



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

June 26, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-57, 2015-60 &
2015-70

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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 it dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the GRC to address Complainant’s Counsel fee application in accordance with N.J.A.C. 5:105-2.13. 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 26th Day of June, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2015-57
2015-60, & 2015-70**

v.

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

Records Relevant to Complaint:

June 25, 2014 OPRA request: Electronic copies of all audio recordings for the Borough of South Bound Brook's ("Borough") meetings held in July, August, and September 2013.³

January 14, 2015 OPRA request: Electronic copy (via Dropbox) of the audio recording of the Borough's January 1, 2015 Reorganization agenda and meeting.⁴

February 22, 2015 OPRA request: Electronic copy (via Dropbox) of the audio recording of the Borough's February 2015 agenda and meeting.⁵

Custodian of Record: Donald E. Kazar

Request Received by Custodian: June 26, 2014; January 15, 2015; February 24, 2015

Response Made by Custodian: July 1, 2014; January 23, 2015; March 3, 2015

GRC Complaint Received: March 9, 2015; March 12, 2015

Background

January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Council considered the January 23, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Walter M. Luers, Esq., of Offices of Walter M. Luers, (Clinton, NJ) represented the Complainant at the Office of Administrative Law and thereafter as co-counsel. He entered his appearance May 19, 2017.

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

³ This OPRA request is the subject of GRC Complaint No. 2015-57.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-60. The Complainant sought additional records that are not at issue here.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-70. The Complainant sought additional records that are not at issue here.

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

1. The Council should accept the Honorable Sarah G. Crowley's, Administrative Law Judge, Initial Decision concluding that "the Borough made good faith efforts" to produce the records at issue in GRC 2015-57 in the medium requested and "neither [the Custodian] or the Borough knowingly and willfully violated OPRA [or] unreasonably denied access under the totality of the circumstances." Further, the Council should accept the Administrative Law Judge's order that GRC 2015-57 be "**DISMISSED.**"
2. With respect to GRC 2015-60 and 2015-70, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee in regard to GRC 2015-60 and 2015-70. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On February 1, 2018, the Council distributed its Interim Order to all parties. On March 5, 2018, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application. On the same day, Complainant's Counsel sought an extension of the fee agreement time frame, which the GRC granted through April 2, 2018.

On, April 4, 2018, having not received a response from the parties, the GRC renewed the fee application time frame. On May 2, 2018, Complainant's Counsel submitted a fee application. On May 18, 2018, Custodian's Counsel sought an extension of time to submit objections to the fee application, which the GRC granted through May 23, 2018. On May 23, 2018, Custodian's Counsel sought another extension until May 25, 2018 based on renewed settlement discussions. On the same day, the GRC granted the requested extension.

On May 25, 2018, Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved. Counsel thus stated that the instant consolidated complaints are withdrawn.

Analysis

Prevailing Party Attorney's Fees

At its January 30, 2018 meeting, the Council determined that, regarding GRC 2015-60 and GRC 2015-70, the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On February 1, 2018, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on March 2, 2018. Following multiple extensions and the submission of a fee application, the parties continued to work towards reaching a fee agreement. On May 25, 2018, the fee issue was ultimately settled; Complainant's Counsel wrote an e-mail the GRC stating that the fees were settled and that the consolidated complaint could be withdrawn. Custodian's Counsel was copied on that e-mail.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the GRC to address Complainant's Counsel fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that it dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the GRC to address Complainant's Counsel fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

June 19, 2018



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

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-57, 2015-60
and 2015-70

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 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 Council should accept the Honorable Sarah G. Crowley’s, Administrative Law Judge, Initial Decision concluding that “the Borough made good faith efforts” to produce the records at issue in GRC 2015-57 in the medium requested and “neither [the Custodian] or the Borough knowingly and willfully violated OPRA [or] unreasonably denied access under the totality of the circumstances.” Further, the Council should accept the Administrative Law Judge’s order that GRC 2015-57 be “**DISMISSED.**”
2. With respect to GRC 2015-60 and 2015-70, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee in regard to GRC 2015-60 and 2015-70. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**



Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2015-57
2015-60, & 2015- 70**

v.

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

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Request Received by Custodian: June 26, 2014; January 15, 2015; February 24, 2015

Response Made by Custodian: July 1, 2014; January 23, 2015; March 3, 2015

GRC Complaint Received: March 9, 2015; March 12, 2015

Background

July 26, 2016 Council Meeting:

At its July 26, 2016 public meeting, the Council considered the June 21, 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 amended findings and recommendations. The Council, therefore, found that:

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Walter M. Luers, Esq., of Offices of Walter M. Luers, (Clinton, NJ) represented the Complainant at the Office of Administrative Law. He entered his appearance May 19, 2017.

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

³ This OPRA request is the subject of GRC Complaint No. 2015-57.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-60. The Complainant sought additional records that are not at issue here.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-70. The Complainant sought additional records that are not at issue here.

1. The Custodian did not comply with the Council’s May 24, 2016 Interim Order. Initially, the Custodian did not seek an extension of time until one (1) business day after the expiration of the time frame to comply. Further, the Custodian failed to perform reasonable due diligence to duplicate the recordings at issue in GRC 2015-57. Thus, the record is still unclear as to whether the Custodian exhausted all duplication options prior to offering inspection of the recordings.

2. This complaint should be referred to Office of Administrative Law for a fact-finding hearing to determine whether the Custodian performed due diligence to duplicate the recordings at issue in GRC 2015-57 prior to offering inspection. *See Gordon v. City of Orange (Essex)*, GRC Complaint No. 2011-256 (Interim Order dated November 18, 2014). This due diligence determination should include: (1) whether the Custodian could have reached out to multiple vendors to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file; and (2) whether he should have contacted the Borough’s Information Technology vendor to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances. Finally, the Office of Administrative Law shall determine whether the Complainant is a prevailing party with respect to GRC 2015-57.

3. Regarding GRC 2015-60 and 2015-70, the GRC finds that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees because the Custodian disclosed responsive records at issue in those complaints to the Complainant following the filing of same. For administrative ease, the Office of Administrative Law should determine the amount of the award of reasonable attorney’s fees based on the relief ultimately achieved. *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). However, based on the New Jersey Supreme Court’s decision in *New Jerseyans for a Death Penalty Moratorium v. NJ Dep’t of Corrections*, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in *Wolosky v. Twp. of Sparta (Sussex)*, GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Procedural History:

On July 27, 2016, the Council distributed its Interim Order to all parties. On October 14, 2016, the Government Records Council (“GRC”) transmitted the consolidated complaint to the Office of Administrative Law (“OAL”). On December 21, 2017, the Honorable Sarah G. Crowley, Administrative Law Judge (“ALJ”), issued an Initial Decision in this matter. The ALJ’s Initial Decision, set forth as “Exhibit A,” determined that “I **FIND** as **FACT** that the Borough made good faith efforts to try to reproduce the tapes, offered several alternatives and provided the minutes

from the meetings.” Id. at 4. Further, the ALJ determined that “I **CONCLUDE** that neither [the Custodian] or the Borough knowingly and willfully violated OPRA and not unreasonably denied access under the totality of the circumstances.” Id. The ALJ therefore ordered the following:

I **ORDER** that the GRC complaint [No. 2015-57] against [the Borough] is **DISMISSED**.

