



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

July 31, 2018 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2016-29

v.

Borough of Washington (Warren)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a 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 31st Day of July, 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: August 3, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2016-29

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Audio recording of the most recent public meeting that was recorded in either an .MP3 or .WAV format.
2. All approved executive session minutes for every meeting from January 1, 2014 to present.
3. The Borough of Washington's ("Borough") current OPRA request form.
4. Check registry data of the general fund by check date from January 1, 2010 to present in a readable .txt format.

Custodian of Record: Kristine Blanchard³
Request Received by Custodian: November 16, 2015
Response Made by Custodian: November 24, 2015
GRC Complaint Received: January 27, 2016

Background

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian did not fully comply with the Council's February 27, 2018 Interim Order. Specifically, the Borough disclosed the responsive check registry data to Complainant's Counsel in the requested medium and free of charge on March 8, 2018. However the current Custodian failed to simultaneously provide certified confirmation of compliance to the Council Staff within the prescribed time frame.

¹ Represented by Eric Dixon, Esq. (North Bergen, NJ).

² Represented by Leslie Parikh, Esq., of Gebhardt & Keifer, P.C. (Clinton, NJ)

³ The current Custodian of Record is Laurie Barton.

2. The Custodian's failure to timely respond within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to check registry data from 2010 through 2013. Also, the current Custodian did not fully comply with the Council's February 27, 2018 Interim Order. However, the Custodian bore her burden of proof that the initial extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to any additional responsive records. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA or the current Custodian's failure to comply fully with the Council's Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Custodians' actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's February 27, 2018 Interim Order, the Complainant has partially achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Custodian disclosed responsive check registry data from 2010 through 2013 in accordance with the Council's Order. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On April 25, 2018, the Council distributed its Interim Order to all parties. On May 23, 2018, Complainant's Counsel e-mailed the Government Records Council ("GRC") advising that the parties were actively negotiating a fee agreement, but that they needed an extension of thirty (30) days to complete said negotiations. On the same day, the GRC responded granted an additional twenty (20) business day extension, or until June 22, 2018.

On June 22, 2018 Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved in principle. Counsel noted that the parties would execute the finalized documents shortly.

Analysis

Prevailing Party Attorney's Fees

At its April 24, 2018 meeting, the Council determined that 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 April 25, 2018, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on May 23, 2018. On the final day to confirm a fee agreement, Complainant's Counsel sought an extension, which the GRC granted through June 22, 2018. On June 22, 2018, Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the parties reached a fee agreement.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a 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 that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a 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

July 24, 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

April 24, 2018 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2016-29

v.

Borough of Washington (Warren)
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian did not fully comply with the Council’s February 27, 2018 Interim Order. Specifically, the Borough disclosed the responsive check registry data to Complainant’s Counsel in the requested medium and free of charge on March 8, 2018. However the current Custodian failed to simultaneously provide certified confirmation of compliance to the Council Staff within the prescribed time frame.
2. The Custodian’s failure to timely respond within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to check registry data from 2010 through 2013. Also, the current Custodian did not fully comply with the Council’s February 27, 2018 Interim Order. However, the Custodian bore her burden of proof that the initial extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to any additional responsive records. Additionally, the evidence of record does not indicate that the original Custodian’s violations of OPRA or the current Custodian’s failure to comply fully with the Council’s Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Custodians’ actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s February 27, 2018 Interim Order, the Complainant has partially achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Custodian disclosed responsive check registry data from 2010



through 2013 in accordance with the Council's Order. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 24th Day of April, 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: April 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 24, 2018 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2016-29

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Audio recording of the most recent public meeting that was recorded in either an .MP3 or .WAV format.
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Custodian of Record: Kristine Blanchard³
Request Received by Custodian: November 16, 2015
Response Made by Custodian: November 24, 2015
GRC Complaint Received: January 27, 2016

Background

February 27, 2018 Council Meeting:

At its February 27, 2018 public meeting, the Council considered the February 20, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial as it related to the thirty (30) day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

¹ Represented by Eric Dixson, Esq. (North Bergen, NJ).

² Represented by Leslie Parikh, Esq., of Gebhardt & Keifer, P.C. (Clinton, NJ)

³ The current Custodian of Record is Laurie Barton.

2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame 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). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian did not unlawfully deny access to the audio recording responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, notwithstanding that the recording was posted to the Borough's website, the Custodian saved and attached a copy of the responsive records to the Statement of Information e-mail. Thus, the Council need not order any additional action here.
4. The Borough's unapproved, draft executive session minutes responsive to OPRA request item No. 2 constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
5. The Custodian did not unlawfully deny access to Borough's official OPRA request form responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed the form, although as part of a response to an unrelated OPRA request, to the Complainant on January 21, 2016. Thus, the Council need not order any additional action here. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008)
6. The Custodian unlawfully denied access to the responsive check registry data from 2010 through 2013. N.J.S.A. 47:1A-6. With the understanding that the data cannot be provided in the medium requested, the Custodian shall convert the record to some other meaningful medium and disclose it to the Complainant. N.J.S.A. 47:1A-5(d). Should such conversion result in an "actual" cost or special service charge, the Custodian must calculate it and provide the Complainant a chance to accept or reject. N.J.S.A. 47:1A-5(c); Wolosky v. Borough of Morris Plains (Morris), GRC Complaint No. 2010-165 (Interim Order dated September 27, 2011).
7. **The Custodian shall comply with conclusion No. 6 above within five (5) business days from receipt of the Council's Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the "actual" cost of converting the check registry data into another meaningful medium. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the five (5) business day period shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to**

