



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

FINAL DECISION

May 24, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint Nos. 2015-97, 2015-98,
2015-99, 2015-100, 2015-101, 2015-102
and 2015-103

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 26, 2016 Interim Order because he responded in the extended time frame by certifying that, after conducting an extensive search, no records existed. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian violated OPRA by failing to respond to the Complainant’s eight (8) OPRA requests in a timely manner. Additionally, the Custodian unlawfully denied access to the Complainant’s OPRA request Nos. 1 and 2 because same were valid. However, the Custodian lawfully denied access to the Complainant’s request Nos. 3 through 8. Moreover, the Custodian timely complied with the Council’s April 26, 2016 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian did not locate any records responsive to the Complainant’s OPRA request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.



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

Final Decision Rendered by the
Government Records Council
On The 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 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

**GRC Complaint Nos. 2015-97, 2015-98, 2015-99,
2015-100, 2015-101, 2015-102 & 2015-103**

v.

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

Records Relevant to Complaint: Electronic copies of:

1. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Arleen Lih among all Borough of South Bound Brook (“Borough”) employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Joseph F. Danielsen) from January 1, 2014, to March 24, 2015, regarding “Carlton.”³
2. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “Verry.”⁴
3. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “sheet.”⁵
4. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “vacation.”⁶
5. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “sick.”⁷
6. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials,

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. 2015-97.

⁴ This OPRA request is the subject of GRC Complaint No. 2015-98.

⁵ This OPRA request is the subject of GRC Complaint No. 2015-99.

⁶ This OPRA request is the subject of GRC Complaint No. 2015-100.

⁷ This OPRA request is the subject of GRC Complaint No. 2015-101.

the Custodian's Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding "personal."⁸

7. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian's Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding "time."⁹
8. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian's Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding "schedule."¹⁰

Custodian of Record: Donald E. Kazar

Request Received by Custodian: March 25, 2015

Response Made by Custodian: April 6, 2015

GRC Complaint Received: April 9, 2015

Background

April 26, 2016 Council Meeting:

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

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's eight (8) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant's OPRA requests No. 1 and 2 are valid because the identification of an individual as the subject or content of correspondence is reasonably specific enough for a custodian to locate responsive records. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). For these requests, the Custodian has unlawfully denied access to any responsive records and must provide same to the Complainant. N.J.S.A. 47:1A-6.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions,**

⁸ This OPRA request is the subject of GRC Complaint No. 2015-102.

⁹ This OPRA request is the subject of GRC Complaint No. 2015-103.

¹⁰ This OPRA request is the subject of GRC Complaint No. 2015-103.

including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.¹²

4. The Complainant's OPRA requests No. 3 through 8 are invalid because they fail to include a narrowly construed "subject or content." Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015). Specifically, the Complainant included a single generic keyword in each request that does not sufficiently narrow the scope of the subject or content of records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). The Custodian would be required to perform research to respond properly to each request and use judgement as to whether the located correspondence was actually responsive: OPRA does not require such actions. For those requests, the Custodian lawfully denied access to them. N.J.S.A. 47:1A-6.
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 April 28, 2016, the Council distributed its Interim Order to all parties. On May 3, 2016, the Custodian sought an extension of time until May 11, 2016, to comply with the Council's Order, which the GRC granted on May 5, 2016.

On May 11, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that he personally searched Ms. Lih's computer for e-mails regarding "Carlton" and "Verry." The Custodian affirmed that his search included reviewing Ms. Lih's e-mail inbox and e-mail folders. The Custodian certified that his search yielded no responsive records.

The Custodian also certified that he asked Ms. Lih if she possessed any other records possibly responsive to the Complainant's two (2) OPRA requests: Ms. Lih advised that she did not maintain any responsive records. The Custodian averred that this complaint should be

¹¹ "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."

¹² 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.

dismissed because no records exist.

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to search for and provide any records responsive to the Complainant's OPRA request Nos. 1 and 2. Moreover, the Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 28, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 5, 2016.

On May 3, 2016, the Custodian sought an extension of time until May 11, 2016, which the GRC granted. On May 11, 2016, the last day of the extended time frame, the Custodian submitted certified confirmation of compliance to the Executive Director. Therein, he certified that he performed a search of Ms. Lih's computer and spoke with her about the existence of responsive records. The Custodian certified that he did not locate any responsive records and that no records therefore exist.