Id. at 5.

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

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).

Here, the ALJ fairly summarized the testimony and evidence, explaining how she weighed the proofs before her and explaining 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.

Therefore, the Council should accept the ALJ's Initial Decision concluding that "the Borough made good faith efforts" to produce the records at issue in GRC 2015-57 in the medium requested and "neither [the Custodian] or the Borough knowingly and willfully violated OPRA [or] unreasonably denied access under the totality of the circumstances." Further, the Council should accept the ALJ's order that GRC 2015-57 be "**DISMISSED.**"

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (*quoting* Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (*quoting* Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

In the instant matter, the Council has already determined in its July 26, 2016 Interim Order that the Complainant was a prevailing party in relation to GRC 2015-60 and GRC 2015-70. As part of its referral, the GRC requested that the OAL determine the amount of the award in relation to these parts of the consolidated complaint. The GRC also requested that the OAL decide the fee issue with respect to 2015-57, if applicable. The ALJ’s Initial Decision ordered that 2015-57 be dismissed. Thus, it follows that the Complainant is not a prevailing party for purposes of OPRA with respect to GRC 2015-57. This is because the Complainant did not achieve the desired result and due to the absence of a casual nexus.

However, the Complainant is still a prevailing party for purposes of GRC 2015-60 and 2015-70. The GRC notes that the ALJ did not address the fee issue as part of her Initial Decision, notwithstanding the GRC request to do so. While this may have previously required the GRC to return this consolidated complaint to the OAL, recent procedural changes in its adjudication process support a different outcome. Specifically, during the pendency of this consolidated complaint at the OAL, the GRC instituted a new process of providing the parties a chance to settle prevailing party fee awards. For this reason, the GRC finds it reasonable to apply its new procedural policy to this consolidated complaint and allow the parties a chance to settle the fee issue.

Accordingly, with respect to GRC 2015-60 and 2015-70, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee in regard to GRC 2015-60 and 2015-70. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Council should accept the Honorable Sarah G. Crowley’s, Administrative Law Judge, Initial Decision concluding that “the Borough made good faith efforts” to produce the records at issue in GRC 2015-57 in the medium requested and “neither [the Custodian] or the Borough knowingly and willfully violated OPRA [or] unreasonably denied access under the totality of the circumstances.” Further, the Council should accept the Administrative Law Judge’s order that GRC 2015-57 be “**DISMISSED.**”
2. With respect to GRC 2015-60 and 2015-70, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee in regard to GRC 2015-60 and 2015-70. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

January 23, 2018



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 15659-2016
AGENCY DKT. NOS. 2015-57; 2015-60;
2015-70

ROBERT A. VERRY,

Petitioner,

v.

BOROUGH OF BOUND BROOK

Respondent.

Walter M. Luers, Esq., for petitioner (Walter M. Luers, LLC, attorneys)

Francesco Taddeo, Esq., for respondent (Francesco Taddeo, LLC, attorneys)

Record Closed: November 6, 2017

Decided: December 21, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

On June 25, 2014, Robert A. Verry (petitioner) filed an Open Public Records Act (OPRA) request with the Borough of South Bound Brook (Bound Brook) seeking audio records of all Borough Council meetings held in July, August, and September 2013. The Bound Brook Municipal Clerk, Donald Kazar responded that the requested tapes could not be duplicated due to the outdated technology which they were initially recorded. The

petitioner was advised that he could come in and listen to the tapes and the meeting minutes that were provided. The Government Records Council Complaint followed alleging that the failure to find a way to duplicate the tapes amounted to a knowing and willful violation of OPRA and an unreasonable denial under the circumstances.

PROCEDURAL HISTORY

On October 14, 2016, the GRC transmitted the complaint to the Office of Administrative Law (OAL) as a contested case, the GRC was unable to determine whether or not there was a denial of access to the requested records. The matter was filed as a contested case at the OAL on October 17, 2016. A hearing was held on October 23, 2017, and the record closed after written submissions were filed by the parties on November 6, 2017.

STATEMENT OF FACTS

The essential facts in this case are not disputed. On June 25, 2014, petitioner submitted an OPRA request to Bound Brook seeking "Audio recordings of all Borough Council meetings held in July, August and September 2013." On July 1, 2013, the Borough Clerk responded to the petitioner advising that the meetings were on cassette tapes and have to be sent out to be copied, as they did not have the equipment to be copied in house. The Clerk also advised of the fee for the tapes to be reproduced outside of the borough was approximately twenty-five dollars per tape. The Borough requested advise on how the petitioner would like to proceed. When the Borough contacted the company to arrange for the copies, they found out the company was no longer in business. They could not find another company to reproduce them and they suggested that the petitioner to come in and listen to the tapes, or sign them out to listen to them. The complaint followed alleging a bad faith refusal to provide the requested information.

The foregoing facts are not disputed and are **FOUND** as **FACT**.

Donald Kazar

Donald Kazar was the only witness called by the respondent. He was the Bound Brook Borough Clerk at the time the cause of action arose. He testified that he had received the request from Mr. Verry. He testified that the tapes were on four track cassettes and they only knew only one company which was able to reproduce the requested tapes. He advised the petitioner of the cost of reproduction and waited for confirmation that he wanted them done at the quoted price. He eventually reached out to the company, and found out that they had gone out of business and he did not know of any other company that could reproduce the tapes. He testified that he reached out to a few vendors in an effort to find someone capable of reproducing the tapes. He advised Mr. Verry of this and asked if he would like to come in and listen to the tapes, but was unsuccessful in locating anyone. Mr. Kazar testified that he advised the petitioner that he could sign the tapes out and take them with the tape machine to listen to on his own time, or come in and listen to them. The minutes of all the meetings were provided. Mr. Verry never signed them out or came in to listen to the tapes.

