-08, Initial Decision (November 18, 2008), adopted, Council (December 10, 2008), <https://njlaw.rutgers.edu/collections/oal/>.

The United States Supreme Court explained that “willful” conduct is not merely negligent.

In common usage the word “willful” is considered synonymous with such words as “voluntary,” “deliberate,” and “intentional.” The word “willful” is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.

[McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (citation omitted)].

In Fielder v. Stonack, the New Jersey Supreme Court stated that “[w]illful misconduct is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.” 141 N.J. 101, 124 (1995) (citations omitted). Thus, “willful misconduct need not involve the actual intent to cause harm, [however], there must be some knowledge that the act is wrongful.” Ibid. As such, “willful conduct is not merely negligent; it is much more.” See ibid.

Although the Fielder Court formulated its “willful” standard expressly for police-chase scenarios, its reasoning is pertinent in the context of ethics violations. See Johnson v. Borough of Oceanport (Monmouth), GRC 6746-09, Initial Decision (October 31, 2011), adopted, Council (January 31, 2012), <https://njlaw.rutgers.edu/collections/oal/>; see also Fielder, 141 N.J. at 124. “Both scenarios deal with possible malfeasance of a person charged with protection of the public.” Ibid.

Accordingly, “willful conduct” in violation of OPRA must be intentional and deliberate with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional. See Exec. Comm’n on Ethical Stds. v. Salmon, 295 N.J. Super. 86, 105–07 (1996); see also N.J.S.A. 47:1A et seq.

The GRC has found a records custodian to have acted “knowingly and willfully” where the custodian was proficient in OPRA procedures, and inexplicably failed to communicate with the requestor or cooperate with the OPRA request. See Jung, GRC 07137-08, Initial Decision (November 18, 2008), adopted, Council (December 10, 2008), <https://njlaw.rutgers.edu/collections/oal/>. The decision held that the custodian’s lack of communication, cooperation, and timeliness amounted to willful misconduct. Ibid.; see also Bart v. City of Paterson Hous. Auth., GRC 09423-06, Final Decision (May 30, 2007),



<https://njlaw.rutgers.edu/collections/oal/> (where the custodian failed to submit documents to a complainant who frequently engaged with the agency. The custodian testified that she did not like the complainant. Thus, the ALJ found that the custodian's ill-will toward the complainant made her less likely to comply with the OPRA request, and therefore her actions amounted to a knowing and willful violation).

On the other hand, having a haphazard system of preserving and retrieving records does not rise to the level of willful conduct. In Johnson v. Borough of Oceanport, the complainant submitted two OPRA requests to the Borough of Oceanport. Johnson, GRC 6746-09, Initial Decision (October 31, 2011), <https://njlaw.rutgers.edu/collections/oal/html/>. The ruling concluded that it is "quite clear that there can be no presumption of 'willful' misconduct arising simply from the failure of a public official to respond in a timely fashion to a request" or from acting "negligent or heedless" when attempting to comply with OPRA. Ibid.; see also Doss v. Borough of Paramus (Bergen), GRC 11319-15, Initial Decision (August 4, 2016), <https://njlaw.rutgers.edu/collections/oal/html/> (where the custodian did not knowingly and willfully violate OPRA when she erroneously referred the complainant to a different agency and was ordered by the GRC to perform a more thorough search).

Here, it may be argued that the Borough's meager OPRA procedures and Kazar's failure to perform a more intense search, especially after the GRC ordered him to perform another search, establishes the element of willfulness. However, case law establishes that a haphazard system of preserving and locating records does not amount to a presumption of willfulness. See Johnson, GRC 6746-09, Initial Decision (October 31, 2011), <https://njlaw.rutgers.edu/collections/oal/html/> (stating that "[n]egligence or heedlessness of the need to comply with the statutory requirements . . . is not enough to label the failure to produce as willful").

Here, unlike Jung, the record shows that Kazar did, in fact, search for the documents and was responsive to Verry. Rather, like Johnson, while the record suggests that Kazar's methods were apathetic and "haphazard," it does not prove that his passive search efforts were an intentional, deliberate, reckless, knowledgeable, or purposeful denial of complainant's rights under OPRA. See Johnson, GRC 6746-09, Initial Decision

(October 31, 2011), <https://njlaw.rutgers.edu/collections/oal/html/> (suggesting that there can be no presumption of willful misconduct arising simply from the failure of a public official to properly respond). Therefore, I **CONCLUDE** that based on the record before me, the custodian's actions do not rise to the level of "knowing and willful" conduct.

