



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. 2016-30

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. 2016-30

v.

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

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

1. The Borough of Washington's ("Borough") OPRA log from January 1, 2015 to present.
2. Every OPRA request received by the Borough from July 1, 2015 to present.
3. Every response the Custodian provided to each requestor above from July 1, 2015 to present.

Custodian of Record: Kristine Blanchard

Request Received by Custodian: November 17, 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 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 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

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

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

- 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 OPRA request item No. 1 because the disclosed OPRA log did not exist at the time of the request. N.J.S.A. 47:1A-6. The Custodian was thus under no obligation to create and/or disclose the log, which came into existence after receipt of the Complainant’s OPRA request. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537 (App. Div. 2005); Paff v. v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).
 4. The Custodian did not unlawfully deny access to the third party OPRA requests responsive to item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant’s OPRA request item No. 2. *See also* Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
 5. The Custodian unlawfully denied access to the October 29, 2015 and September 16, 2015 records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, although a technological issue resulted in non-disclosure October 29, 2015 response, the Custodian was vested with the requirement to ensure she disclosed all responsive records. Further, the September 16, 2015 e-mail was clearly part of the Borough’s “response” to an OPRA request and should have been provided accordingly. However, the GRC declines to order disclosure of these records because she provided them as part of the Statement of Information and an April 27, 2016 submission respectively.
 6. 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 two (2) records responsive to OPRA request item No. 3. However, the Custodian’s first (1st) extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to records responsive to OPRA request item Nos. 1 and 2. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
 7. 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, the Custodian disclosed records responsive to the

Complainant's OPRA request item No. 3 as a result of this complaint. 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 an 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



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DEPARTMENT OF COMMUNITY AFFAIRS
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PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 24, 2018 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2016-30

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 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 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 OPRA request item No. 1 because the disclosed OPRA log did not exist at the time of the request. N.J.S.A. 47:1A-6. The Custodian was thus under no obligation to create and/or disclose the log, which came into existence after receipt of the Complainant’s OPRA request. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537 (App. Div. 2005); Paff v. v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).
4. The Custodian did not unlawfully deny access to the third party OPRA requests responsive to item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant’s OPRA request item No. 2. *See also* Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).



5. The Custodian unlawfully denied access to the October 29, 2015 and September 16, 2015 records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, although a technological issue resulted in non-disclosure October 29, 2015 response, the Custodian was vested with the requirement to ensure she disclosed all responsive records. Further, the September 16, 2015 e-mail was clearly part of the Borough's "response" to an OPRA request and should have been provided accordingly. However, the GRC declines to order disclosure of these records because she provided them as part of the Statement of Information and an April 27, 2016 submission respectively.
6. 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 two (2) records responsive to OPRA request item No. 3. However, the Custodian's first (1st) extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to records responsive to OPRA request item Nos. 1 and 2. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
7. 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, the Custodian disclosed records responsive to the Complainant's OPRA request item No. 3 as a result of this complaint. 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**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2016-30

v.

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

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

1. The Borough of Washington's ("Borough") OPRA log from January 1, 2015 to present.
2. Every OPRA request received by the Borough from July 1, 2015 to present.
3. Every response the Custodian provided to each requestor above from July 1, 2015 to present.

Custodian of Record: Kristine Blanchard

Request Received by Custodian: November 17, 2015

Response Made by Custodian: November 24, 2015

GRC Complaint Received: January 27, 2016

Background³

Request and Response:

On November 17, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 24, 2015, the fifth (5th) 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, 2015, the Complainant objected to a thirty (30) day extension, but stated that he would allow an extension through December 4, 2015.

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

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.

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 the Complainant's OPRA request. Therein, she provided to the Complainant multiple attachments via e-mail. Those attachments included an OPRA log responsive to item No. 1 and multiple third party OPRA requests/responses responsive to item Nos. 2 and 3.

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 such lengthy extensions. The Complainant noted that his request was valid because it sought identifiable government records, which the Custodian should have disclosed 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 also contended that the Custodian failed to respond within the first (1st) extended time frame, thus resulting in a "deemed" denial.

The Complainant argued that the disclosed OPRA log did not include any of his OPRA requests, which he submitted during the time period identified in his OPRA request. The Complainant alleged that this omission brings into question whether the disclosed log was the official Borough log. The Complainant also questioned why it took so long to produce a two (2) page record.