FINDING OF FACTS

The resolution of this matter, requires that I make a credibility determination with regard to some of the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. Super. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions

which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. Super. 514, 521–22 (1950); see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that the witness for the Borough was sincere and credible. I **FIND** as **FACT** that he contacted the company that he had used in the past to reproduce the tapes and they had gone out of business. I further **FIND** as **FACT** that he reached out to other vendors in an effort to find someone else to reproduce the tapes. I further **FIND** as **FACT** that he offered to let the petitioner take the tapes and the tape recorder home or come in to listen to them. I **FIND** as **FACT** that the Borough made good faith efforts to try to reproduce the tapes, offered several alternatives and provided the minutes from the meetings.

Therefore, I **FIND** that there has been no evidence presented to establish that Mr. Kazar or the Borough knowingly and willfully violated OPRA and unreasonably denied access to the e-mail addresses.

CONCLUSIONS OF LAW

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq., known as “OPRA,” declares the public policy of the State of New Jersey to be that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions. N.J.S.A. 47:1A-5 requires that the custodian shall indicate the specific basis upon which he is unable to comply.

Therefore, I **CONCLUDE** that neither Mr. Kazar or the Borough knowingly and willfully violated OPRA and not unreasonably denied access under the totality of the circumstances.

DECISION AND ORDER

Based on the foregoing, I hereby **FIND** that Bound Brook did not knowingly and willfully violated OPRA and not unreasonably denied access. Based on this finding, I **ORDER** that the GRC complaint against Bound Brook is **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, 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 21, 2017

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

December 21, 2017 (emailed)

Date Mailed to Parties:

SGC/mel

APPENDIX

WITNESSES:

For Petitioner:

none

For Respondent:

Donald Kazar

EXHIBITS:

For Petitioner:

- P-1 New Jersey Government Records Counsel Denial of Access Complaint for Verry for 2015-57
- P-2 Custodian Statement of Information for Verry for 2015-57
- P-3 New Jersey Government Records Counsel Denial of Access Complaint for Verry for 2015-60
- P-4 Custodian Statement of Information for Verry for 2015-60
- P-5 New Jersey Government Records Counsel Denial of Access Complaint for Verry for 2015-70
- P-6 Custodian Statement of Information for Verry for 2015-70
- P-7 Certification of Kazar
- P-8 Email from Verry to Kazar dated June 20, 2016

For Respondent:

- R-1 E-mail from Caruso to Skudera with attachments



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

July 26, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2015-57, 2015-60 and
2015-70

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 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 did not comply with the Council’s May 24, 2016 Interim Order. Initially, the Custodian did not seek an extension of time until one (1) business day after the expiration of the time frame to comply. Further, the Custodian failed to perform reasonable due diligence to duplicate the recordings at issue in GRC 2015-57. Thus, the record is still unclear as to whether the Custodian exhausted all duplication options prior to offering inspection of the recordings.
2. This complaint should be referred to Office of Administrative Law for a fact-finding hearing to determine whether the Custodian performed due diligence to duplicate the recordings at issue in GRC 2015-57 prior to offering inspection. *See Gordon v. City of Orange (Essex)*, GRC Complaint No. 2011-256 (Interim Order dated November 18, 2014). This due diligence determination should include: (1) whether the Custodian could have reached out to multiple vendors to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file; and (2) whether he should have contacted the Borough’s Information Technology vendor to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances. Finally, the Office of Administrative Law shall determine whether the Complainant is a prevailing party with respect to GRC 2015-57.
3. Regarding GRC 2015-60 and 2015-70, the GRC finds that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees because the Custodian disclosed responsive records at issue in those complaints to the Complainant following the filing of same. For administrative ease, the Office of



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

Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 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: July 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2015-57
2015-60, & 2015-70**

v.

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

Records Relevant to Complaint:

June 25, 2014 OPRA request: Electronic copies of all audio recordings for the Borough of South Bound Brook's ("Borough") meetings held in July, August, and September 2013.³

January 14, 2015 OPRA request: Electronic copy (via Dropbox) of the audio recording of the Borough's January 1, 2015 Reorganization agenda and meeting.⁴

February 22, 2015 OPRA request: Electronic copy (via Dropbox) of the audio recording of the Borough's February 2015 agenda and meeting.⁵

Custodian of Record: Donald E. Kazar

Request Received by Custodian: June 26, 2014; January 15, 2015; February 24, 2015

Response Made by Custodian: July 1, 2014; January 23, 2015; March 3, 2015

GRC Complaint Received: March 9, 2015; March 12, 2015

Background

May 24, 2016 Council Meeting:

At its May 24, 2016 public meeting, the Council considered the May 17, 2016 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, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

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

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

³ This OPRA request is the subject of GRC Complaint No. 2015-57.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-60. The Complainant sought additional records that are not at issue here.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-70. The Complainant sought additional records that are not at issue here.

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's June 25, 2014, OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian responded in writing to the Complainant's January 14, and February 22, 2015 OPRA requests, said responses were insufficient pursuant to N.J.S.A. 47:1A-5(i) and Turner, III v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011), because the Custodian failed to provide a date certain by which he would respond to the Complainant. *See also* Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008). However, the GRC declines to order disclosure of the responsive records because the Custodian provided same to the Complainant via Dropbox on March 25, 2015 and again on March 30, 2015.
3. The Custodian violated N.J.S.A. 47:1A-5(d) by not providing to the Complainant the recordings responsive to his June 25, 2014 OPRA request in the medium requested. Specifically, the subject OPRA request sought copies of audio recordings and the evidence of record does not suggest that the Custodian did his due diligence to duplicate the records prior to offering inspection: in the instant matter, on-site inspection is not a reasonable substitute for actual copies of the requested tape recordings. *See* Mangeri v. Monroe Twp. Bd. of Fire Comm'r of Dist. No. 1 (Middlesex), GRC Complaint No. 2010-70 (Interim Order dated January 25, 2011). Thus, the Custodian may have unlawfully denied the Complainant access to the recordings. N.J.S.A. 47:1A-6. The Custodian shall either contact all available vendors and/or contact the Borough's IT vendor to determine whether duplication is possible. Should the Custodian obtain a quote, he must provide same to the Complainant prior to incurring the cost of duplication. *See* O'Shea, GRC 2007-192. Should the Custodian not find any other method to duplicate the tapes (either in their current state or otherwise), he must certify to this fact.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷ If applicable, the Custodian shall make the amount of the charge available to the Custodian within three (3) business days from receipt**

⁶ "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."

⁷ 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.

of the Council's Interim Order and provide certified confirmation within the five (5) business days. Thereafter, if the Complainant accepts payment, the Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon remittance of the charge within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director at that time. If the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director at that time.

5. 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.
6. 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 May 26, 2016, the Council distributed its Interim Order to all parties. The final day to comply with the Council's Order was June 3, 2016. On June 6, 2016, the Custodian sought an extension of time until June 10, 2016, to comply with the Council's Order. On June 8, 2016, the GRC granted said extension but noted that the Custodian had already missed the Council's deadline.