N.J.S.A. 47:1A- 5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide to the Communications Specialist/Resource Manager a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s response shall be in the form of a legal certification in accordance with N.J. Court Rule 1:4-4.⁴

8. 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.
9. 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 March 1, 2018, the Council distributed its Interim Order to all parties. On March 20, 2018, Custodian’s Counsel e-mailed the Government Records Council (“GRC”) advising that she worked with Chief Financial Officer (“CFO”) Natasha Turchan to disclose the required check registry data to Complainant’s Counsel on March 8, 2018. Custodian’s Counsel noted that the Borough provided the information free of charge in Microsoft Excel format. Counsel asked whether additional action was required to comply with the Council’s Order given that the data was disclosed without cost. On the same day, the GRC e-mailed Custodian’s Counsel advising that the Custodian was required to submit certified confirmation of compliance within ten (10) business days after receipt of the Order. The GRC noted that, notwithstanding that the time frame expired, it would allow the Custodian until March 27, 2018 to submit the required legal certification. On March 21, 2018, Custodian’s Counsel confirmed receipt of the GRC’s e-mail and advised that the Borough would complete compliance.⁵

On March 26, 2018, the current Custodian responded to the Council’s Interim Order attaching a legal certification from CFO Turchan. The current Custodian certified that she was not the custodian of record until April 18, 2017. The current Custodian certified that following receipt of the Order, Custodian’s Counsel worked with CFO Turchan to obtain the responsive registry data in an acceptable format for disclosure. The current Custodian certified that CFO Turchan was able to access the information in the requested medium without cost. The current Custodian certified that the Borough sent the data to Complainant’s Counsel on March 8, 2018.

In supplementing the current Custodian’s response, CFO Turchan certified that Custodian’s Counsel contacted her regarding the relevant check registry data. CFO Turchan affirmed that it was her understanding that the original Custodian was under the impression that

⁴ "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."

⁵ On the same day, Complainant’s Counsel stated that he would, upon receipt of the legal certification, submit a memorandum addressing the knowing and willful and prevailing party fee issue. Complainant’s Counsel also stated that he would submit a fee application. However, the GRC subsequently e-mailed Complainant’s Counsel asking him to refrain from such submission until the Council addressed the issue by way of decision. The GRC received no submissions from Complainant’s Counsel thereafter.

the data could not be disclosed because of a licensing issue. CFO Turchan certified that the Borough did begin using a new software provider, but that the original Custodian was mistaken in her belief. CFO Turchan certified that she was able to access the registry data and could download same into an acceptable medium at no cost. CFO Turchan certified that she performed this task and the responsive registry data was sent to Complainant's Counsel on March 8, 2018.

Analysis

Compliance

At its February 27, 2018 meeting, the Council ordered the Custodian to disclose the responsive check registry data from 2010 through 2013, and advise the Complainant if there was any applicable "actual cost" or special service charge to convert them to some other meaningful medium. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff. On March 1, 2018, the Council distributed its Interim Order to all parties, providing the Custodian ten (10) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on March 15, 2018.

On March 20, 2018, three (3) business days after the expiration of the compliance time frame, Custodian's Counsel advised the GRC that the Borough sent the responsive data to Complainant's Counsel on March 3, 2018. Custodian's Counsel asked whether any additional compliance material was required. On the same day, the GRC confirmed that the Order required the Custodian to submit certified confirmation of compliance and that the time frame had expired. Notwithstanding, the GRC provided a new deadline, March 27, 2018, for the Custodian to submit same.

On March 26, 2018, the current Custodian submitted certified confirmation of compliance. Therein, the current Custodian certified that Counsel and CFO Turchan worked together to retrieve the responsive registry data in the medium requested. Further, the current Custodian certified that the Borough sent the responsive data to Complainant's Counsel on March 8, 2018. The current Custodian included as part of her compliance submission a separate certification from CFO Turchan corroborating her certification. Accordingly, the current Custodian complied with all elements of the Order except for the compliance time frame.

Therefore, the current Custodian did not fully comply with the Council's February 27, 2018 Interim Order. Specifically, the Borough disclosed the responsive check registry data to Complainant's Counsel in the requested medium and free of charge on March 8, 2018. However the current Custodian failed to simultaneously provide certified confirmation of compliance to the Council Staff within the prescribed time frame.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access

under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

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

The Custodian’s failure to timely respond within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to check registry data from 2010 through 2013. Also, the current Custodian did not fully comply with the Council’s February 27, 2018 Interim Order. However, the Custodian bore her burden of proof that the initial extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to any additional responsive records. Additionally, the evidence of record does not indicate that the original Custodian’s violations of OPRA or the current Custodian’s failure to comply fully with the Council’s Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Custodians’ actions rose 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. 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.]

The Complainant filed the instant complaint requesting that the GRC order disclosure of multiple records. Thereafter, and within a framework of continuing extensions, the Custodian disclosed many of those records. However, the Custodian did not disclose check registry data for 2010 through 2013. In the Statement of Information, the Custodian asserted that said data could not be disclosed in the requested medium because of a software licensing issue. Although the Custodian offered alternatives at that time, the evidence of record indicated that no disclosure occurred. Based on this, the Council's February 27, 2018 Interim Order required the Custodian to disclose the data after receiving the appropriate cost, if applicable. In response to the Order, the Borough disclosed the data to Complainant's Counsel on March 8, 2018 free of charge. The current Custodian subsequently certified to this fact on March 26, 2018.