Accordingly, the Custodian complied with the Council's April 26, 2016 Interim Order because he responded in the extended time frame by certifying that, after conducting an extensive search, no records existed. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been

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

The Custodian violated OPRA by failing to respond to the Complainant's eight (8) OPRA requests in a timely manner. Additionally, the Custodian unlawfully denied access to the Complainant's OPRA request Nos. 1 and 2 because same were valid. However, the Custodian lawfully denied access to the Complainant's request Nos. 3 through 8. Moreover, the Custodian timely complied with the Council's April 26, 2016 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (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, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

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

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

The Complainant filed the instant Complaint, disputing the Custodian’s response that the subject OPRA requests were invalid. The Complainant requested that the GRC order the Custodian to disclose all responsive records. In its April 26, 2016 Interim Order, the Council determined that only two (2) of the eight (8) OPRA requests were valid and ordered the Custodian to perform a search and disclose any responsive records. The Custodian submitted compliance of the Order on May 11, 2016, wherein he certified that he performed an extensive search and was unable to locate any responsive records. Based on the foregoing, although the Custodian was required to perform a search for records responsive to the Complainant’s OPRA

request Nos. 1 and 2, he ultimately certified that no such records existed. For this reason, the Complainant did not prevail in this matter because the Custodian did not locate, and was thus unable to disclose, responsive records.

Accordingly, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian did not locate any records responsive to the Complainant's OPRA request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 26, 2016 Interim Order because he responded in the extended time frame by certifying that, after conducting an extensive search, no records existed. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian violated OPRA by failing to respond to the Complainant's eight (8) OPRA requests in a timely manner. Additionally, the Custodian unlawfully denied access to the Complainant's OPRA request Nos. 1 and 2 because same were valid. However, the Custodian lawfully denied access to the Complainant's request Nos. 3 through 8. Moreover, the Custodian timely complied with the Council's April 26, 2016 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian did not locate any records responsive to the Complainant's OPRA request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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

May 17, 2016

4. The Complainant's OPRA requests No. 3 through 8 are invalid because they fail to include a narrowly construed "subject or content." Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015). Specifically, the Complainant included a single generic keyword in each request that does not sufficiently narrow the scope of the subject or content of records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). The Custodian would be required to perform research to respond properly to each request and use judgement as to whether the located correspondence was actually responsive: OPRA does not require such actions. For those requests, the Custodian lawfully denied access to them. N.J.S.A. 47:1A-6.
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 26th Day of April, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 28, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

**GRC Complaint Nos. 2015-97, 2015-98, 2015-99,
2015-100, 2015-101, 2015-102 & 2015-103**

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**Borough of South Bound Brook (Somerset)²
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1. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Arleen Lih among all Borough of South Bound Brook (“Borough”) employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Joseph F. Danielsen) from January 1, 2014, to March 24, 2015, regarding “Carlton.”³
2. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “Verry.”⁴
3. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “sheet.”⁵
4. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “vacation.”⁶
5. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian’s Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding “sick.”⁷
6. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials,

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Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-97, 2015-98, 2015-99, 2015-100, 2015-101, 2015-102 & 2015-103 – Findings and Recommendations of the Executive Director

the Custodian's Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding "personal."⁸

7. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian's Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding "time."⁹
8. Any and all e-mails, e-mail attachments, and/or correspondence sent or received from Ms. Lih among all Borough employees (including police officers, all appointed officials, the Custodian's Counsel, all elected officials, and Mr. Danielsen) from January 1, 2014, to March 24, 2015, regarding "schedule."¹⁰

Custodian of Record: Donald E. Kazar

Request Received by Custodian: March 25, 2015

Response Made by Custodian: April 6, 2015

GRC Complaint Received: April 9, 2015

Background¹¹

Request and Response:

On March 24, 2015, the Complainant submitted eight (8) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. On April 6, 2015, the eighth (8th) business day after receipt of the OPRA request, the Custodian responded in writing to all OPRA requests, denying access on the basis that, although the requests provided a "range of dates over three months," they failed to identify a specific recipient and content or subject. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

Denial of Access Complaint:

On April 9, 2015, the Complainant filed seven (7) Denial of Access Complaints with the Government Records Council ("GRC"). The Complainant first asserted that the Custodian failed to respond until the eighth (8th) business day, thus resulting in a "deemed" denial of his OPRA requests. The Complainant contended that the Custodian, who is well-versed in the statutory response time based on numerous prior GRC decisions against him, knowingly and willfully failed to respond timely to the subject OPRA requests. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010); Verry

⁸ This OPRA request is the subject of GRC Complaint No. 2015-102.