On June 10, 2016, the Custodian responded to the Council's Interim Order. Therein, the Custodian reiterated that he did not speak with the Borough's IT vendor regarding GRC Complaint No. 2015-57 because the Complainant's OPRA request involved a Lanier recording machine, not a computer issue. The Custodian certified that he attached a memorandum from Tape Reporters, advising that they no longer have the necessary equipment to "transfer a cassette onto a CD." The Custodian reiterated that he repeatedly offered the Complainant an opportunity to visit the Borough offices and listen to the tapes onsite. Further, the Custodian averred that the Complainant could sign out the recorder and tapes to review offsite at his leisure as long as he agreed to return the equipment in a few days.

On June 20, 2016, the Complainant e-mailed the Custodian, contending that he could not understand why the Custodian could not duplicate the recordings at issue in GRC 2015-57. Further, the Complainant expressed concern that the Custodian certified he that never contacted the Borough's IT vendor to produce electronic copies of the records.

On July 17, 2016, the Complainant's Counsel submitted a letter brief to the GRC. Therein, Counsel argued that the Custodian's certification is another example of his obstructionist stance to OPRA. Counsel stated that the Custodian did not produce the recordings

at issue in GRC 2015-57 and did not respond to the Complainant's June 20, 2016 e-mail. Counsel noted that the Complainant has submitted several requests to the newly designated Borough custodian without issue, which further proves the Custodian's allegedly obstructionist actions. Counsel ultimately argued that this complaint should be referred to the Office Administrative Law ("OAL") because of contested facts. N.J.A.C. 1:1-2.1; N.J.A.C. 1:1-3.2(a). Counsel asserted that such a ruling would be consistent with the Council's past holding in Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-141 (Interim Order dated June 26, 2012).

Analysis

Compliance

At its May 24, 2016 meeting, the Council ordered the Custodian to contact "all available vendors and/or the Borough's IT vendor" to determine whether he could duplicate the records at issue in GRC 2015-57. The Council ordered the Custodian to provide the Complainant a quote for duplication, if applicable. Further, the Council ordered the Custodian, if he could not duplicate the tapes "either in their current state or otherwise," to certify to that fact. Moreover, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 26, 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 June 3, 2016.

On June 6, 2016, one (1) business day after the expiration of the compliance time frame, the Custodian sought an extension of time until June 10, 2016, which the GRC granted. On June 10, 2016, the Custodian submitted a certification, which essentially rehashed the Borough's position in GRC 2015-57. The Custodian added a memorandum from Tape Reporters, wherein the vendor advised that they no longer had the ability to "transfer a cassette onto a CD." The Custodian certified that the Complainant could either listen to the record onsite at the Borough offices or sign out the Lanier recorder for offsite review.

Upon review, the GRC is not satisfied that the Custodian adequately responded to the Interim Order. The Custodian failed to provide detailed facts necessary to prove that he did his due diligence to duplicate the records prior to offering inspection: his certification added little to the Borough's position regarding GRC 2015-57. Specifically, the evidence of record supports that, between July and August 2014, the Custodian twice advised the Complainant that he would contact the Borough's IT vendor to inquire whether he could hook the Lanier recorder to his computer. However, in April 2016 and as part of his compliance, the Custodian asserted that he did not contact the Borough's IT vendor because "this matter did not involve a computer." Additionally, Tape Reporters' memorandum only confirms that they cannot duplicate tape to CD. The Custodian does not provide evidence that Tape Reporters cannot duplicate tape to tape, which represents the "current state" of the records. The Custodian also failed to explain whether he attempted to locate or contact any other vendors to duplicate the tapes.

Accordingly, the Custodian did not comply with the Council's May 24, 2016 Interim Order. Initially, the Custodian did not seek an extension of time until one (1) business day after the expiration of the time frame to comply. Moreover, the Custodian failed to perform reasonable due diligence to duplicate the recordings at issue in GRC 2015-57. Thus, the record is still unclear as to whether the Custodian exhausted all duplication options prior to offering inspection of the recordings.

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 the matter currently before the Council, the Custodian's failure to do his due diligence to duplicate the recordings at issue in GRC 2015-57, as well as his failure to comply sufficiently with the Council's Interim Order created contested facts in the instant complaint. The GRC does not believe that sufficient facts exist to support that the Custodian had no ability to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file. The GRC failed to garner enough information from the SOI, the Custodian's April 8, 2016 additional information responses, and his compliance certification to decide on this issue. It is thus apparent that a fact-finding hearing will provide the most efficient and effective method for developing the record. See also Gordon v. City of Orange (Essex), GRC Complaint No. 2011-256 (Interim Order dated November 18, 2014).

Accordingly, this complaint should be referred to OAL for a fact-finding hearing to determine whether the Custodian performed due diligence to duplicate the recordings at issue in GRC 2015-57 prior to offering inspection. See Gordon, GRC 2011-256. This due diligence determination should include: (1) whether the Custodian could have reached out to multiple vendors to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file; and (2) whether he should have contacted the Borough's Information Technology vendor to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file. Further, and if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances. Finally, the OAL shall determine whether the Complainant is a prevailing party with respect to GRC 2015-57.

Regarding GRC 2015-60 and 2015-70, the GRC finds that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees because the Custodian disclosed responsive records at issue in those complaints to the Complainant following the filing of same. For administrative ease, the OAL should determine the amount of the award of reasonable attorney's fees based on the relief ultimately achieved. 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). However, based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Dep’t of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply with the Council’s May 24, 2016 Interim Order. Initially, the Custodian did not seek an extension of time until one (1) business day after the expiration of the time frame to comply. Further, the Custodian failed to perform reasonable due diligence to duplicate the recordings at issue in GRC 2015-57. Thus, the record is still unclear as to whether the Custodian exhausted all duplication options prior to offering inspection of the recordings.
2. This complaint should be referred to Office of Administrative Law for a fact-finding hearing to determine whether the Custodian performed due diligence to duplicate the recordings at issue in GRC 2015-57 prior to offering inspection. *See Gordon v. City of Orange (Essex), GRC Complaint No. 2011-256 (Interim Order dated November 18, 2014)*. This due diligence determination should include: (1) whether the Custodian could have reached out to multiple vendors to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file; and (2) whether he should have contacted the Borough’s Information Technology vendor to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file. Further, and if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances. Finally, the Office of Administrative Law shall determine whether the Complainant is a prevailing party with respect to GRC 2015-57.
3. Regarding GRC 2015-60 and 2015-70, the GRC finds that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees because the Custodian disclosed responsive records at issue in those complaints to the Complainant following the filing of same. For administrative ease, the Office of Administrative Law should determine the amount of the award of reasonable attorney’s fees based on the relief ultimately achieved. 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). However, based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Dep’t of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November

2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this case do not rise to a level of “unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

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

June 21, 2016⁸

⁸ This complaint was prepared for adjudication at the Council’s June 28, 2016 meeting, but could not be adjudicated due to lack of quorum.