In determining whether this complaint was the causal nexus for a change in the Borough's conduct, it is arguable that the Custodian's initial disclosure was the result of the filing of this complaint. Specifically, the Custodian sought multiple extensions that overlapped the filing and pendency of this complaint. The Custodian also ultimately provided almost every responsive record within those extensions. Further, the Custodian offered to disclose check registry data for 2010 through 2013, but asserted that it could not be provided in the medium requested. Thus, it would appear that this complaint did not bring about a change, voluntary or otherwise.

However, the evidence of record indicated that the Custodian ultimately never disclosed the relevant data. Based on this, in its February 27, 2018 Interim Order, the Council ordered disclosure of same after receipt of the appropriate fee, if applicable. It was only after the Order that the Borough disclosed the data to the Complainant. The Borough also determined at that point the data could be disclosed in the medium requested and free of charge. The evidence of record thus supports that this complaint did bring about a voluntary change in the Borough's conduct as it applied to the relevant check registry data. Specifically, although the Custodian previously disclosed a number of the responsive records, this complaint directly led to the disclosure of the check registry data from 2010 through 2013 in the requested medium. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, and pursuant to the Council's February 27, 2018 Interim Order, the Complainant has partially achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, Custodian disclosed responsive check registry data from 2010 through 2013 in accordance with the Council's Order. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council's February 27, 2018 Interim Order. Specifically, the Borough disclosed the responsive check registry data to Complainant's Counsel in the requested medium and free of charge on March 8, 2018. However the current Custodian failed to simultaneously provide certified confirmation of compliance to the Council Staff within the prescribed time frame.
2. The Custodian's failure to timely respond within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to check registry data from 2010 through 2013. Also, the current Custodian did not fully comply with the Council's February 27, 2018 Interim Order. However, the Custodian bore her burden of proof that the initial extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to any additional responsive records. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA or the current Custodian's failure to comply fully with the Council's Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither Custodians' actions rose to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's February 27, 2018 Interim Order, the Complainant has partially achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Custodian disclosed responsive check registry data from 2010 through 2013 in accordance with the Council's Order. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

April 17, 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

February 27, 2018 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2016-29

v.

Borough of Washington (Warren)
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no “deemed” denial as it related to the thirty (30) day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame 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). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian did not unlawfully deny access to the audio recording responsive to the Complainant’s OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, notwithstanding that the recording was posted to the Borough’s website, the Custodian saved and attached a copy of the responsive records to the Statement of Information e-mail. Thus, the Council need not order any additional action here.
4. The Borough’s unapproved, draft executive session minutes responsive to OPRA request item No. 2 constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.



5. The Custodian did not unlawfully deny access to Borough's official OPRA request form responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed the form, although as part of a response to an unrelated OPRA request, to the Complainant on January 21, 2016. Thus, the Council need not order any additional action here. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008)
6. The Custodian unlawfully denied access to the responsive check registry data from 2010 through 2013. N.J.S.A. 47:1A-6. With the understanding that the data cannot be provided in the medium requested, the Custodian shall convert the record to some other meaningful medium and disclose it to the Complainant. N.J.S.A. 47:1A-5(d). Should such conversion result in an "actual" cost or special service charge, the Custodian must calculate it and provide the Complainant a chance to accept or reject. N.J.S.A. 47:1A-5(c); Wolosky v. Borough of Morris Plains (Morris), GRC Complaint No. 2010-165 (Interim Order dated September 27, 2011).
7. **The Custodian shall comply with conclusion No. 6 above within five (5) business days from receipt of the Council's Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the "actual" cost of converting the check registry data into another meaningful medium. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the five (5) business day period shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Communications Specialist/Resource Manager a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rule 1:4-4.¹**
8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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."

Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2016-29

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Audio recording of the most recent public meeting that was recorded in either an .MP3 or .WAV format.
2. All approved executive session minutes for every meeting from January 1, 2014 to present.
3. The Borough of Washington's ("Borough") current OPRA request form.
4. Check registry data of the general fund by check date from January 1, 2010 to present in a readable .txt format.

Custodian of Record: Kristine Blanchard
Request Received by Custodian: November 16, 2015
Response Made by Custodian: November 24, 2015
GRC Complaint Received: January 27, 2016

Background³

Request and Response:

On November 16, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 24, 2015, the sixth (6th) business day after receipt of the OPRA request, the Custodian responded in writing seeking a thirty (30) day extension of time due to multiple OPRA requests submitted and the volume of records sought in those requests.⁴ On November 25, 2017, the Complainant objected to a thirty (30) day extension. However, the Complainant noted that he would allow until November 30, 2015 for a response to OPRA request item Nos. 1, 3, and 4. Further, the

¹ Represented by Eric Dixson, Esq. (North Bergen, NJ).

² Represented by Leslie Parikh, Esq., of Gebhardt & Keifer, P.C. (Clinton, NJ)

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

⁴ The Custodian was likely referring to multiple OPRA requests submitted by the Complainant within that time frame. Three (3) of those requests were the subject of multiple Denial of Access Complaints.

Complainant stated that would allow until December 7, 2015, for a response to OPRA request item No. 2.

On December 10, 2015, in response to the Complainant's e-mail about an unrelated OPRA request, the Custodian e-mailed a letter to the Complainant providing an explanation for her extension of time. Therein, the Custodian stated that the Borough is small and that responding to the Complainant's "various requests" would take additional time, especially given the timing of Thanksgiving. The Custodian further stated that many of the records are not readily accessible. The Custodian noted that OPRA allows for extensions of time per N.J.S.A. 47:1A-1.1, and that the Borough intended to provide a response within the extended time frame.