⁹ This OPRA request is the subject of GRC Complaint No. 2015-103.

¹⁰ This OPRA request is the subject of GRC Complaint No. 2015-103.

¹¹ 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.

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v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160 *et seq.* (Final Decision dated September 25, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-161 *et seq.* (Interim Order dated August 28, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013).

The Complainant also disputed the Custodian's denial of access, arguing that his request conformed to the criteria set forth in Elcavage, GRC 2009-07. Specifically, the Complainant asserted that he included the sender/recipient (Ms. Lih and all Borough employees, elected officials, *etc.*), range of dates (January 1, 2014, to March 24, 2015) and content ("vacation").¹² The Complainant argued that the Custodian knowingly and willfully denied the subject OPRA requests even though the GRC previously ruled against the Custodian *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2011-114, *et seq.* (Interim Order dated July 31, 2012). The Complainant also contended that the Custodian's response proved that he did not review the request prior to denying same; the Custodian referenced the relevant time period as three (3) months and not the actual fifteen (15) month time period identified in the requests.

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

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

Statement of Information:

On May 5, 2015, the Custodian filed seven (7) Statements of Information ("SOI"). The Custodian certified that he received the Complainant's eight (8) OPRA requests on March 25, 2015. The Custodian certified that he responded in writing on April 6, 2015, denying access to all requests as invalid under OPRA.

The Custodian argued that each request sought every e-mail for a fifteen (15) month time frame relating to an individual keyword without any context. The Custodian argued that these requests represent an open-ended demand for records that is inconsistent with prior precedent. MAG, 375 N.J. Super. at 546; Elcavage, GRC 2009-07.

The Custodian noted that the Complainant previously submitted one (1) OPRA request containing all elements of the eight (8) requests at issue here. The Custodian affirmed that, after

¹² The GRC notes that the Complainant identified "vacation" as the content word on page 6 of the legal brief attached to every Denial of Access Complaint. However, each individual OPRA request identified a different word. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-97, 2015-98, 2015-99, 2015-100, 2015-101, 2015-102 & 2015-103 – Findings and Recommendations of the Executive Director

he denied access to that request for the same reasons advanced in his April 6, 2015 response, the Complainant resubmitted these eight (8) OPRA requests on his own accord. The Custodian argued that the Complainant's actions evidence that these complaints should be dismissed.¹³

Additional Submissions:

On May 26, 2015, the Complainant's Counsel submitted a letter brief responding to the Custodian's SOIs. Therein, Counsel contended that the Complainant's OPRA requests were valid because he followed the exact formula provided by the GRC in its Handbook for Records Custodians (Fifth Edition – January 2011).

Counsel contended that, notwithstanding the significant amount of time that the Custodian had to complete SOIs for these complaints, he only identified "vacation" as the term relevant to all complaints. Counsel suggested that the Custodian's failure to personalize each SOI represented either: 1) a well-thought out strategy and true basis for the denial of access, or 2) willfully false statements.¹⁴ Counsel thus requested that, because of the foregoing, the Council either adjudicate these complaints based on the Denial of Complaints only or take the necessary action to address the Custodian's allegedly false statements.