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

May 24, 2016 Government Records Council Meeting

Robert A. Verry
Complainant
v.

Complaint Nos. 2015-57-2015-60
and 2015-70

Borough of South Bound Brook (Somerset)
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 24, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s June 25, 2014, OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to said OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian responded in writing to the Complainant’s January 14, and February 22, 2015 OPRA requests, said responses were insufficient pursuant to N.J.S.A. 47:1A-5(i) and Turner, III v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011), because the Custodian failed to provide a date certain by which he would respond to the Complainant. See also Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008). However, the GRC declines to order disclosure of the responsive records because the Custodian provided same to the Complainant via Dropbox on March 25, 2015 and again on March 30, 2015.
3. The Custodian violated N.J.S.A. 47:1A-5(d) by not providing to the Complainant the recordings responsive to his June 25, 2014 OPRA request in the medium requested. Specifically, the subject OPRA request sought copies of audio recordings and the evidence of record does not suggest that the Custodian did his due diligence to duplicate the records prior to offering inspection: in the instant matter, on-site inspection is not a reasonable substitute for actual copies of the requested tape recordings. See Mangeri v. Monroe Twp. Bd. of Fire Comm’r of Dist. No. 1 (Middlesex), GRC Complaint No. 2010-70 (Interim Order dated January 25, 2011). Thus, the Custodian may have unlawfully denied the Complainant access to the recordings. N.J.S.A. 47:1A-6. The Custodian shall either contact all available vendors and/or contact the Borough’s IT vendor to determine whether duplication is possible. Should the Custodian obtain a quote, he must provide



same to the Complainant prior to incurring the cost of duplication. *See O'Shea*, GRC 2007-192. Should the Custodian not find any other method to duplicate the tapes (either in their current state or otherwise), he must certify to this fact.

4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.² If applicable, the Custodian shall make the amount of the charge available to the Custodian within three (3) business days from receipt of the Council's Interim Order and provide certified confirmation within the five (5) business days. Thereafter, if the Complainant accepts payment, the Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon remittance of the charge within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director at that time. If the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director at that time.**
5. 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.
6. 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 24th 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

¹ "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."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2015-57
2015-60, & 2015-70**

v.

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

Records Relevant to Complaint:

June 25, 2014 OPRA request: Electronic copies of all audio recordings for the Borough of South Bound Brook's ("Borough") meetings held in July, August, and September 2013.³

January 14, 2015 OPRA request: Electronic copy (via Dropbox) of the audio recording of the Borough's January 1, 2015 Reorganization agenda and meeting.⁴

February 22, 2015 OPRA request: Electronic copy (via Dropbox) of the audio recording of the Borough's February 2015 agenda and meeting.⁵

Custodian of Record: Donald E. Kazar

Request Received by Custodian: June 26, 2014; January 15, 2015; February 24, 2015

Response Made by Custodian: July 1, 2014; January 23, 2015; March 3, 2015

GRC Complaint Received: March 9, 2015; March 12, 2015

Background⁶

Request and Response:

On June 25, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 1, 2014, the Custodian responded in writing, advising the Complainant that the responsive recordings are on cassette

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

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

³ This OPRA request is the subject of GRC Complaint No. 2015-57.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-60. The Complainant sought additional records that are not at issue here.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-70. The Complainant sought additional records that are not at issue here.

⁶ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-57, 2015-60, & 2015-70 – Findings and Recommendations of the Executive Director

tapes that he needed to send to an outside vendor for duplication because the Borough does not have the equipment. The Custodian noted that he previously paid \$25.00 for one tape and that some meetings could be on multiple tapes. Further, the Custodian noted that he did not know the current price for duplication, but the Complainant could visit the Borough's offices and listen to the tapes if he wanted.

On the same day, the Complainant requested that the Custodian provide him a current price. The Complainant also inquired as to the cost to duplicate the cassettes "in their current state." On July 21, 2014, the Complainant e-mailed the Custodian seeking a status update because the Custodian did not forward a current price.

On July 24, 2014, in an exchange of e-mails, the Custodian advised the Complainant that he contacted the outside vendor that previously duplicated the cassettes: they no longer duplicate tape-to-tape recordings. The Custodian stated that the Borough therefore could not fulfill the request; however, the Complainant was welcomed to visit the Borough's offices and listen to the recordings. The Custodian also noted that, if the Complainant knew of a company that duplicated cassette tapes, he would contact them. The Complainant replied, reiterating his request for the cost to duplicate the cassettes "in their current state." The Custodian responded, reiterating that the company he used previously did not duplicate cassette tapes anymore; thus, he could not provide a cost. The Complainant responded by clarifying that, "by current state," he meant recording the responsive cassette to another cassette. The Custodian responded that the Borough did not possess the equipment to perform a cassette-to-cassette recording, which is why he had to contact an outside vendor. The Custodian again offered the Complainant the opportunity to come in and listen to the recordings. The Complainant responded, advising the Custodian that, with a tape recorder, a computer, and an audio jack connection, the Custodian could utilize his computer to convert the cassette to an electronic recording. The Complainant thus contended that the Custodian's response that the Borough did not have the equipment to duplicate the recording was factually inaccurate.

On July 25, 2014, the Custodian acknowledged receipt of the Complainant's suggestion and stated that he would contact the Borough's Information Technology ("IT") group.

On August 27, 2014, the Complainant sought a status update. The Complainant noted that the Custodian failed to provide him with an update for over a month and that he had until August 29, 2014, to provide the responsive recordings. On August 28, 2014, the Custodian responded to the Complainant, advising that he could not get the recordings into a playable format and that the Borough's IT person was on vacation. The Custodian stated that he would ask for help once the IT person returned on September 1, 2014, but that he could not produce responsive records at that time.

On January 14, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 23, 2015, the Custodian responded in writing, advising the Complainant that the responsive recording was "[n]ot available at this time."

On February 22, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On March 3, 2015, the Custodian responded in writing,

advising the Complainant that the responsive recording was “not available at this time.”

Denial of Access Complaint:

On March 9, 2015, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). On March 12, 2015, the Complainant filed a third (3rd) complaint with the GRC.

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.