### Prevailing Party

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq., provides that a "prevailing party" shall be awarded reasonable attorney's fees. Attorney fees are permitted so as "to attract competent counsel in cases involving statutory rights . . . and to ensure justice for all citizens." Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989). OPRA cases support the need to "even the fight" where the citizen needs to "battle against a public entity vested with almost inexhaustible resources." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005) (quoting Courier News v. Hunterdon Cty. Prosecutor's Office, 378 N.J. Super. 538, 546 (App. Div. 2005)).

Pursuant to N.J.A.C. 5:105-2.13(a), a "prevailing party" shall be awarded attorney's fees when the OPRA "requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the Council, access was improperly denied and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties."

To this end, "custodians of government records must grant access to them or deny a request . . . no later than seven business days after receiving the request." N.J.S.A. 47:1A-5(i). Failure to respond shall be deemed a denial. Ibid.; see also Kohn v. Twp. of Livingston, GRC 08192-10, Initial Decision (March 10, 2011), <https://njlaw.rutgers.edu/collections/oal/html/>. However, even if the custodian fails to respond within the statutorily-mandated period, which results in a deemed "denial," if the custodian subsequently certifies that no records exist, the custodian's actions may not rise to the level of an "unlawful denial."

In Goode v. Little Ferry Board of Education, the OPRA requestor filed a Denial of Access Complaint on January 27, 2017, alleging that he submitted the OPRA request to

the custodian on January 11, 2017, and the custodian failed to reply. OAL Dkt. No. GRC 2017-20, Final Decision (February 14, 2017). On January 31, 2017, the custodian responded to the request after being prompted to do so by the filing of the complaint. The GRC determined that “the Custodian’s failure to respond in writing to the Complainant’s OPRA request . . . immediately results in a deemed denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).” Ibid. (citations omitted).

The GRC, however, explained that there was no “unlawful denial.” “[B]ecause the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.” Ibid.

Furthermore, if a requestor is in possession of the sought-after document prior to submitting an OPRA request, failing to fulfill the request is not a denial. In Bart, 403 N.J. Super. at 618, the court stated:

It is undisputed that Bart at all times had within his possession a copy of the cover letter at issue; indeed, he attached a copy to the complaint he filed with the Council. He could not have been denied access to the document, however, if he already had the document he sought. Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 34, 38, 884 A.2d 240 (App. Div. 2005). Requiring the Authority to duplicate another copy and send it to Bart does not, in our judgment, advance the purpose of OPRA, which is to ensure an informed citizenry. Times of Trenton, 183 N.J. at 535, 874 A.2d 1064. Further, even if we were to determine that the Authority should have done so, we cannot conclude that the failure constituted a knowing and willful violation, justifying the imposition of a civil penalty.

In the instant matter, Verry sent the Borough an OPRA request for subpoenas served between September 23, 2014, and February 4, 2015. Respondent acknowledged receipt of the request on February 9, 2015. Kazar initially responded to Verry in writing, on February 18, 2015—the sixth business day—seeking an extension until February 26, 2015. On March 2, 2015, a date after the expiration of the extended timeframe, Kazar replied, stating that the Borough did not maintain any of the responsive subpoenas.

Verry, however, asserted that he was in possession of a subpoena dated within the relevant time period. He filed a Denial of Access Complaint asserting that Kazar's search was insufficient. Verry explained that "in response to an unrelated OPRA request," he received an invoice from the Borough's Counsel which included a subpoena dated January 15, 2015.

On April 26, 2016, the GRC held that "Complainant provided competent, credible evidence refuting the Custodian's denial of access: at least one (1) subpoena falling within the time frame identified in the OPRA request existed." See Pet'r's Ex. K at 6. Consequently, the GRC ordered Kazar to "conduct a thorough search" and to "certify to the specific search undertaken." Ibid.

Moreover, the GRC found that "[a]lthough [Kazar] timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, [Kazar's] failure to respond timely in writing within the extended deadline results in a 'deemed' denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124." Id. at 5.