Counsel reiterated the Complainant's arguments, made in the Denial of Access Complaint, that the Custodian knowingly and willfully denied access to responsive records based on as many as eight (8) past complaints in which the Council found that the Custodian unlawfully denied similar OPRA requests. *See Verry*, GRC 2011-114 *et seq.*; Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated March 25, 2014); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-311 (Interim Order dated November 18, 2014). Counsel asserted that should (8) prior notices that such a denial is unlawful does not prove that the Custodian's actions were knowing and willful in nature, the Council should explain to the public how many actual times would constitute a knowing and willful violation.¹⁵

In closing, Counsel contended that the evidence of record suggested that the Custodian did not intend to disclose responsive records even though the Complainant's OPRA requests conformed to the appropriate criteria set forth in Elcavage, GRC 2009-07. Counsel further contended that these complaints prove that the Custodian knowingly and willfully withheld records in order to block the Complainant from gathering conflicting evidence in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-71.¹⁶ Council contended that the GRC should hold its decision in Verry, GRC 2015-71, until after the conclusion of the instant matter to preserve the Complainant's right of due process to disprove the Custodian's SOI in that complaint.

¹³ The Custodian requested that the GRC explore the possibility of allowing the Borough to seek fees and costs from the Complainant for frivolous litigation. The GRC notes that OPRA's fee shifting provision only applies to complainants. N.J.S.A. 47:1A-6.

¹⁴ The GRC reiterates that each of the Complainant's Denial of Access Complaints contained the same issue.

¹⁵ The GRC notes that it already addressed this issue in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-158 *et seq.* (May 2013) at 8-9.

¹⁶ This complaint is currently pending adjudication before the GRC.

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Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).¹⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian certified in the SOIs that he received each OPRA request on March 25, 2015, and responded in writing on April 6, 2015. Absent any evidence in the record to support that the Borough was not open on any given day between March 26, 2015 (the first business day) and April 3, 2015 (the seventh business day), the GRC finds that the Custodian did not respond until the eighth (8th) business day after receipt of the Complainant's eight (8) OPRA requests. Accordingly, the Custodian failed to respond in writing in a timely manner and the Complainant's eight (8) OPRA requests were "deemed" denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's eight (8) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 them pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Unlawful Denial of Access

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

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful*

¹⁷ 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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information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

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

The Court reasoned that:

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

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;¹⁸ NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151.

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

Additionally, the Court has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

¹⁸ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

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In Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015), one of the subject OPRA requests comprised sixteen (16) individual items seeking e-mails and correspondence between specifically identified persons over a defined time period for a number of keywords. The Council held that said request was invalid, reasoning that:

Even though the Complainant's request items included the requisite criteria set forth in Elcavage, the inclusion of eighty (80) applicable search terms is contrary to the Appellate Division's holding in Burke. Whereas the request at issue in Burke, identified a particular subject (EZ Pass benefits for retirees), the Complainant's request items here identify numerous terms, most very generic and others a little more specific (from "approvals" and "loans" to "297 Palisades Avenue"). In order to fulfill this type of request, the Custodian would not be limited to just electronically searching e-mails by the search terms provided but would also have to research all Borough files for a period greater than fourteen (14) months in an effort to locate all correspondence responsive to the request. Given all the search words for each of the sixteen (16) request items this would be a daunting task, and one not required under the law because ". . . OPRA does not countenance open-ended searches of an agency's files." MAG, at 549.

Id. at 4.

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

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

Id. at 5.

Here, the Complainant argued that the Custodian unlawfully denied access to the subject OPRA requests as invalid. The Complainant contended that all OPRA requests contained the requisite criteria set forth through in precedential case law. Moreover, the Complainant's Counsel argued in his May 26, 2015 submission that the Complainant crafted each request in the exact same form that appears in the Handbook for Records Custodians (Fifth Edition – January 2011). To the contrary, the Custodian initially denied access to the requests stating that same did not include a "specific recipient and content or subject." In the SOI, the Custodian reiterated his position that the requests were overly broad because they constituted open-ended requests for all record inclusive of a keyword.

Initially, a review of the Complainant's eight (8) OPRA requests provide that each includes: 1) sender/recipient; 2) a range of dates; and 3) a keyword comprised of either a proper name or generic word. Thus, in form alone, the requests appear to contain all relevant criteria

necessary for a valid request seeking correspondence under OPRA. Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

However, the threshold issue raised in these complaints is whether the identified keywords are sufficient to act as the “subject or content” of the requested correspondence. Such a determination is predicated on enough specificity for a custodian to readily identify, locate and produce records based on a “routine search of files pertaining to a very narrowly specified topic.” Burke, 429 N.J. Super. at 177. A review of this issue is first and foremost governed by the Council’s reasoning in Verry, 2013-43. Specifically, the subject should be readily identified based on the request. Further, any determination on the identifiable nature of the subject must be addressed on a case-by-case basis.