GRC 2015-57

The Complainant asserted that the Custodian unlawfully denied him access to the responsive audio recordings. The Complainant argued that he went above and beyond what is required of a requestor by providing the Custodian instructions on how to duplicate the recordings; however, the Custodian failed to provide the records over the last six (6) months. The Complainant also contended that the evidence supported that the Custodian would not have responded had he not followed up on multiple occasions between July and August 2014.

GRC 2015-60

The Complainant contended that the Custodian had no intention of disclosing the responsive audio recording of the January 1, 2015 meeting. Specifically, the Complainant noted that over a month had passed since the Custodian advised him that the responsive recording was “not available” at that time, but he had not since updated the Complainant on disclosure.

GRC 2015-70

The Complainant contended that the Custodian similarly had no intention of disclosing the responsive February 2015 audio recording. Specifically, the Complainant noted that the Custodian advised him that he did “not have the [February] recording available” at that time and then ended his response with “[a]ll completed.”

The Complainant argued that the facts of all three (3) complaints prove that the Custodian knowingly and willfully denied the Complainant access to the responsive records. 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.

Supplemental Response:

On March 25, 2015, the Custodian e-mailed the Complainant, advising that he sent “the meeting minutes” via Dropbox and asked the Complainant to confirm receipt. The Complainant responded via e-mail, stating that he did not receive the records. The Custodian responded via e-mail, confirming that he would try to send the records again; however, he was unfamiliar with the program and had some issues. The Custodian also asked the Complainant to confirm his e-mail address. The Complainant confirmed his e-mail address.

On March 30, 2015, the Custodian e-mailed the Complainant, stating that he sent “the meeting audio” a few days ago and sought confirmation of receipt. The Complainant replied via e-mail, requesting that the Custodian identify the records sent so he could confirm whether he received them. The Custodian replied via e-mail, stating that he sent the recordings responsive to the Complainant’s January 14, and February 22, 2015 OPRA requests.

Statement of Information:

On April 9, 2015, the Custodian filed two (2) Statements of Information (“SOI”). On April 16, 2015, the Custodian submitted a third (3rd) SOI.

GRC 2015-57

The Custodian certified that he received the Complainant’s OPRA request on June 26, 2014. The Custodian certified that he located the responsive recordings. The Custodian certified that he initially responded in writing on July 1, 2014, advising that he would need to contact an outside vendor. However, as an alternative, the Complainant visit the Borough’s offices and listen to the responsive recordings.

The Custodian averred that the responsive recordings are on cassette tapes produced from a special recorder. The Custodian certified that the cassettes cannot be played in a regular tape recorder and that the Borough was unable to transfer the recordings to a regular tape or compact disc. The Custodian affirmed that he had contacted an outside vendor that previously duplicated the records, but that vendor no longer duplicated same. The Custodian asserted that, notwithstanding that the outside vendor no longer duplicated the recordings, the Complainant was unwilling to pay for same. The Custodian noted that his offer for the Custodian to visit the Borough’s offices and listen to the recordings was still available.

GRC 2015-60

The Custodian certified that he received the Complainant’s OPRA request on January 15, 2015. The Custodian certified that he had located responsive records and subsequently responded on January 23, 2015.

The Custodian affirmed that he sent responsive records several times via Dropbox but received no confirmation that the Complainant received same.⁷ The Custodian contended that the instant complaint is moot because he already provided the responsive records. The Custodian noted that, if the Complainant did not receive the records, he would resend them.

GRC 2015-70

The Custodian certified that he received the Complainant's OPRA request on February 24, 2015. The Custodian certified that he responded to the Complainant on March 3, 2015, advising that the February 2015 meeting audio recording was not available at that time.

The Custodian certified that he provided the responsive audio recording to the Complainant via Dropbox after the filing of the instant complaint. The Custodian noted that he had previously advised the Complainant that he could review the records in person at the Borough's offices and that this offer was still available.

Additional Submissions:

GRC 2015-60

On April 27, 2015, the Complainant's Counsel submitted a letter brief to the GRC in response to the Custodian's SOI. Therein, Counsel asserted that the Custodian's SOI was inconsistent with the Denial of Access Complaint because the Custodian only identified "January 2015 meeting minutes" as the relevant records. Counsel asserted that the Complainant would not be averse to allowing the Custodian to resubmit an SOI that would likely bolster the Complainant's position; however, he objects to the Custodian's "waste of taxpayer funds and resources . . . on such incompetence."

GRC 2015-57

On May 29, 2015, the Complainant's Counsel submitted a letter brief to the GRC in response to the Custodian's SOI. Therein, Counsel suggested that the GRC, by not finding that the Custodian has knowingly and willfully violated OPRA since his first violation in 2007,⁸ is somehow complicit in the Custodian's allegedly false certifications. Specifically, the Counsel rebuked the Custodian's statement that the Complainant was unwilling to pay for the records. To the contrary, Counsel noted that the Complainant repeatedly asked the Custodian for a cost that he failed to provide. Moreover, Counsel asserted that the Custodian offered inspection but never mentioned reimbursing the Complainant for his time and travel expenses to do so.⁹ Counsel argued that the Custodian's offer did nothing more than shift the burden to the Complainant and should be given no weight here.

⁷ The Custodian does not indicate in his SOI whether he actually provided the audio recording at issue here to the Complainant. Additionally, there is no evidence in the record to support that the Custodian provided the recording to the Complainant at some point after his January 23, 2015 response.

⁸ See Paff v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2006-158 (April 2007).

⁹ The GRC notes that no provision in OPRA requires a custodian to reimburse a requestor for ancillary expenses associated with production of records, whether through inspection or otherwise.

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Counsel contended that, if the Custodian could play the recordings, then he could copy them in accordance with the Complainant's suggestion in his July 24, 2014 e-mail. Counsel argued that the Custodian could have easily copied the recordings in the same amount of time that it would have taken the Complainant to listen to them. Counsel noted that, in fact, the Custodian confirmed that he endeavored to do just that in an August 28, 2014 e-mail to the Complainant. However, Counsel noted that the Custodian indicated that he would contact the Borough's IT person on September 1, 2014, but never responded to the Complainant thereafter.

Counsel argued that the Custodian failed to support his SOI assertion that the recordings "cannot be played in a regular recorder." However, Counsel stated that the facts indicate that the recordings existed and that he was supposed to contact the Borough's IT person. Counsel requested that the GRC seek a legal certification from the IT person with respect to the conversation he had with the Custodian. Counsel asserted that such a certification was necessary because it could explain why the Custodian offered to disclose the same exact records in March 2014, in response to a December 2013 OPRA request submitted by John Paff.¹⁰ Regarding that request, Counsel argued that the correspondence verified that the Borough utilized a Lanier recorder to tape the meetings, which caused the recordings to be high-pitched. Counsel argued that the Complainant requested the tapes "in the current state" on more than one occasion.

