



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

April 26, 2022 Government Records Council Meeting

Jessica Bishop
Complainant

Complaint No. 2018-214

v.

County of Salem
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 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 adopt the Honorable Jeffrey R. Wilson’s, Administrative Law Judge, Initial Decision “**CONCLUD[ING]** that the [Complainant] has abandoned her appeal, and that dismissal is therefore appropriate” *Id.* at 2. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED.**” Thus, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of April 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 28, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 26, 2022 Council Meeting**

**Jessica Bishop¹
Complainant**

GRC Complaint No. 2018-214

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All text messages between Kevin or Shanna McCann and Melissa DeCastro between April 4 through 26, 2018.
2. All e-mails to/from Ms. DeCastro between September 1, 2017 through September 14, 2018.
3. All purchase orders (“PO”) issued to Chance & McCann, LLC., Kevin McCann, or Shanna McCann and all resulting invoices from the forgoing between August 1, 2018 and September 14, 2018.

Custodian of Record: Stacy Pennington

Request Received by Custodian: September 14, 2018

Response Made by Custodian: None.

GRC Complaint Received: October 2, 2018

Background

August 25, 2020 Council Meeting:

At its August 25, 2020 public meeting, the Council considered the August 18, 2020 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, found that:

1. The Custodian failed to comply with the Council’s June 30, 2020 Interim Order because she failed to respond at all.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s June 30, 2020 Interim Order to disclose

¹ Represented by Katie B. Coleman, Esq. (Elmer, NJ).

² Represented by Mark Mulligan, Esq. (Salem, NJ).

the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

3. The Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant's OPRA request item Nos. 1 and 2 were invalid, the Custodian unlawfully denied access to records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council's April 28, and June 30, 2020 Interim Orders. Thus, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Pursuant to the Council's April 28, and June 30, 2020 Interim Orders, the Complainant has 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 Council twice ordered disclosure of those records sought in the Complainant's OPRA request item No. 3. While the Custodian did disclose some of those records on May 5, 2020, the Council ordered additional disclosures on June 30, 2020. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney's fees.

Procedural History:

On August 26, 2020, the Council distributed its Interim Order to all parties. On November 19, 2020, the Government Records Council ("GRC") transmitted this complaint to the Office of Administrative Law ("OAL").

On March 18, 2022, the Honorable Jeffrey R. Wilson, Administrative Law Judge ("ALJ"), issued an Initial Decision "**CONCLUD[ING]** that the Complainant] has abandoned her appeal, and that dismissal is therefor appropriate." Id. at 2. The ALJ further "**ORDER[ED]** that this appeal be **DISMISSED.**" Id.³

³ The GRC did not receive any exceptions from either party within the statutory thirteen (13) day time frame. N.J.S.A. 52:14B-10.

Analysis

Administrative Law Judge's Initial Decision

The Administrative Procedures Act (“APA”) provides that:

The head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the [Initial Decision] no later than 45 days after receipt of such recommendations . . . Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

[N.J.S.A. 52:14B-10(c).]

The ALJ’s findings of fact are entitled to deference from the GRC because they are based upon the ALJ’s determination of the credibility of the parties. “The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

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

In the matter currently before the Council, the ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

A telephone prehearing conference was to be heard on February 17, 2022. Notice of that that telephone conference was emailed to the parties, on January 3, 2022. The notice included the following language:

If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

The parties failed to participate in the February 17, 2022, telephone conference and did not contact the OAL to explain why they were unable to do so.

On February 18, 2022, the undersigned [ALJ] caused to be emailed to the parties a letter confirming their failure to participate in the February 17, 2022, telephone conference and scheduling another telephone prehearing conference for March 17, 2022. The letter included the following language:

If you fail to participate in this conference/hearing, I will mark this file as a failure to appear and return it to the transmitting agency as a closed matter. (emphasis included)

In addition, on February 18, 2022, notice was emailed to the parties advising them of the telephone conference, scheduled March 17, 2022. The notice included the following language:

If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

The [Complainant] did not participate in the March 17, 2022, telephone conference and did not contact the OAL explaining her failure to do so. Accordingly, I **CONCLUDE** that the [Complainant] has abandoned her appeal, and that dismissal is therefore appropriate.

[Id. at 1-2.]

Based on the foregoing, the ALJ “**ORDER[ED]** that this appeal be **DISMISSED.**” Id. at 2.

Here, the ALJ fairly summarized the evidence, explaining how he weighed the proofs before him and explaining why he arrived at the conclusion that the Complainant abandoned this complaint. The ALJ’s conclusions are aligned and consistent with those determinations. As such, the GRC is satisfied that it can ascertain which evidence the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ’s conclusions.

Therefore, the Council should adopt the ALJ’s Initial Decision “**CONCLUD[ING]** that the [Complainant] has abandoned her appeal, and that dismissal is therefore appropriate” Id. at 2.