The Complainant also contended that the Custodian failed to provide all records responsive to the subject OPRA request. The Complainant asserted that six (6) of the ten (10) third party requests did not include a response e-mail. Those request dates were August 3, (2 requests), October 29, October 30, November 5, and November 16, 2015. The Complainant also asserted that the November 5, 2015 third party request was "missing."

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.

The Complainant also contended that it was highly likely that he was 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 obtain access to those records not provided on January 21, 2016.

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

Statement of Information:

On February 24, 2016, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that she received the Complainant's OPRA request on November 17, 2015. The Custodian certified that she responded in writing on November 24, 2015, and again on December 28, 2015, seeking a total of sixty (60) 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 that there was also significant snowstorm in January.

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, 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 was addressing the others. Further, 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 contended that the Complainant erroneously questioned the validity of the disclosed OPRA log. The Custodian averred that she did not enter his requests into the log because they were not completed.

OPRA request item Nos. 2 and 3

The Custodian disputed that her disclosure of responsive records was incomplete. The

Custodian contended that in many instances, records were sent to requestors without transmittal correspondence. The Custodian noted that this is especially true where records are disclosed via facsimile or picked up in person.

The Custodian affirmed that each of the August 3, 2015 requests were responded to without a transmittal letter; thus, none exist. The Custodian certified that the records responsive to the first request were sent via facsimile. The Custodian further certified that the Zoning Office called the second August 3, 2015 requestor and verbally advised that no records existed. The Custodian also certified that the Borough handled the November 16, 2015 request in the same manner; records were faxed to the requestor on November 19, 2015. The Custodian also noted that all records disclosed were included in her response to the Complainant.

Regarding the October 30, and November 5, 2015 OPRA requests, the Custodian affirmed that no physical November 5 OPRA request existed: she memorialized the requestor's verbal amendment to his original OPRA request in the log. The Custodian further affirmed that the requestor picked up 25 pages of records without a transmittal letter on November 6, 2015. The Custodian noted that those 25 pages of records were provided to the Complainant in response to item No. 3.

The Custodian finally affirmed that the October 29, 2015 OPRA requestor picked up responsive records at the Borough. The Custodian averred that she intended to disclose those records to the Complainant as part of her response; however, they became jammed in the scanner while she was preparing her response. The Custodian affirmed that she did not realize that the records were not included in her January 21, 2016 response until she began preparing the SOI. The Custodian certified that she was attaching them to the SOI in order to cure the inadvertent mistake. The Custodian argued that the Council previously determined that nondisclosure based on a mistake did not constitute a violation of OPRA. Wolosky v. Twp. of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012).

The Custodian further argued that the facts support that the Complainant was not a prevailing party. The Custodian contended that this complaint did not bring about a change in her conduct. The Custodian argued that the extensions were reasonable, she always intended to disclose all responsive records, and her response preceded the filing of this complaint. The Custodian further asserted that the OPRA log provided was complete as of the date she provided it and the alleged missing records did not exist. 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 disclosure of those records inadvertently not provided due to a technological issue. The Custodian reiterated that her failure to disclose the records originated from a paper jam. The Custodian asserted that she had no knowledge that the paper jam thwarted disclosure until after receiving this complaint. The Custodian argued that the Counsel should look to its decision in Wolosky, GRC 2010-242, and similarly hold that no fees are warranted.

Additional Submissions:

On March 28, 2016, 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 log⁵ through the second extension 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, 2016⁶ and the SOI, the Custodian sent e-mails on every work day except January 25, 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) an OPRA log; 2) third party OPRA requests submitted from July 1, 2015 to the request date; and 3) the responses to those third party OPRA requests. Counsel contended that all records were easily accessible and did not require lengthy extensions.

Regarding the OPRA log, Counsel questioned the Custodian's SOI statements that the log did not include the Complainant's multiple OPRA requests. Counsel also questioned the contemporaneous nature of the log. Counsel also argued that the ten (10) identified requests are far fewer than the number of e-mails containing the "Subject" line "OPRA" in the e-mail log (allegedly ten (10) requests to forty-five (45) e-mails). Counsel also contended that the disclosed log appeared to be a re-creation of an actual document for the purposes of responding to this OPRA request. To support this argument, Counsel noted that three (3) entries contain the typo "2105," which suggests that the field was cut and pasted multiple times.