Here, Kazar certifies that the Borough did not have any responsive records in its possession. Although Verry proved that at least one record existed, Verry was in possession of said record prior to filing the OPRA request. Thus, Kazar did not unlawfully deny Verry a government record and Verry was not successful in obtaining government records after filing a complaint. See Bart, 403 N.J. Super. at 618 (stating, "He could not have been denied access to the document, however, if he already had the document he sought."). As such, in accordance with N.J.A.C. 5:105-2.13(a), Verry does not meet the criteria of a "prevailing party." Specifically, Verry is not an "OPRA requestor [who was] successful in obtaining access to government records after a denial of access complaint filed with the Council." N.J.A.C. 5:105-2.13(a). Moreover, no "access [was] improperly denied and [no] requested records were disclosed pursuant to a determination of the Council." Ibid.

Case law provides that a plaintiff could be a prevailing party even if he does not obtain all the relief sought in the lawsuit as explicitly provided for at N.J.A.C. 5:105-2.13.

See Mason v. City of Hoboken, 196 N.J. 51 (2008); see also N.J.A.C. 5:105-2.13. If a plaintiff's complaint acted as a catalyst that prompted the defendant to take action and correct an unlawful practice, the plaintiff is a prevailing party. See Mason, 196 N.J. 51.

In Mason, the Supreme Court considered whether attorney's fees were properly awarded where, after the filing of a lawsuit, the defendant voluntarily disclosed the records sought. The Court concluded that in OPRA matters public policy favored the adoption of the "catalyst theory." To prevail on a fee application,

requestors 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." Consistent with our case law, litigants seeking fees are required to make that showing.

[Mason, 196 N.J. at 76 (citation omitted).]

Case law further explains that under the "catalyst theory," "[t]o the extent plaintiff succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit, plaintiff has obtained prevailing party status entitling it to seek an attorney fee award." Lebbing v. Middlesex Cty. Clerk's Office, No. A-2738-10T3 (App. Div. May 4, 2012), <https://njlaw.rutgers.edu/collections/courts/> (where the court held that the plaintiff achieved some of the sought-after benefit because the County changed its copying-fee policy after the plaintiff filed a complaint) (citations omitted). Moreover, "the prevailing party is one that is able to point to a resolution of the dispute that changes the legal relationship between itself and the other party." Ibid. (citations omitted).

In the instant matter, Verry is not the prevailing party in accordance with the catalyst theory. Verry submitted an OPRA request and Kazar searched for the records. Subsequently, Verry filed a complaint and the GRC ordered Kazar to complete three actions that appear procedural in nature: (1) submit an SOI, (2) perform a search, and (3) certify his search efforts. See Complainant Ex. F; see also Complainant Ex. K; Carter v. Franklin Fire Dist. No. 2, No. A-4726-14T1 (App. Div. November 22, 2017),

<https://njlaw.rutgers.edu/collections/courts/>. Kazar repeated his initial search, and reiterated that the Borough was not in possession of the responsive documents.

Unlike Lebbing, where the plaintiff achieved some benefit (a change in the County's copying-fee policy), here, Kazar did not alter his procedures and the legal relationship between the Borough and Verry did not change after Verry filed a complaint. See Lebbing, No. A-2738-10T3 (App. Div. May 4, 2012), <https://njlaw.rutgers.edu/collections/courts/> (stating that "the prevailing party is one that is able to point to a resolution of the dispute that changes the legal relationship between itself and the other party"). Additionally, Verry did not receive relief or succeed on a significant issue in litigation, as the Borough did not uncover responsive documents or unlawfully deny Verry's OPRA request. See *ibid.* (stating, "if plaintiff succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit, plaintiff has obtained prevailing party status").

Furthermore, it is acknowledged that Kazar complied with the GRC's Interim Order and searched for the documents a second time. However, the GRC's Interim Order directing Kazar to complete actions that essentially amounted to procedural tasks does not make Verry a prevailing party. See *Carter v. Franklin Fire Dist. No. 2*, No. A-4726-14T1 (App. Div. November 22, 2017), <https://njlaw.rutgers.edu/collections/courts/> (stating, "[c]ontrary to Carter's contention, the GRC's interim order directing the custodian to respond to Carter's complaint with an SOI did not make him a 'prevailing party' under OPRA . . . or a 'catalyst' to the GRC awarding him any relief").