On December 28, 2015, the Custodian responded stating that the Borough would need an additional thirty (30) days to respond. The Custodian noted that the Borough was in the process of gathering the requested records.

On January 21, 2016, the Custodian responded to an unrelated November 17, 2015 OPRA request.⁵ Therein, she provided a copy of the Borough's OPRA request form to the Complainant, notwithstanding that the unrelated OPRA request did not seek it.

Denial of Access Complaint:

On January 27, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the Custodian's use of multiple thirty (30) day extensions to respond to the subject OPRA request. The Complainant contended that both extensions were unreasonable and there was no evidence in the record to support them. The Complainant noted that his request was valid because it sought identifiable government records and that the Custodian should have disclosed them in timely manner. The Complainant also noted that the Custodian took the first (1st) extension despite his objections. Further, the Complainant contended that the Custodian failed to provide a "date certain" on which she would respond.

The Complainant contended that the Custodian knowingly and willfully violated OPRA because she failed to provide a valid reason for extending the response time frame. N.J.S.A. 47:1A-11. The Complainant contended that the knowing and willful violation and imposition of the civil penalty is warranted here because the Custodian could not justify her extensions in the least.

The Complainant also contended that it was highly likely that he is a prevailing party entitled to an award of attorney's fees. N.J.S.A. 47:1A-6; Mason v. City of Hoboken, 196 N.J. 51, 75-76 (2008). The Complainant asserted that, at a minimum, Complainant Counsel's involvement was necessary to enforce his right to access under OPRA.

The Complainant thus requested that the GRC: 1) order disclosure of the responsive records immediately, or provide a deadline for production; 2) determine that the Custodian

⁵ This OPRA request is the subject of Wolosky v. Borough of Washington (Warren), GRC Complaint No. 2016-30.

Jesse Wolosky v. Borough of Washington (Warren), 2016-29 – Findings and Recommendations of the Council Staff

knowingly and willfully violated OPRA per N.J.S.A. 47:1A-11; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Supplemental Response:

On January 29, 2016, the Custodian e-mailed the Complainant seeking an additional thirty (30) business days to respond to his OPRA request.

Statement of Information:

On February 24, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 16, 2015. The Custodian certified that she responded in writing on November 24, 2015, December 28, 2015, and January 29, 2016 seeking a total of ninety (90) additional days to respond to the subject OPRA request. The Custodian certified that the extension was necessary because the Municipal Clerk's Office had very limited staff, she received four (4) other OPRA requests from the Complainant in a short time frame, and she had received the subject OPRA request during the holiday season. Further, the Custodian affirmed that she missed substantial time from work in January 2016 due to a family medical situation and significant snowstorm.

The Custodian contended that the Complainant submitted this OPRA request, in tandem with the other four (4) OPRA requests, as a form of harassment after inappropriately interacting with Borough officials about a tax lien issue. The Custodian argued that she reasonably sought extensions for the reasons noted above. More specifically, the Custodian affirmed that she is the only full-time employee in the Clerk's Office and serves as both Municipal Clerk and Borough Manager. Further, the Custodian stated that Complainant submitted five (5) OPRA requests between November 10, and November 17, 2015 all of which contained multiple items and, in some instances, spanned a number of years. The Custodian reiterated that she had additional work obligations in November and December 2015, as well as an unexpected medical obligation in December 2015 and January 2016. The Custodian affirmed that those obligations, along with the significant snow storm, led to her being either out of work or consumed with her official duties during much of the extended time periods.

The Custodian further averred that, during her attempts to respond to the instant OPRA request, she simultaneously addressed the other requests. Also, the Custodian noted that the Complainant filed Wolosky v. Borough of Washington (Warren), GRC Complaint No. 2015-402 and a Court action (Docket No. WRN-L-18-16) during her attempts to respond. The Custodian certified that the Complainant then filed this complaint, as well as two (2) others, with three (3) different attorneys representing him and preventing all actions from being consolidated.

OPRA request Item No. 1

The Custodian certified that the most recent audio recording came from the Borough's November 16, 2015 Council meeting. The Custodian affirmed that the Borough posts audio recordings of its meetings on its website, to which she provided a link in the SOI. The Custodian noted that the Complainant could save the responsive recording in the requested format directly

from the website. The Custodian also averred that she believed that directing the Complainant to the website did not constitute as proper response under OPRA. The Custodian thus certified that she sent a copy of the responsive recording to the Complainant as part of the SOI submission.

OPRA request item No. 2

The Custodian certified that Borough executive session minutes from 2014 to the present were exempt from disclosure because they remained unapproved. Wolosky v. Cnty. of Sussex Bd. of Chosen Freeholders, GRC Complaint No. 2009-26 (Interim Order dated February 23, 2010).⁶

OPRA request item No. 3

The Custodian certified that she provided a copy of the Borough's OPRA request form to the Complainant as part of her response to his unrelated November 17, 2016 OPRA request. The Custodian asserted that she was not required to send another copy of it to the Complainant. Scutro v. City of Linden (Union), GRC Complaint No. 2012-219 (June 2013) (citing Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008) and Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order February 2013).