Regarding the alleged response deficiency, Counsel contended that the Custodian never denied the existence of the records the Complainant sought. Counsel alleged that the e-mail log contained several e-mails on the dates identified in the Denial of Access Complaint. The Complainant further noted that the Custodian redacted the recipient names and "Subject" lines for each in the log, thereby bringing into question whether these e-mails were responsive to the subject OPRA request. Counsel contended that each e-mail is a "government record" under OPRA and should be disclosed.

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

⁵ The Complainant received the referenced e-mail log in response to an unrelated OPRA request.

⁶ Counsel e-mailed this complaint to the GRC on 10:54 p.m. on January 25, 2016.

condition of access to records. Counsel also reiterated the requested relief sought in the Denial of Access Complaint.

On April 4, 2016, Custodian's Counsel sought permission to submit a reply to Complainant's Counsel's March 28, 2016 letter brief. On April 27, 2016, Custodian's Counsel submitted a sur-reply attaching legal certifications from the Custodian and Tara St. Angelo, Esq. 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. See Custodian's cert. at ¶ 4. 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.

Regarding the OPRA log, Counsel contended that OPRA does not require the Borough to create and maintain such. While confirming the Complainant's assertion that the log was created contemporaneously with the subject OPRA request, Counsel contended that no violation of OPRA occurred. Counsel asserted that the Custodian realized after receiving the OPRA request that it would be prudent to maintain a log. See Custodian's cert. at ¶ 6. Counsel argued that although no log existed at the time of the OPRA request, the Custodian felt that not providing the newly created one would be disingenuous. Id. at ¶ 8. Counsel further argued that the Borough did not maintain any other logs.

Regarding the OPRA requests and responses, Counsel argued that the Complainant did not request "transmittal e-mails," he specifically requested the actual request and the response. Notwithstanding, Counsel gave a detailed account of each of the six (6) e-mails Complainant's Counsel identified in his March 28, 2016 letter, and an explanation for why each was not responsive to the subject OPRA request. See also St. Angelo cert. Regarding the November 5, 2015 e-mail entry, Custodian's Counsel explained that the requestor e-mailed the Custodian (to which she subsequently responded) to thank her for her cooperation. Counsel further asserted that the Complainant miscounted the number of times "OPRA" appeared in a "Subject" line in the e-mail log (forty (40) as opposed to the asserted forty-five (45)). Counsel noted that almost every e-mail was between the Custodian and Borough officials. Counsel further noted that the remaining e-mails did not constitute an OPRA request or response as requested by the Complainant. Counsel

gave a detailed accounting of each e-mail and an explanation as to the responsiveness, to include a September 16, 2015 e-mail attaching records sent to a third party requestor pursuant to an OPRA request. Id.

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.⁷

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).⁸ 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) 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

⁷ On May 13, 2016, 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 2016-29 (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.

⁸ 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.

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.⁹ 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.

⁹ 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.

The Complainant's OPRA request sought three (3) items comprising of 1) an OPRA log from January 1, 2015 to the request date; 2) every third party OPRA request received from July 1, 2015 to the request date; and 3) the Custodian's response to each OPRA request during that time frame. The Custodian extended the response time twice (2) and ultimately responded on January 21, 2016, disclosing a number of responsive records. 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 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.¹⁰

The evidence of record indicates that 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 also included both the Thanksgiving and Christmas holidays. The Custodian also noted that a family medical emergency arose in December 2015 that necessitated her attention. The Custodian also noted that she was the only full-time employee in an office of three (3). The 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.

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 and the amount of records provided here, 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).

¹⁰ "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*.

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 at the end of 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 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: OPRA Log

Established OPRA case law provides that custodians are not required to create a “government record” in order to satisfy a pending OPRA request. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537 (App. Div. 2005); Sussex Commons Assoc., LLC. V. Rutgers, 210 N.J. 531, 544 (2012)(citing MAG, 375 N.J. Super. at 546, 549). Further, the GRC has determined that a custodian was under no obligation to provide a record that had not been created at the time of an OPRA request. Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Paff v. v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).