As such, there is an absence of a causal connection between Verry's complaint and the production of documents by the Borough. From the inception of the OPRA request, Kazar acknowledged his responsibility to produce the responsive subpoenas by requesting an extension. Subsequently, Kazar searched his files and made inquiries to the department heads. Although Kazar failed to respond to the request by the expiration date of the extension, he did, in fact, complete the request prior to Verry's filing of the Denial of Access Complaint. Thus, under these circumstances, it cannot be said that Verry's complaint was a catalyst to Kazar's search and compliance. Hence, there is no factual nexus between Verry bringing this action and a legal decision in his favor.

Therefore, applying the catalyst-theory principles, I **CONCLUDE** that Verry is not a prevailing party and is not entitled to attorney's fees.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, which by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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



December 13, 2019  
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency:

December 13, 2019 (emailed)

Date Mailed to Parties:

\_\_\_\_\_

/mel

**WITNESSES**

**For Petitioner:**

None

**For Respondent:**

Donald Kazar

**EXHIBITS**

**For Petitioner:**

- P-A February 4, 2015, OPRA request
- P-B February 18, 2015, request from Kazar to extend time to respond to various OPRA
- P-C March 2, 2015, denial from Kazar (handwritten on February 4, 2015 request)
- P-D March 2, 2015, denial from Kazar via email correspondence and subsequent emails
- P-E March 6, 2015, Denial of Access Complaint (excluding brief and exhibits)
- P-F March 12, 2015, GRC letter to Kazar with Custodian SOI requesting he fill it out
- P-G April 9, 2015, email attaching SOI
- P-H April 9, 2015, SOI
- P-I May 28, 2015, reply brief and attachments
- P-J October 9, 2015, letter regarding Kazar's retirement and all Verry matters from Walter Luers' office
- P-K April 24, 2016, Order and Findings by the GRC
- P-L Twenty-one subpoenas, with services dates ranging from March 2014 to September 2014
- P-M Certification by Kazar
- P-N May 24, 2016, Order and Findings by the GRC
- P-O October 14, 2016, Entry Appearance by Walter M. Luers, Esq.,



P-P February 2, 2017, Pre-Hearing Order submitted by the Office of Administrative Law

P-Q February 2, 2017, Notice of Hearing from Office of Administrative Law

P-R Letter and Subpoena to Kazar c/o Mr. Taddeo

**For Respondent:**

None



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**

**May 24, 2016 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-58

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 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 failed to comply fully with the Council’s April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.
2. The instant complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant’s possession. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).



Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of May, 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: May 26, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 24, 2016 Council Meeting**

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

**GRC Complaint No. 2015-58**

v.

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

**Records Relevant to Complaint:** Electronic copies of subpoenas served to: the Custodian; Maria Caemmerer; Arleen Lih; Randy Bahr; Mayor Tamas Ormosi; every elected councilmember for 2013, 2014 and 2015; Barbara Flaghety; Bill Boyle; Carol Rice; Donna Alessi; Donna Piazzolla; Ken Pine; every Borough of South Bound Brook (“Borough”) Public Works employee; Michael Allenovitch; Paul Kaminsky; Chief William C. King; and every Police Department employee from September 23, 2014, to February 4, 2015.

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

**Request Received by Custodian:** February 9, 2015

**Response Made by Custodian:** February 18, 2015

**GRC Complaint Received:** March 9, 2015

**Background**

**April 26, 2016 Council Meeting:**

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until February 26, 2015, the Custodian’s failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.
2. The Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Thus, the Custodian must conduct

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

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

a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

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 April 28, 2016, the Council distributed its Interim Order to all parties. On May 3, 2016, the Custodian sought an extension of time until May 11, 2016, to comply with the Council's Order, which the GRC granted on May 5, 2016.

On May 11, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that he again searched his files and did not locate any responsive subpoenas.<sup>5</sup> The Custodian affirmed that, upon receipt of the request, he verbally inquired with several officials about the existence of subpoenas. The Custodian certified that he received no responses.

The Custodian also noted that some of the officials were no longer with the agency; he would have to send letters to those individuals to follow up with them. The Custodian affirmed that, notwithstanding the foregoing, the Borough maintains no other responsive records.

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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.

<sup>5</sup> The Custodian attached a number of subpoenas to his compliance submission; however, none were responsive to the Complainant's OPRA request.