OPRA request item No. 4

The Custodian certified that the Complainant requested five (5) years of check registries in .txt format and would not accept them in .pdf or image files. The Custodian affirmed that the Borough could provide a 2014-2015 registry in an excel spreadsheet. The Custodian also certified that due to an ongoing server upgrade, she could not provide the files until closer to the expiration of the third (3rd) extension deadline.

The Custodian also certified that the registry from 2010 through 2013 was not available in Complainant's preferred format because the Borough changed software. The Custodian affirmed that the Borough used Edmunds for those years, but switched to "GFMS" in 2014. The Custodian certified that she could no longer convert Edmunds files because the Borough did not retain a license. The Custodian asserted that she had the records in several forms, but none that complied with the Complainant's OPRA request. To this end, the Custodian argued that no records existed. Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (Interim Order dated November 4, 2009). However, the Custodian offered the following compromises: 1) the Borough could disclose Council meeting agendas containing purchasing records for that time frame in .pdf format; or 2) the Borough could attempt to produce raw data from the Edmunds system that could be read with on an appropriate software program with a valid license.

⁶ The Custodian noted that the Borough acknowledged that it was in violation of the Open Public Meetings Act ("OPMA") but was attempting to cure the issue. The Custodian also correctly noted that the GRC did not have the authority to adjudicate OPMA issues. N.J.S.A. 47:1A-7(b).

The Custodian further argued that the facts support that the Complainant should be denied prevailing party attorney's fees. The Custodian contended that she had no knowledge of the instant complaint when she sought her third extension on January 29, 2016; the Complainant did not copy the Borough on the initial filing. Further, she stated that she had overlooked the GRC's initial SOI request e-mail, sent on January 28, 2016, due to a combination of circumstances as discussed above. The Custodian thus asserted that the instant complaint was not the catalyst for her responses and disclosures to date. Mason v. City of Hoboken, 196 N.J. 51 (2008); Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). The Custodian further argued that there was no causal nexus between the complaint and her response, which is supported by her continued extension e-mails. The Custodian averred that the Borough always intended to provide responsive records; thus, there was no causal nexus between this complaint and the disclosure of responsive records.

Supplemental Response:

On March 1, 2016, the Custodian responded by e-mail providing the Complainant a check registry file for 2014-2015.

Additional Submissions:

On March 16, 2016, the Complainant's Counsel submitted a letter brief rebutting the Custodian's SOI. Therein, Counsel argued that an analysis of the Custodian's sent e-mails over the initial extension period prove that she did not act in good faith. Counsel further contended that the Custodian's alleged good faith effort is further undone when reviewing her e-mail account through the second and third extensions of time. Counsel asserted that the Custodian sent e-mails on each and every work day in December, including Christmas Eve and New Year's Eve. Counsel did note that she did not send e-mails on November 19, November, 26, and November 27, 2015. Further, Counsel asserted that the Custodian sent e-mails from her account on twelve (12) weekdays in January not to include January 4, January 8, and January 12, 2016. Counsel finally asserted that between the filing of this complaint on January 25, 2016⁷ and the SOI, the Custodian sent e-mails on every work day except January 25, 2016. Counsel noted that the Custodian did not send e-mails on February 12 and February 15, 2016.

Counsel contended that the Custodian's e-mail usage proved that she did not need the extensions she unilaterally took in order to respond to this OPRA request. Counsel argued that, even if a family medical issue occurred, the Custodian's e-mail usage does not substantiate her claim that she missed significant time. Also, Counsel contended that the Custodian erroneously combined all requests; the request at issue here was narrowly construed to seek 1) one (1) audio file; 2) executive session minutes for meetings from 2014 to November 2015; 3) the Borough's own blank OPRA request form; and 4) a check register. Counsel contended that all records were easily accessible and did not require lengthy extensions.

Counsel argued that the Borough's "own disorganization" is highlighted by the fact that the Custodian provided the responsive OPRA request form as part of a response to a separate OPRA request that did not seek it. Counsel also contended that the Custodian even failed to

⁷ Counsel e-mailed this complaint to the GRC on 10:54 p.m. on January 25, 2016.

change the “Name of Agency” placeholder on the last page of the form in multiple places. Counsel argued that all of the foregoing clearly proves the unreasonable and unjustified nature of her extensions.

Additionally, Counsel contended that the Custodian’s attempts to sway the Council by impugning the Complainant’s “motive” for this action are improper. Counsel noted that OPRA guarantees the public’s right to access government records regardless of motive. Counsel further averred that OPRA does not require a public agency’s approval of a requestor’s “motive” as a condition of access to records.

Finally, Counsel contended that the facts of this case prove that this complaint was the catalyst for the disclosure of responsive records and that the Complainant is a prevailing party. Counsel contended that the Custodian granted herself a thirty (30) day extension, which expired on December 24, 2015, and failed to respond until December 28, 2015. Counsel further argued that she sought another extension at that time, which expired on January 27, 2016, and again failed to respond within that extended time frame. Counsel stated that the Custodian admitted in the SOI that she was disclosing records as part of her submission, twenty-nine (29) days after this complaint filing and ninety-nine (99) days after the initial OPRA request.

On March 17, 2016, Custodian’s Counsel sought permission to submit a reply to Complainant’s Counsel’s March 16, 2016 letter brief. On March 24, 2016, the GRC granted permission for Custodian’s Counsel to submit a sur-reply within ten (10) business days.