In the instant matter, the Complainant’s OPRA request item No. 1 sought an OPRA log of requests received between January 1, 2015 and the date of the subject request. Following the Custodian’s January 21, 2016 disclosure of an OPRA log, the Complainant filed this complaint contending that the it appeared to be incomplete or not the Borough’s “official log.” In the SOI, the Custodian certified that the disclosed log was the only one that existed. Thereafter, Complainant’s Counsel submitted an SOI rebuttal noting that errors in the log signified the contemporaneous nature of it. The Custodian responded certifying that the subject OPRA request prompted the Borough to create and maintain a log for efficiency purposes. The Custodian also certified that although the log began after submission of the OPRA request, she felt it would have been disingenuous to not provide it. The Custodian also affirmed that the Borough maintained no other logs.

In reviewing the facts of this complaint, the GRC finds the Custodian’s certified statements regarding the creation of the log as fact. Further, longstanding case law provides that the Custodian was not required to either: 1) create an OPRA log to fulfill OPRA request item No. 1; or 2) disclose said log if it came into existence after receipt of the OPRA request. Notwithstanding that she ultimately provided the log, she was under no obligation to do so.

Accordingly, the Custodian did not unlawfully deny access to OPRA request item No. 1 because the disclosed OPRA log did not exist at the time of the request. N.J.S.A. 47:1A-6. The Custodian was thus under no obligation to create and/or disclose the log, which came into existence after receipt of the Complainant’s OPRA request. MAG, 375 N.J. Super. at 546; Paff, 2010-307.

OPRA request item No. 2: Third party OPRA requests

In Scheeler v. Office of the Governor, 448 N.J. Super. 333 (App. Div. 2017), the Appellate Division affirmed the trial court’s holding requiring disclosure of third-party OPRA requests and that dicta present in Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) did not authorize a blanket denial to those records. In affirming, the Court reasoned that:

[A] citizen submitting an OPRA request ordinarily would not have a reasonable expectation that the request will not be disclosed to others. As noted, OPRA requests are “government records” and there is no OPRA exemption, legislative resolution, executive order or court rule that precludes their disclosure.

Even so, there may be individual cases in which a citizen may have a reasonable expectation of privacy regarding that citizen's OPRA request. However, the agency may deny the public access to the OPRA request only after it has considered and applied the [Burnett v. Cnty. of Bergen, 198 N.J. 408, 414, (2009)] balancing test. Nevertheless, there is no justification for denying the public access to all third-party OPRA requests merely because of the possibility that a requestor might have an interest in preserving the confidentiality of a particular request.

Finally, we note that under OPRA, the records custodian has the burden to show that the denial of access was authorized by law. [Citation omitted] Here, defendants did not deny access on the basis of any exemption in OPRA. Instead, as previously noted, defendants relied exclusively on the dicta in Gannett. Thus, defendants did not carry their burden to show that the denials were based on any exemptions in OPRA.

[Id. at 348-349.]

Moreover, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant’s OPRA request item No. 2 sought all OPRA requests submitted to the Borough between July 1, 2015 and the date of the subject request. The Custodian disclosed to the Complainant a number of responsive third party OPRA requests (without redactions) on January 21, 2016. In the Denial of Access Complaint, the Complainant that the Custodian failed to provide at least one third party request dated November 5, 2015. In the SOI, the Custodian certified that no physical November 5, 2015 OPRA request existed: the requestor verbally amended his October 30, 2015 OPRA request on that day and she memorialized it in the newly created OPRA log.

In reviewing the evidence of record and arguments submitted by both parties in regard to this item, the GRC is satisfied that no unlawful denial of access occurred. Specifically, the Complainant disputed that not all records were disclosed based on an entry in the OPRA log. The Custodian certified in the SOI that the November 5, 2015 OPRA log entry memorialized a verbal amendment to the requestor’s October 30, 2015 OPRA request. The Complainant’s Counsel subsequently rebutted the SOI by providing an e-mail log from the Custodian’s account to support

his allegation. However, as part of her April 27, 2016 submission to the GRC, Custodian's Counsel provided a sufficient explanation (including a detailed description of the e-mail content) to refute Complainant Counsel's rebuttal. Further, Custodian's Counsel supported that explanation with legal certifications from both the Custodian and Ms. St. Angelo. Thus, all of the facts and certifications presented to the GRC here support a conclusion that no unlawful denial of access occurred.