## Analysis

### Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to conduct a more thorough search for responsive subpoenas and certify whether he was able to locate any additional responsive records. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 28, 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 May 5, 2016.

On May 3, 2016, the Custodian sought an extension of time until May 11, 2016, which the GRC granted. On May 11, 2016, the last day of the extended time frame, the Custodian submitted certified confirmation of compliance to the Executive Director. Therein, he certified that he performed the search and that he was unable to locate any additional responsive records.

The GRC previously noted that the Custodian failed to provide adequate details supporting that he conducted a thorough search prior to responding that no records existed. Further, the Complainant provided competent, credible evidence to refute the certification. The Council thus required the Custodian to conduct a thorough search and disclose responsive records.

However, a review of the Custodian's certification does not support that he conducted a more thorough search. Rather, the certification supports that he conducted a less thorough search. The Custodian still only searched his "files in [his] office," as he initially did upon receipt of the request. Further, the Custodian certified that he previously contacted certain officials verbally but then affirmed that he did not contact them in connection with the Council's Order. Having contacted the officials verbally in the first place, the Custodian could not produce any supporting documentation as to how they responded to him (other than that he received no response). Moreover, the Custodian simply certified that, were he to contact some of them, he would have to do so by letter. The Custodian provided no indication as to whether he contacted those same officials who still worked for the Borough. For these reasons, the GRC is not satisfied that the Custodian conducted a more thorough search in accordance with the Council's Order. Further, the certification does not adequately dispel the notion that the Custodian searched outside the four corners of his own office.

Therefore, the Custodian failed to comply fully with the Council's April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.

## **Contested Facts**

The Administrative Procedures Act provides that the OAL “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). In the past, when contested facts have arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See Hyman v. City of Jersey City (Hudson)*, GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); *Mayer v. Borough of Tinton Falls (Monmouth)*, GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); *Latz v. Twp. of Barnegat (Ocean)*, GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In this matter, the Council found that the Custodian might have unlawfully denied access to additional responsive subpoenas beyond the one the Complainant already possessed. In order to do this, the Council required that the Custodian perform a more thorough search of the Borough’s records and certify to that search. As noted above, the Custodian timely provided compliance in which he certified to his secondary search. However, the Custodian’s certification further called into question whether he adequately searched for all responsive records. Specifically, the Custodian certified that he essentially conducted a less thorough search than he initially conducted upon receipt of the Complainant’s OPRA request. The Custodian’s failure to comply fully with the Council’s Order and his failure to perform and certify to a more thorough search has made it impossible for the GRC to determine whether the Custodian unlawfully denied access to any additional records. It is thus apparent that a fact-finding hearing would provide the most efficient and effective method for developing the record.

Accordingly, the instant complaint should be referred to OAL for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant’s possession. Further, and if necessary, the OAL should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, OAL should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees. *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006); *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008).

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council’s April 26, 2016 Interim Order. The Custodian responded in the extended time frame by certifying that he conducted a search and did not locate any additional responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to prove that, as ordered by the Council, he performed a search more thorough than his initial attempt.

2. The instant complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) whether the Custodian performed an adequate search to locate all responsive records; and 2) whether the Custodian properly certified that the Borough, in its entirety, did not maintain any records beyond the one already in the Complainant's possession. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian and/or any other Borough official with knowledge of this request knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e). Finally, Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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

May 17, 2016





State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PO Box 819  
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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**INTERIM ORDER**

**April 26, 2016 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-58

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a unanimous vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until February 26, 2015, the Custodian’s failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.
2. The Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Thus, the Custodian must conduct a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.
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>**

<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



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 26<sup>th</sup> Day of April, 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: April 28, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

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

**GRC Complaint No. 2015-58**

v.

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

**Records Relevant to Complaint:** Electronic copies of subpoenas served to: the Custodian; Maria Caemmerer; Arleen Lih; Randy Bahr; Mayor Tamas Ormosi; every elected councilmember for 2013, 2014 and 2015; Barbara Flaghety; Bill Boyle; Carol Rice; Donna Alessi; Donna Piazzolla; Ken Pine; every Borough of South Bound Brook (“Borough”) Public Works employee; Michael Allenovitch; Paul Kaminsky; Chief William C. King; and every Police Department employee from September 23, 2014, to February 4, 2015.