GRC 2015-70

On August 3, 2015, the Complainant's Counsel submitted a letter brief to the GRC in response to the Custodian's SOI. Therein, Counsel contended that the Custodian's disclosure of the responsive February 2015 meeting recording after the filing of GRC 2015-70 proved that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees.

Additionally, Counsel accused the Custodian of falsely certifying that he offered the Complainant a chance to review the recording at the Borough's offices. Counsel asserted that the record supported that the Custodian simply advised the Complainant that he did not possess the responsive recording at the time of his response. Counsel contended that, notwithstanding that inspection was not one of the Complainant's preferred methods of delivery, the Custodian did not offer it.¹¹

On March 30, 2016, the GRC sought additional information from the Custodian and the Borough's IT vendor. Specifically, the GRC stated that each complaint contained evidence contradicting that the Custodian was unable to produce the responsive recordings, either on the basis that he did not have the ability or that the recordings were not "available." The GRC requested that the Custodian and the IT person submit legal certifications answering the following:

¹⁰ The GRC notes that the evidence of record does not indicate whether the Custodian provided the recordings to Mr. Paff in March 2014, as promised.

¹¹ The GRC notes that it is clear from a review of the Custodian's SOI in GRC 2015-70 that he was referring to a previous offer of inspection and not one connected to his March 3, 2015 response. The GRC further notes that the Custodian did, in fact, offer inspection as part of his response to the Complainant's June 25, 2014 OPRA request at issue in GRC 2015-57.

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1. Regarding GRC 2015-57, did the Custodian communicate with the Borough's IT vendor and what was the outcome?
2. Also regarding GRC 2015-57, did the Custodian provide copies of the audio recordings at issue here to the other requestor in March 2014, as he promised to do in January 2014?
3. Regarding GRC 2015-60 and 2015-70, did the responsive audio recordings exist at the time of the Complainant's OPRA request?
4. Also regarding GRC 2015-60 and GRC 2015-70, on what date did the Custodian provide the audio recordings at issue in these two (2) complaints?

The GRC required the Custodian and IT person to submit their certifications by close of business on April 4, 2016.

On April 8, 2016, the Custodian responded to the GRC's request for additional information.¹²

GRC 2015-57

The Custodian certified that he did not speak with the Borough's IT person because the Complainant's OPRA request did not involve a computer. The Custodian affirmed that the Borough used an outdated Lanier machine to produce the responsive recordings. The Custodian certified that he could not cross-record from one cassette to another because of a recording speed discrepancy: a professional company would have to duplicate the record. The Custodian affirmed that, as previously noted in his responses to the Complainant, he was unable to locate a company and offered inspection as an alternative.

Additionally, the Custodian affirmed that he did not provide the recordings to the other requestor because he could not copy the recordings to a disk. The Custodian again noted that he offered the Complainant the chance to inspect the recordings.

GRC 2015-60 and 2015-70

The Custodian certified that the responsive recordings existed but that he could not e-mail them to the Complainant due to e-mail size restrictions. The Custodian certified that he had to learn how to use Dropbox. The Custodian affirmed that he delivered the responsive recordings to the Complainant on March 30, 2015, via Dropbox once he became familiar with the feature. The Custodian attached e-mails supporting the foregoing.

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.

¹² The GRC notes that the Borough's IT person did not submit a legal certification. However, the Custodian certified that he did not contact the IT person, thus obviating the need for the IT person's certification. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-57, 2015-60, & 2015-70 – Findings and Recommendations of the Executive Director

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).¹³ 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).

Regarding the Custodian's actions in GRC 2015-57, the Custodian initially responded on July 1, 2014, advising the Complainant that he could either send cassette tapes containing the responsive recordings to a third party vendor or make same available for inspection. At that time, the Custodian requested that the Complainant advise of his preference. The Complainant responded on the same day, asking additional questions; however, the Custodian did not respond again until July 24, 2014, after the Complainant again requested a response to his additional questions.

Ultimately, the nature of the Custodian's July 1, 2014 response did not identify definitively whether he was granting or denying access to the responsive recordings. Further, the Custodian's response did not seek clarification, nor did he obtain an extension of time until a date certain to receive and provide a third party quote to the Complainant. The various communications between the parties from July 24, through August 28, 2015, further highlight the Custodian's failure to respond appropriately to the Complainant. For these reasons, the GRC is not satisfied that the Custodian's initial response was not appropriate and resulted in a "deemed" denial.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's June 25, 2014 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Sufficiency of Response

In Turner, III v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011), the custodian initially responded to the complainant's OPRA request by stating that information responsive to request item No. 1 was "not available," but she was researching same. The complainant filed a denial of access complaint to challenge the custodian's response. The Council, noting that "the [c]ustodian essentially requested an extension of time to respond," held that the response was insufficient because she failed to provide a date certain on which she would respond. Id. at 7 (*citing* Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008)).

¹³ 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.

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Here, the Custodian responded to the Complainant's January 14, and February 22, 2015 OPRA requests in a timely manner, stating that the responsive recordings were "not available at [that] time." However, the Custodian later disclosed the recordings to the Complainant via Dropbox on March 25, and again on March 30, 2015. The Custodian also submitted a certification to the GRC on April 8, 2016, wherein he certified that the recordings were "not available at the time" due to e-mail account size limitations. Additionally, the Custodian affirmed that he needed time to learn how to use Dropbox.

As appeared to be the case in Turner, the Custodian's response here essentially amounted to a request for an extension of time. Specifically, the evidence of record supports that the Custodian needed additional time to send the recordings via Dropbox. However, the Custodian failed to provide a date certain on which he would respond. Ultimately, the Custodian produced the responsive records a month or more after receiving both OPRA requests.

Therefore, although the Custodian responded in writing to the Complainant's January 14, and February 22, 2015 OPRA requests, said responses were insufficient pursuant to N.J.S.A. 47:1A-5(i) and Turner, GRC 2009-176, because the Custodian failed to provide a date certain by which he would respond to the Complainant. *See also* Hardwick, GRC 2007-164. However, the GRC declines to order disclosure of the responsive records because the Custodian provided same to the Complainant via Dropbox on March 25, 2015, and again on March 30, 2015.

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.

OPRA provides that copies of a governmental record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5(b).

OPRA also provides that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied . . . is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size . . . the public agency may charge, *in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .*

N.J.S.A. 47:1A-5(c)(emphasis added).

OPRA further provides that:

A custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium . . . If a request is for a record . . . (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, *a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology . . . that is actually incurred by the agency or attributable to the agency* for the programming, clerical, and supervisory assistance required, or both.