Therefore, the Custodian did not unlawfully deny access to the third party OPRA requests responsive to item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant's OPRA request item No. 2. See also Danis, GRC 2009-156, *et seq.*

OPRA request item No. 3: Responses to third party OPRA requests

Here, the Complainant's OPRA request item No. 3 sought every response to the above disclosed OPRA requests. On January 21, 2016, the Custodian disclosed a number of records responsive to this item. In the Denial of Access Complaint, the Complainant contended that the Custodian failed to provide all responses because six (6) of the ten (10) third party requests did not include a response e-mail. In the SOI, the Custodian certified that she provided all responsive records, noting that five (5) of the requests were responded to by fax or pickup without a cover letter. Further, the Custodian affirmed that the Zoning Office responded to the sixth (6th) OPRA request verbally. However, the Custodian also certified that records provided in response to an October 29, 2015 OPRA request were inadvertently left out due to a scanning jam. The Custodian certified that she was providing them as part of the SOI to cure the mistake, which she discovered while preparing the SOI. The Custodian also argued that she did not unlawfully deny access to the records (citing Wolosky v. Twp. of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012)).

In his rebuttal, Complainant's Counsel pointed to multiple e-mails in the log that brought into question whether the Custodian provided all responsive records. In her April 27, 2016 response, Custodian's Counsel argued that the Complainant attempted to "change his OPRA request" to include "'transmittal' letters or e-mails." Further, Custodian's Counsel explained, with detailed descriptions, each e-mail that Complainant's Counsel suggested was not provided. The Custodian's Counsel also included supporting certifications from the Custodian and Ms. St. Angelo. It was also revealed therein that the Custodian sent a response via e-mail to one requestor that she did not disclose to the Complainant. A copy of that September 16, 2015 e-mail was attached.

In reviewing the facts provided by the parties, as well as their arguments and legal certifications, the Custodian ultimately unlawfully denied access to two (2) responses: the October 29, 2015 OPRA request response and the September 16, 2015 e-mail provided as part of the April 27, 2016 submission. Otherwise, the GRC is satisfied that the Borough's submissions, detailed explanations of all e-mails, and legal certifications support that none of the additional e-mails in the log represent records responsive to OPRA request item No. 3.

Regarding the October 29, 2015 OPRA request response, OPRA requires a custodian to ensure that they are providing records that exist. N.J.S.A. 47:1A-5(g). In this instance, non-disclosure as the result of a technological mistake is not a grounds for a lawful denial of access. While the GRC is cognizant that the number of responsive records could have led to the error in disclosure, the Custodian was ultimately vested within ensuring she disclosed all responsive records at the time of her response. Further, the facts of this complaint do no mirror those in Wolosky, GRC 2010-242 (holding that the custodian's mistaken disclosure of the wrong record did not result in an unlawful denial of access). The facts are actually similar to those in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-86 (Final Decision dated June 28, 2011) (holding that the custodian unlawfully denied access to the responsive records regardless of the fact that he certified to a technological issue as the reason for the alleged non-disclosure).

Regarding the September 16, 2015 e-mail, the record was clearly part of the universe of responsive records. The GRC does not agree that the Complainant or Complainant's Counsel "change[d]" the OPRA request. The request item specifically sought the Borough's responses and did not limit that term to "responsive records provided." To the extent that those responses included any e-mails (with attachments), cover letters, *etc.*, those documents clearly encompassed part of the Borough's "response." To narrowly conclude that only the documents provided were responsive to item No. 3 here is contrary to the plain language of the request item. The GRC also notes that the Custodian denied access to one of the third party requests via e-mail because no records existed: she included that e-mail in her response to the Complainant. To provide that e-mail and then argue that the September 16, 2015 e-mail did not constitute a "response" is curious.

Accordingly, the Custodian unlawfully denied access to the October 29, 2015 and September 16, 2015 records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, although a technological issue resulted in non-disclosure October 29, 2015 response, the Custodian was vested with the requirement to ensure she disclosed all responsive records. Further, the September 16, 2015 e-mail was clearly part of the Borough's "response" to an OPRA request and should have been provided accordingly. However, the GRC declines to order disclosure of these records because she provided them as part of the SOI and an April 27, 2016 submission respectively.