On April 4, 2016, Custodian’s Counsel submitted a sur-reply. Therein, Counsel initially reiterated that OPRA allows custodians to extend a time frame where reasonable. *See Rivera v. City of Plainfield Police Dep’t (Union)*, GRC Complaint No. 2009-317 (May 2011); *Criscione v. Town of Guttenberg (Hudson)*, GRC Complaint No. 2010-68 (November 2010); *O’Shea v. Borough of Hopatcong (Sussex)*, GRC Complaint No. 2009-223 (December 2010). Counsel contended that the Custodian’s extensions were reasonable. Counsel refuted Complainant Counsel’s analysis of the Custodian’s e-mail log because it did not take into account that she was issued a Borough laptop. Counsel contended that, to the contrary, the e-mail log proved that the Custodian went above and beyond her duties by responding to e-mails when not physically in the office. Counsel asserted that the OPRA request at issue here required the Custodian’s physical presence at work to search for, locate, and review responsive records. Counsel also provided a detailed description of the Custodian’s schedule during the extended response time frame.

Counsel also reiterated that the extension was necessary because the Custodian was handling five (5) OPRA requests submitted over a week-long period resulting in the disclosure of more than 400 pages of records. Counsel also noted that the Borough provided over 100 pages of records to the Complainant in response to two (2) March 2016 OPRA requests. Counsel argued that the Complainant purposely tried to isolate the requests to mislead the GRC, noting that he also hired three (3) separate attorneys over five (5) actions.

Counsel next contended that the Custodian disclosed the Borough’s OPRA request form to the Complainant regardless of whether she mistakenly did so as part of another OPRA request. Counsel argued that although the Complainant bifurcated his requests, the Borough chose to

view them as a whole. Counsel argued that this resulted in a minor clerical error. Counsel noted that the Complainant did not allege that he did not receive the record, which moots any argument that the Custodian unlawfully denied access to it. Counsel also briefly refuted Complainant Counsel's March 16, 2016 "own disorganization" argument by noting that numerous municipalities overlooked template placeholders on last page of the model request form.

Counsel also refuted that the SOI attempted to "impugn" the Complainant's character. Counsel argued that the Borough simply provided factual information where the Complainant "conveniently" and "continuously" omitted it. Counsel further asserted that the Borough believed that facts provided, as certified to by the Custodian, were important to the GRC's evaluation of this complaint.

Finally, Counsel contended that this complaint filing was not the catalyst to disclose responsive records. Counsel contended that the Borough extended the time frame for disclosure through February 29, 2016, but provided responsive records on February 24, 2016 as part of the SOI. Counsel further noted that records not available on February 24, 2016 were provided on March 1, 2016. Counsel further argued that the Borough believed it best to complete disclosure as part of the SOI because of the requirement to copy all parties while following the Rules of Professional Conduct with respect to represented parties. NJ Court Rules R.P.C. 4.2.⁸

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).⁹ 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).

Custodian's request for an extension:

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th)

⁸ On May 13, 2016, the Custodian's Counsel requested that the instant complaint be consolidated with Wolosky v. Borough of Washington (Warren), GRC Complaint Nos. 2015-402, 2016-19, and 2016-30 (currently pending adjudication). The GRC has a long-standing policy of consolidating complaints based on the commonality of parties and issues. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-158 & 2011-193 (May 2013). However, after reviewing all complaints, the GRC finds that consolidation is not appropriate due to the number of requested items, submissions, issues, and differences in the Complainant's representation.

⁹ 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.

business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i)."

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009).

Although extensions are rooted in well-settled case law, the Council need not unquestioningly find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29,

2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian timely responded seeking an extension of thirty (30) days to respond to the Complainant’s OPRA request.¹⁰ At that time, the Custodian stated that she received multiple OPRA requests from the Complainant seeking a voluminous amount of records as her reason for the extension.

The Complainant’s OPRA request sought four (4) items comprising of: 1) an audio recording from the most recent meeting in .MP3 or .WAV format; 2) all approved executive session minutes for all meetings from January 1, 2014 to the OPRA request date; 3) the Borough’s current OPRA request form; and 4) check registry data of the general fund from January 1, 2010 to the OPRA request date in .txt format. The Custodian extended the response time multiple times before responding as part of the SOI on February 24, 2016. However, the GRC is only addressing the first thirty (30) day extension here. As noted above, a requestor’s approval is not required for a valid extension. However, the evidence of record shows that the Complainant objected to the first extension on November 25, 2015.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.¹¹

The evidence of record here indicates that in a short period of time the Custodian received five (5) OPRA requests for multiple items spanning multiple time periods, one of which was the subject OPRA request. The Custodian averred in the SOI that the extended response time frame included both the Thanksgiving and Christmas holidays. The Custodian certified that she was the only full-time employee in an office of three (3). The Custodian also noted that a family medical emergency arose in December 2015 that necessitated her attention. The OPRA request at issue here caused additional confusion due to the Custodian’s understanding of providing access to records on a website and the technological issue surrounding disclosure of certain check registry data. Complainant’s Counsel disputed these reasons, arguing that an analysis of the Custodian’s e-mail account showed that she was actively working a majority of the extended time frame. Counsel also argued that the Custodian erroneously combined all five (5) requests; however, the subject OPRA request sought readily available records.

¹⁰ The Custodian subsequently sought a second (2nd) extension of time on December 28, 2015 and additional extensions thereafter. The December 28, 2015 extension request will be addressed below.

¹¹ “Extenuating circumstances” could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency’s need to reallocate resources to a higher priority due to *force majeure*.