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

**Request Received by Custodian:** February 9, 2015

**Response Made by Custodian:** February 18, 2015

**GRC Complaint Received:** March 9, 2015

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

**Request and Response:**

On February 4, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 7, 2015, a Saturday, the Complainant asked the Custodian to confirm receipt of the OPRA request because he received “undeliverable” notices in several other e-mails.

On February 18, 2015, the sixth (6<sup>th</sup>) business day after receipt of the OPRA request,<sup>4</sup> the Custodian responded in writing, seeking additional time until February 26, 2015, to respond to the Complainant’s OPRA request. On March 2, 2015, two (2) business days after the last day of the extension, the Custodian responded in writing, first noting that neither Ms. Caemmerer nor Ms. Alessi was employed during the relevant time frame. The Custodian stated that, in

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<sup>1</sup> Represented by John A. Birmingham, 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.

<sup>4</sup> President’s Day, a federal holiday, was observed on February 16, 2015.

accordance with the Borough's process, he was supposed to receive any submitted subpoenas. To that end, he received no subpoenas. The Custodian also noted that the subpoenas might be confidential in nature.

On March 3, 2015, the Complainant sought clarification of the Custodian's response. The Complainant asserted that the Custodian's statement that he was given no subpoenas is unclear and could mean that records exist but the Custodian was unable to obtain them, or no records exist. On the same day, the Custodian responded via e-mail, stating that no record exist "in [the Custodian's] office."

#### Denial of Access Complaint:

On March 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian failed to respond timely to his OPRA request. The Complainant acknowledged that he resent his request to the Custodian on February 7, 2015, based on an error with his initial e-mail; however, the Custodian confirmed receipt of the OPRA request on February 9, 2015. The Complainant asserted that the last day for the Custodian to respond was February 17, 2015, and that he did not respond to the Custodian's request for an extension of time because it was one day late.

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 asserted that notwithstanding the Custodian's request for an extension of time, he still failed to provide a response until three (3) calendar days after the expiration of the extension, or on March 2, 2015. The Complainant also argued that the Custodian's denial of access appeared to be unlawful because he only stated that no records were in his possession.

The Complainant stated that given the Custodian's twenty-four (24) 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 responsive recordings; 3) determine that the Custodian knowingly and willfully violated OPRA, thus 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 April 9, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 18, 2015.<sup>5</sup> The Custodian certified that his search included “review[ing] records.” The Custodian certified that he responded in writing on March 3, 2015,<sup>6</sup> advising that no records existed. The Custodian affirmed that he did not maintain any records responsive to the Complainant’s OPRA request.

### Additional Submissions:

On May 29, 2015, the Complainant’s Counsel submitted a letter brief, arguing that the Custodian provided vague responses regarding the non-existence of responsive subpoenas to deceive the Complainant. Specifically, Counsel asserted that the Custodian’s responses only indicated that he did not personally possess any responsive records. Counsel contended that the Custodian also used a vague response in the SOI to avoid presenting a willfully false statement should the Complainant find evidence of responsive subpoenas. Counsel stated that, in response to an unrelated OPRA request, the Complainant uncovered such evidence in an invoice from Custodian’s Counsel containing a January 15, 2015 entry “Motion to Quash subpoena.”

Counsel contended that the entry proved that the Borough received at least one (1) subpoena during the time frame identified in the OPRA request. In fact, Counsel attached a copy of the subpoena in question, which was served on the Custodian by Walter M. Luers, Esq., on December 29, 2014, in regard to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-323 (OAL Docket No. 09328-2013S). Counsel contended that this conflicting fact raises the question of how many subpoenas the Custodian failed to or refused to disclose. Counsel further contended that the Custodian could not be trusted to disclose responsive records and the instant complaint is evidence of the knowing and willful nature of his repeated OPRA violations. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114, *et seq.* (Interim Order dated July, 31, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated March 25, 2014); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-311 (Interim Order dated November 18, 2014).

## 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

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<sup>5</sup> This date appears to be the date the Custodian initially responded and not the date he actually received the OPRA request.

<sup>6</sup> This date is one day after the Custodian initially responded, although he did again respond on March 3, 2015, reiterating that no records existed.

N.J.S.A. 47:1A-5(g).<sup>7</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).