While novel in nature for the GRC, given this exact set of facts, the GRC looks to Elcavage, Burke, and Doss in finding that that request Nos. 1 and 2 are valid. However, request Nos. 3 through 8, containing generic terms interchangeably falling with an unlimited context, are invalid because said keywords are not substantive enough to define “subject or content.”

In reaching this conclusion, the GRC notes that proper names are more easily identifiable as “subject or content” because those e-mails or correspondence referring to an individual name cannot be construed interchangeably. If the identified person were the subject of correspondence, a custodian would easily be able to ascertain this fact without conducting research.

However, a generic keyword, such as “sheet” or “time,” can easily appear in a broad universe of records without any specific meaning. While the GRC recognizes that the requests in Doss, GRC 2014-149, sought correspondence and a larger contingent of keywords over a time frame similar to the requests at issue here, the basic tenet of the Council’s decision is applicable here. Specifically, requiring a custodian to attempt to locate responsive correspondence containing a single word of generic meaning without any context is not supported either by Elcavage or Burke. Further, requiring a custodian to locate responsive correspondence based on a single generic keyword would inevitably present a daunting task and is clearly not consistent with the establishment of “subject or content” as one of the criteria for a valid correspondence search. More important, employing generic keywords is certainly akin to the type of overly broad request that the MAG and NJ Builder Courts determined to be invalid.

A review of request Nos. 3 through 8 at issue here does not elicit a readily identifiable subject on their face. It was not until May 26, 2015, when Complainant’s Counsel clarified that the Complainant sought evidence to refute the Custodian’s SOI in Verry, GRC 2015-71 (wherein a request seeking Ms. Lih’s timesheets were at issue). Had the Complainant sought e-mails and correspondence regarding Ms. Lih’s time sheets and/or work attendance from the outset, such a request would have conformed to a “limited subject matter.” Burke, 429 N.J. Super. at 178. However, as currently composed, the generic terms contained within each individually submitted OPRA request do not constitute a valid “subject or content.”

Accordingly, the Complainant’s OPRA requests No. 1 and 2 are valid because the identification of an individual as the subject or content of correspondence is reasonably specific enough for a custodian to locate responsive records. Elcavage, GRC 2009-07; Burke, 429 N.J.

Super. at 177. For those requests, the Custodian has unlawfully denied access to any responsive records and must provide same to the Complainant. N.J.S.A. 47:1A-6. However, the Complainant's OPRA requests No. 3 through 8 are invalid because they fail to include a narrowly construed "subject or content." Elcavage, GRC 2009-07; Doss, GRC 2014-149. Specifically, the Complainant included a single generic keyword in each request that does not sufficiently narrow the scope of the subject or content of records sought. MAG, 375 N.J. Super. at 546; NJ Builders, 390 N.J. Super. at 180; Burke, 429 N.J. Super. at 177. The Custodian would be required to perform research to respond properly to each request and use judgement as to whether the located correspondence was actually responsive: OPRA does not require such actions. For those requests, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

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 eight (8) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant's OPRA requests No. 1 and 2 are valid because the identification of an individual as the subject or content of correspondence is reasonably specific enough for a custodian to locate responsive records. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). For these requests, the Custodian has unlawfully denied access to any responsive records and must provide same to the Complainant. N.J.S.A. 47:1A-6.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁹ to the Executive Director.²⁰

4. The Complainant's OPRA requests No. 3 through 8 are invalid because they fail to include a narrowly construed "subject or content." Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015). Specifically, the Complainant included a single generic keyword in each request that does not sufficiently narrow the scope of the subject or content of records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). The Custodian would be required to perform research to respond properly to each request and use judgement as to whether the located correspondence was actually responsive: OPRA does not require such actions. For those requests, the Custodian lawfully denied access to them. N.J.S.A. 47:1A-6.
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

March 22, 2016²¹

¹⁹ "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."

²⁰ 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.

²¹ This consolidated complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.

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