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)).

In the matter currently before the Council, 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 two (2) records responsive to OPRA request item No. 3. However, the Custodian’s first (1st) extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to records responsive to OPRA request item Nos. 1 and 2. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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. 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 arguing, among other things, that the Custodian failed to disclose all responsive records as part of her January 21, 2016 response. In the SOI, the Custodian certified that she disclosed an OPRA log responsive to item No. 1 that she created after the subject OPRA request submission date and all third party OPRA requests

responsive to item No. 2. Further, the Custodian certified that she disclosed all responses to the third party requests except for one set of records from October 29, 2015 that were subject to a scanning error. The Custodian disclosed them as part of the SOI, but argued that she did not unlawfully deny access to them. (citing Wolosky v. Twp. of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012)). The Custodian also argued that the Complainant was not a prevailing party based on this mistake based on Wolosky. Thereafter, Custodian's Counsel argued in her April 27, 2016 submission that the September 16, 2015 e-mail sending responsive records to a third party requestor was not responsive because it was a "transmittal" e-mail. Custodian's Counsel included a copy of the e-mail, which the GRC has determined fell squarely within the confines of the Complainant's OPRA request item No. 3.

In determining whether this complaint was the causal nexus for a change in the Borough's conduct, it is clear that there is a connection with post-filing disclosures relevant to the Complainant's OPRA request item No. 3. The Complainant's Denial of Access Complaint allegation that not all records were disclosed was partially correct: the Custodian disclosed two (2) additional records responsive to item No. 3. Further, the Custodian's reliance on Wolosky, GRC 2010-242 is misplaced.

In Wolosky, GRC 2010-242, the custodian responded to the subject OPRA request disclosing what she believed to be the responsive record. However, upon receipt, the complainant quickly determined that it was the wrong record and filed a complaint without contacting the custodian. After being made aware of the error through the Denial of Access Complaint, the custodian immediately cured the issue. The Council, relying on past case law in Wolosky v. Township of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011), determined that the complainant was not a prevailing party in part because the complainant failed to engage in "the cooperative balance contemplated by the Supreme Court in Mason." Id.

The evidence of record here is inapposite to Wolosky. Specifically, the Custodian did not disclose the wrong records; she failed to disclose certain records until after the filing of this complaint. Additionally, although the October 29, 2015 records were not disclosed based on a technological mistake, the Custodian defended non-disclosure of the September 16, 2015 e-mail was not responsive to item No. 3. The GRC disagreed with both points and found that access was unlawfully denied. Ultimately, the disclosure resulting from this complaint provides sufficient evidence in the record to support that the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, 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, the Custodian disclosed records responsive to the Complainant's OPRA request item No. 3 as a result of this complaint. 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 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 OPRA request item No. 1 because the disclosed OPRA log did not exist at the time of the request. N.J.S.A. 47:1A-6. The Custodian was thus under no obligation to create and/or disclose the log, which came into existence after receipt of the Complainant's OPRA request. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537 (App. Div. 2005); Paff v. v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).
4. The Custodian did not unlawfully deny access to the third party OPRA requests responsive to item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records responsive to the Complainant's OPRA request item No. 2. *See also* Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
5. The Custodian unlawfully denied access to the October 29, 2015 and September 16, 2015 records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, although a technological issue resulted in non-disclosure October 29, 2015 response, the Custodian was vested with the requirement to ensure she disclosed all responsive records. Further, the September 16, 2015 e-mail was clearly part of the Borough's "response" to an OPRA request and should have been provided accordingly. However, the GRC declines to order disclosure of these records because she provided them as part of the Statement of Information and an April 27, 2016 submission respectively.
6. 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 two (2) records responsive to OPRA request item No. 3. However, the Custodian's first (1st) extension was warranted and substantiated. Also, the Custodian did not unlawfully deny access to records responsive to OPRA request item Nos. 1 and 2. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

7. 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, the Custodian disclosed records responsive to the Complainant's OPRA request item No. 3 as a result of this complaint. 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.**

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April 17, 2018