Additionally, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

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

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007 OPRA request, 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 [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant 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 [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i), resulting in a "deemed" denial of access to the records.

Id.

As a threshold issue, the Complainant contended that, initially, the Custodian did not timely respond to his OPRA request. However, the Complainant noted in the Denial of Access Complaint that the Custodian acknowledged receipt of the request on February 9, 2015. Further, the evidence supports that the Custodian initially responded to the Complainant in writing on February 18, 2015, the sixth (6<sup>th</sup>) business day after receipt of the request, taking into account the Borough's closure on President's Day. For this reason, the Custodian's initial response was timely.

However, although the evidence of record indicates that the Custodian initially responded to the Complainant's OPRA request appropriately by seeking an extension until February 26,

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<sup>7</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.

2015, to respond, he did not actually respond until March 2, 2015. The response fell two (2) days beyond the expiration of the extended time frame. In accordance with N.J.S.A. 47:1A-5(i), the request was “deemed” denied at that time.

Therefore, although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until February 26, 2015, the Custodian’s failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

### **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.

As a threshold issue, there is no dispute that the Complainant’s OPRA request is valid under OPRA. In fact, the GRC previously addressed similar OPRA requests in Verry v. Borough of South Bound Brook (Somerset), 2011-128, *et seq.* (Interim Order dated July 31, 2012).

In Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012), the custodian initially denied access to the subject OPRA request, asserting that the Franklin Fire District (“FFD”) did not maintain responsive financial disclosure statement (“FDS forms”) and certified to this in the SOI. However, the complainant subsequently provided competent, credible evidence that the FFD did maintain FDS forms. The Council distinguished that case from Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), and held that the custodian unlawfully denied access to responsive records. In coming to this conclusion, the Council reasoned that “the Complainant provided competent, credible evidence refuting the Custodian’s denial of access: an e-mail from Ms. Nelson to the Custodian dated January 25, 2011 forwarding FDS forms from 2007.” Id. at 8.

In the matter currently before the Council, the Custodian responded to the Complainant stating “[no] record given to the clerk” and subsequently “[n]o records exist in [the Custodian’s] office for subpoenas.” In the SOI, the Custodian certified that the Borough did not maintain any records responsive to the subject OPRA request. However, there was a significant lack of detail or supporting documentation in the SOI regarding the Custodian’s search other than “reviewed records.” Such a description provides no insight into whether the Custodian contacted anyone else in the Borough or Custodian’s Counsel prior to responding to either the subject OPRA request or the instant complaint. On May 29, 2015, the Complainant’s Counsel provided competent, credible evidence to the contrary. Specifically, the Borough disclosed an invoice annotating that the Custodian’s Counsel drafted a motion to quash a subpoena in early January, 2015. Additionally, the Complainant was in possession of at least one (1) responsive subpoena.<sup>8</sup>

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<sup>8</sup> The GRC notes that there is no evidence in the record to indicate how the Complainant came into possession of same, except that same referred to Verry, GRC 2011-323. However, it is likely that the Complainant, or his legal Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-58 – Findings and Recommendations of the Executive Director

The facts of this complaint are similar to the facts of Carter. Specifically, the Complainant provided competent, credible evidence refuting the Custodian's denial of access: at least one (1) subpoena falling within the time frame identified in the OPRA request existed. Additionally, it is possible that the January 15, 2015 invoice entry references another subpoena. Thus, the GRC is not satisfied that the Custodian bore his burden of proving a lawful denial of access.

Accordingly, the Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter, GRC 2011-76. Thus, the Custodian must conduct a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

### **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. Although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until February 26, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.
2. The Custodian may have unlawfully denied access to responsive subpoenas that were in the possession of Borough at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Thus, the Custodian must conduct a thorough search and disclose any additional subpoenas to the Complainant via his preferred method of delivery. Additionally, the Custodian must certify to the specific search undertaken to locate all responsive records and certify whether he was unable to locate any additional records. However, the Council should decline to order

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representative in Verry, was already in possession of the subpoena prior to submitting the subject OPRA request. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008).

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disclosure of the December 29, 2014 subpoena because the Complainant is already in possession of it.

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>9</sup> to the Executive Director.<sup>10</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

March 22, 2016<sup>11</sup>

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<sup>9</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>10</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.

<sup>11</sup> This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.