From the Custodian's receipt of the Complainant's OPRA request, she initially sought thirty (30) days to respond. Notwithstanding any additional requests for an extension addressed below, the Custodian sought, in addition to the original seven (7) business days, one (1) calendar month amounting to approximately nineteen (19) business days (accounting for Thanksgiving, Black Friday, and Christmas Day as non-business days). This extension, given the other requests, the process of disclosing some items contained herein, and scheduling complications, indicates merit to the need for an extension of time. Thus, the record sufficiently proved extenuating circumstances that warranted a thirty (30) day delay.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial as it related to the thirty (30) day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Failure to Respond within the Extended Time Frame:

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

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

[Id.]

Here, the Custodian initially responded on November 24, 2015, the fifth (5th) business day after receipt of the subject OPRA request, obtaining a thirty (30) day extension of time. Assuming that the extension would begin on the first (1st) day after the seventh (7th) business day, the final date to respond was December 26, 2015 (a Saturday). The Custodian did not respond until December 28, 2015, which was beyond thirty (30) calendar days. Thus, in keeping with Kohn, GRC 2007-124, the Custodian's failure to respond prior to the extension expiration resulted in a "deemed" denial.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame 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. See also Kohn, GRC 2007-124.

Finally, the GRC notes that the risk that the time frame may expire on a holiday or weekend is inherent when a custodian provides a general time frame as opposed to an actual deadline date for the extension. Thus, best practices would dictate that a custodian provide a specific date, as opposed to a time frame, when seeking an extension of the statutory response time.

Further, because the OPRA request was “deemed” denied at the time the Custodian sought her second (2nd) extension, the GRC declines to address the reasonableness of any subsequent extensions.

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 request item No. 1

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), the Council reversed a prior decision prohibiting custodians from directing requestors to records posted on the internet. In doing so, the Council provided guidance to custodians when disclosing records online by making it clear that:

[A] custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document.

[Id.]

Here, the Complainant’s OPRA request item No. 1 sought an audio recording from the most recent public meeting prior to submission of the request. In the SOI, the Custodian certified that she was providing the record notwithstanding that it was available on the Borough’s website. The Custodian noted that she believed that directing the Complainant to the website would have constituted an improper response under OPRA. However, the Council’s decision in Rodriguez, GRC 2013-69 actually supports the Custodian’s ability to direct the Complainant to the recording. Unfortunately, her mistaken belief appeared to complicate disclosure, which finally occurred as part of the SOI. Regardless of the forgoing, the evidence of record supports that the Custodian disclosed the record to the Complainant.

Accordingly, the Custodian did not unlawfully deny access to the audio recording responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, notwithstanding that the recording was posted to the Borough's website, the Custodian saved and attached a copy of the responsive records to the SOI e-mail. Thus, the Council need not order any additional action here.

OPRA request item No. 2

OPRA further provides that "[g]overnment record' or 'record' means any paper, written or printed book . . . information stored or maintained electronically . . . [t]he terms shall not include inter-agency, intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. Regarding draft meeting minutes, the Council has previously determined same are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), the Council held that “. . . the Custodian has not unlawfully denied access to the requested meeting minutes as . . . said minutes had not been approved by the governing body and as such, they constitute [ACD] material and are exempt from disclosure . . .” (citing N.J.S.A. 47:1A-1.1). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009); Wolosky v. Stillwater Twp. (Sussex), GRC Complaint No. 2009-30 (January 2010).

Regarding OPRA request item No. 2, the Complainant sought all executive session meeting minutes from January 1, 2014 to the present. In the SOI, the Custodian certified that the Borough had not approved any minutes since 2014 and thus they were exempt from disclosure (citing Wolosky, GRC 2009-26). Based on the GRC's precedential case law, the Custodian was not obligated to disclose the draft minutes to the complaint because they constituted ACD material.¹²

Accordingly, the Borough's unapproved, draft executive session minutes responsive to OPRA request item No. 2 constitute ACD material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Parave-Fogg, GRC 2006-51. Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

OPRA request item No. 3

Regarding OPRA request item No. 3, the Complainant sought a copy of the Borough's official OPRA request form. Subsequent to the expiration of the first (1st) extension but before the filing of this complaint, the Custodian provided a copy of the form, albeit in response to another OPRA request. That request ultimately became the subject of Wolosky, GRC 2016-30. In this complaint filing, the Complainant made no reference to this disclosure. In the SOI, the Custodian certified that she provided the Borough's form to the Complainant in response to the unrelated OPRA request. The Custodian also argued that she was not required to provide the record again because the Complainant was already in possession of it. Bart, 403 N.J. Super. 609. Only after the SOI did the Complainant, through Counsel, acknowledge that he received the form

¹² The exempt nature of draft meeting minutes was recently upheld by the Appellate Division. Libertarians for Transparent Gov't v. Gov't Records Council & Frank Caruso, 2018 N.J. Super. LEXIS 14 (App. Div. 2018). The GRC notes that plaintiff has filed for certification with the Supreme Court.

in response to the other OPRA request. The evidence of record thus proves that the Custodian disclosed the responsive record to the Complainant.

Therefore, the Custodian did not unlawfully deny access to Borough's official OPRA request form responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed the form, although as part of a response to an unrelated OPRA request, to the Complainant on January 21, 2016. Thus, the Council need not order any additional action here. Bart, 403 N.J. Super. 609.

OPRA request item No. 4

OPRA 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 the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record:

1. in a medium not routinely used by the agency;
2. not routinely developed or maintained by an agency; or
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, or for the labor cost of personnel providing the service, 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).]