N.J.S.A. 47:1A-5(d)(emphasis added).

In O’Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and charged the complainant for the duplication. The complainant objected to the fee, asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided a cost estimate from outside vendors. The Council did not find it was unreasonable to obtain an estimate from an outside vendor for the actual cost of duplicating the record because the custodian certified that the Board lacked the equipment necessary to otherwise fulfill the complainant’s request. N.J.S.A. 47:1A-5(c).

Moreover, in Mangeri v. Monroe Twp. Bd. of Fire Comm’r of Dist. No. 1 (Middlesex), GRC Complaint No. 2010-70 (Interim Order dated January 25, 2011), the custodian initially denied access to meeting recordings as unofficial records. However, the custodian subsequently allowed for inspection of the recordings as an alternative to copies because the District did not “have the capacity to produce copies . . .” of the minutes. Id. at 3. The Council was not satisfied that inspection represented “some other meaningful medium” as set forth in OPRA, holding that:

[B]ecause the Complainant’s OPRA request sought copies of tape recordings of Board meetings . . . and based on the GRC’s definition of “medium” in [NJ Libertarian Party v. NJ Dep’t of Human Serv., Div. of Youth and Family Serv., GRC Complaint No. 2004-114 (April 2006)], on-site inspection of the tape recordings . . . is not a reasonable substitute for actual copies of the requested tape recordings. The Custodian has therefore violated N.J.S.A. 47:1A-5(d) by not providing the records responsive in the medium requested by the Complainant and therefore unlawfully denied the Complainant access to the records responsive. N.J.S.A. 47:1A-6. See also [Grauer v. NJ Dep’t of the Treasury, GRC Complaint No. 2007-03 (November 2007), [Manahan v. Salem Cnty., GRC Complaint No. 2006-184 (December 2008)].

Id. at 9. In reaching this conclusion, the Council noted that the custodian had the ability to obtain a quote from a third party vendor. Accordingly, the Council ordered the custodian to “obtain an actual cost of duplicating the responsive tape recordings and provide same to the [c]omplainant prior to incurring the cost of duplication.” Id.

Here, the Custodian responded to the Complainant's June 25, 2014 OPRA request, stating that the Borough did not have the ability to duplicate the responsive recordings. The Custodian stated that he would need to obtain a quote to duplicate the responsive recordings from an outside vendor, which previously was \$25.00. The Custodian later advised the Complainant that the vendor no longer duplicated cassette tapes, but the Complainant could inspect the recordings at the Borough's office. After some back and forth between the parties regarding the Borough's ability to duplicate cassette tapes, either in hard copy or electronically, the Custodian advised the Complainant that he would speak with the Borough's IT person. However, the Custodian did not respond, did not provide records, and did not admit that he never spoke with the IT person until April 8, 2016.

In looking to the Council's decisions in O'Shea, the GRC is initially satisfied that the Custodian could have reasonably shifted the vendor cost for duplication of the responsive records to the Complainant. Notwithstanding the Council's decision in Mangeri, the GRC is satisfied that inspection could have represented a reasonable alternative in the very limited circumstances that the Custodian had no other options to duplicate the records. However, there is no evidence in the record to support that: 1) the Custodian reached out to another vendor upon notice that the usual vendor no longer duplicated cassette tapes; or 2) discussed viable options for converting the cassette tapes into electronic files. For this reason, the GRC is ultimately not satisfied that the Custodian complied with OPRA by merely offering onsite inspection to the Complainant. Similar to the fact in Mangeri, the evidence here does not support that the Custodian did his due diligence to ensure that the Borough had no other options to duplicate the responsive recordings prior to offering inspection.

Accordingly, the Custodian violated N.J.S.A. 47:1A-5(d) by not providing to the Complainant the recordings responsive to his June 25, 2014 OPRA request in the medium requested. Specifically, the subject OPRA request sought copies of audio recordings, and the evidence of record does not suggest that the Custodian did his due diligence to duplicate the records prior to offering inspection: in the instant matter, on-site inspection was not a reasonable substitute for actual copies of the requested tape recordings. *See Mangeri*, GRC 2010-70. Thus, the Custodian may have unlawfully denied the Complainant access to the recordings. N.J.S.A. 47:1A-6. The Custodian shall either contact all available vendors and/or contact the Borough's IT vendor to determine whether duplication is possible. Should the Custodian obtain a quote, he must provide same to the Complainant prior to incurring the cost of duplication. *See O'Shea*, GRC 2007-192. Should the Custodian not find any other method to duplicate the tapes (either in their current state or otherwise), he must certify to this fact.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's June 25, 2014, OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian responded in writing to the Complainant's January 14, and February 22, 2015 OPRA requests, said responses were insufficient pursuant to N.J.S.A. 47:1A-5(i) and Turner, III v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011), because the Custodian failed to provide a date certain by which he would respond to the Complainant. *See also* Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008). However, the GRC declines to order disclosure of the responsive records because the Custodian provided same to the Complainant via Dropbox on March 25, 2015 and again on March 30, 2015.
3. The Custodian violated N.J.S.A. 47:1A-5(d) by not providing to the Complainant the recordings responsive to his June 25, 2014 OPRA request in the medium requested. Specifically, the subject OPRA request sought copies of audio recordings and the evidence of record does not suggest that the Custodian did his due diligence to duplicate the records prior to offering inspection: in the instant matter, on-site inspection is not a reasonable substitute for actual copies of the requested tape recordings. *See* Mangeri v. Monroe Twp. Bd. of Fire Comm'r of Dist. No. 1 (Middlesex), GRC Complaint No. 2010-70 (Interim Order dated January 25, 2011). Thus, the Custodian may have unlawfully denied the Complainant access to the recordings. N.J.S.A. 47:1A-6. The Custodian shall either contact all available vendors and/or contact the Borough's IT vendor to determine whether duplication is possible. Should the Custodian obtain a quote, he must provide same to the Complainant prior to incurring the cost of duplication. *See* O'Shea, GRC 2007-192. Should the Custodian not find any other method to duplicate the tapes (either in their current state or otherwise), he must certify to this fact.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide**

certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁴ to the Executive Director.¹⁵ If applicable, the Custodian shall make the amount of the charge available to the Custodian within three (3) business days from receipt of the Council's Interim Order and provide certified confirmation within the five (5) business days. Thereafter, if the Complainant accepts payment, the Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon remittance of the charge within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director at that time. If the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director at that time.

5. 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.
6. 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

May 17, 2016

¹⁴ "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."

¹⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-57, 2015-60, & 2015-70 – Findings and Recommendations of the Executive Director