Regarding check registry data, the issue of converting or technologically manipulating such data was addressed in Wolosky v. Borough of Morris Plains (Morris), GRC Complaint No. 2010-165 (Interim Order dated September 27, 2011). There, the custodian certified in the SOI that the Borough did not maintain registry data in the format requested. However, the custodian and other employees of the agency certified that the "actual cost" to convert the record totaled \$300.00. In reviewing the issue of disclosure, the Council stated that a custodian "has an affirmative duty to provide a copy of the record in the medium requested . . ." Id. at 12. Further, the Council stated that should the agency not maintain the record in that medium, the custodian "is required to either convert the record to the requested medium or provide a copy in some other meaningful medium." Ibid. The Council ultimately required the custodian there to calculate the appropriate conversion cost and make the charge available to the complainant (citing N.J.S.A. 47:1A5(c)). Further, the Council ordered the custodian to disclose the data once the complainant remitted payment.

Here, the Complainant's OPRA request item No. 4 sought check registry data from 2010 to present in .txt. format. As part of the SOI, the Custodian certified that she would disclose the portion of the registry for 2014 and 2015 to the Complainant, which she did on March 1, 2016. However, regarding the registry from 2010 through 2013, the Custodian certified that the Borough changed programs (from Edmunds to GFMS) in 2014. The Custodian thus affirmed that she could not disclose the registry in the format requested because the Borough did not retain a license for Edmunds. The Custodian thus averred that technically no records existed. However, the Custodian offered that Complainant the following options:

1. The Borough could disclose meeting agendas containing purchasing records for that time frame; or
2. The Borough could attempt to produce raw data from Edmunds that could be read in an appropriate software with a valid license.

In reviewing the facts of this complaint, it should initially be noted that there is no dispute that the registry information, which still appears to be stored electronically, is considered a "government record." See Paff v. Galloway Twp., 229 N.J. 340, 353 (holding that information stored electronically is considered a "government record" for purposes of OPRA). The Custodian averred in the SOI that the 2010 through 2013 registry data could not be provided in the format requested due to a change from Edmunds to GRMS in 2014. Further, the Custodian made an offer to disclose the responsive data, of which the second option seemed to fall within the confines of N.J.S.A. 47:1A-5(d).

However, unlike in Wolosky, the Custodian did not address whether the records could be disclosed through conversion and at what cost, if applicable. Additionally, neither of the two (2) options appear to resemble "another meaningful medium." Specifically, meeting agendas are obviously not a reasonable alternative for check registry data. Such disclosure would require the Complainant to individually siphon information from each agenda already inputted into an existing check registry. Also, the raw data option requires the Complainant to obtain a valid software license in order to view the registry data. Such disclosure likely resulting in an unintelligible stream of data requiring licensed software does not meet the definition of "some other meaningful medium." See Wolosky v. Borough of Mt. Arlington (Morris), GRC Complaint No. 2010-194 (Interim Order dated November 29, 2011). Based on this, the Custodian unlawfully denied access to the responsive registry data from 2010 through 2013.

Accordingly, the Custodian unlawfully denied access to the responsive check registry data from 2010 through 2013. N.J.S.A. 47:1A-6. With the understanding that the data cannot be provided in the medium requested, the Custodian shall convert the record to some other meaningful medium and disclose it to the Complainant. N.J.S.A. 47:1A-5(d). Should such conversion result in an "actual" cost or special service charge, the Custodian must calculate it and provide the Complainant a chance to accept or reject. N.J.S.A. 47:1A-5(c); Wolosky, GRC 2010-165.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6. Therefore, no "deemed" denial as it related to the thirty (30) day extension occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame 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). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian did not unlawfully deny access to the audio recording responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, notwithstanding that the recording was posted to the Borough's website, the Custodian saved and attached a copy of the responsive records to the Statement of Information e-mail. Thus, the Council need not order any additional action here.
4. The Borough's unapproved, draft executive session minutes responsive to OPRA request item No. 2 constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
5. The Custodian did not unlawfully deny access to Borough's official OPRA request form responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed the form, although as part of a response to an unrelated OPRA

request, to the Complainant on January 21, 2016. Thus, the Council need not order any additional action here. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008)

6. The Custodian unlawfully denied access to the responsive check registry data from 2010 through 2013. N.J.S.A. 47:1A-6. With the understanding that the data cannot be provided in the medium requested, the Custodian shall convert the record to some other meaningful medium and disclose it to the Complainant. N.J.S.A. 47:1A-5(d). Should such conversion result in an “actual” cost or special service charge, the Custodian must calculate it and provide the Complainant a chance to accept or reject. N.J.S.A. 47:1A-5(c); Wolosky v. Borough of Morris Plains (Morris), GRC Complaint No. 2010-165 (Interim Order dated September 27, 2011).
7. **The Custodian shall comply with conclusion No. 6 above within five (5) business days from receipt of the Council’s Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the “actual” cost of converting the check registry data into another meaningful medium. Within five (5) business days of receipt of such statement, the Complainant shall deliver to the Custodian (a) payment of the actual cost of converting the requested records or (b) a statement declining to purchase these records. The Complainant’s failure to take any action within the five (5) business day period shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A- 5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council’s Interim Order, the Custodian shall provide to the Communications Specialist/Resource Manager a statement with respect to the Complainant’s willingness or refusal to purchase the requested records. The Custodian’s response shall be in the form of a legal certification in accordance with N.J. Court Rule 1:4-4.¹³**
8. 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.
9. 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

February 20, 2018

¹³ "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."