Further, the Council should accept the ALJ's order that this complaint be "**DISMISSED.**" Thus, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should adopt the Honorable Jeffrey R. Wilson's, Administrative Law Judge, Initial Decision "**CONCLUD[ING** that the [Complainant] has abandoned her appeal, and that dismissal is therefore appropriate" Id. at 2. Further, the Council should accept the ALJ's order that this complaint be "**DISMISSED.**" Thus, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

April 19, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. GRC 10179-21

AGENCY DKT. NO. 2018-214

JESSICA BISHOP,

Petitioner,

v.

COUNTY OF SALEM,

Respondent.

Katie Coleman, Esq. for petitioner

Stacy Pennington, Custodian, for respondent, County of Salem, pursuant to
N.J.A.C. 1.1-5.4(a)3

Record Closed: March 18, 2022

Decided: March 18, 2022

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 14, 2021. A telephone prehearing conference was to be heard on February 17, 2022. Notice of that that telephone conference was emailed to the parties, on January 3, 2022. The notice included the following language:

If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

The parties failed to participate in the February 17, 2022, telephone conference and did not contact the OAL to explain why they were unable to do so.

On February 18, 2022, the undersigned Administrative Law Judge caused to be emailed to the parties a letter confirming their failure to participate in the February 17, 2022, telephone conference and scheduling another telephone prehearing conference for March 17, 2022. The letter included the following language:

If you fail to participate in this conference/hearing, I will mark this file as a failure to appear and return it to the transmitting agency as a closed matter. (emphasis included)

In addition, on February 18, 2022, notice was emailed to the parties advising them of the telephone conference, scheduled March 17, 2022. The notice included the following language:

If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

The petitioner did not participate in the March 17, 2022, telephone conference and did not contact the OAL explaining her failure to do so. Accordingly, I **CONCLUDE** that the petitioner has abandoned her appeal, and that dismissal is therefore appropriate.

ORDER

It is hereby **ORDERED** that this appeal be **DISMISSED**.

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

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

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



March 18, 2022

DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JRW/gd/tat



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

August 25, 2020 Government Records Council Meeting

Jessica Bishop
Complainant

Complaint No. 2018-214

v.

County of Salem
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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:

1. The Custodian failed to comply with the Council’s June 30, 2020 Interim Order because she failed to respond at all.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s June 30, 2020 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant’s OPRA request item Nos. 1 and 2 were invalid, the Custodian unlawfully denied access to records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council’s April 28, and June 30, 2020 Interim Orders. Thus, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Pursuant to the Council’s April 28, and June 30, 2020 Interim Orders, the Complainant has 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 Council twice ordered disclosure of those records sought in the Complainant's OPRA request item No. 3. While the Custodian did disclose some of those records on May 5, 2020, the Council ordered additional disclosures on June 30, 2020. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 25th Day of August 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 26, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Jessica Bishop¹
Complainant**

GRC Complaint No. 2018-214

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All text messages between Kevin or Shanna McCann and Melissa DeCastro between April 4 through 26, 2018.
2. All e-mails to/from Ms. DeCastro between September 1, 2017 through September 14, 2018.
3. All purchase orders (“PO”) issued to Chance & McCann, LLC., Kevin McCann, or Shanna McCann and all resulting invoices from the forgoing between August 1, 2018 and September 14, 2018.

Custodian of Record: Stacy Pennington
Request Received by Custodian: September 14, 2018
Response Made by Custodian: None.
GRC Complaint Received: October 2, 2018

Background

June 30, 2020 Council Meeting:

At its June 30, 2020 public meeting, the Council considered the June 23, 2020 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, found that:

1. The Custodian failed to comply with the Council’s April 28, 2020 Interim Order. Specifically, although the Custodian responded within the prescribed time frame disclosing some responsive records, the evidence of record indicates the existence of additional responsive records. Moreover, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director.

¹ Represented by Katie B. Coleman, Esq. (Elmer, NJ).

² Represented by Mark Mulligan, Esq. (Salem, NJ).

2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian a final opportunity to conduct a sufficient search based to locate all invoices and purchase orders responsive to the Complainant's OPRA request item No. 3. Upon conducting said search, the Custodian shall disclose the responsive invoices and purchase orders to the Complainant. It should be noted that the Custodian need not again disclose those two (2) invoices and one (1) purchase order already provided. Should the Custodian believe that any invoices and purchase orders, or portions thereof, fall within an exemption, the Custodian must provide a document index identifying the specific lawful basis for each denial or redaction. Further, should the Custodian's sufficient search fail to yield the additional responsive invoices and purchase orders, the Custodian must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 1, 2020, the Council distributed its Interim Order to all parties. To date, the Custodian has not responded to the Council's Interim Order.

Analysis

Compliance

At its June 30, 2020 meeting, the Council provided the Custodian a final opportunity to conduct a sufficient search and disclose to the Complainant all invoices and purchases responsive to the subject OPRA request. The Council further ordered the Custodian to submit certified

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On July 1, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 9, 2020. As of this date, the GRC has not received a response from the Custodian.

Therefore, the Custodian failed to comply with the Council's June 30, 2020 Interim Order because she failed to respond at all.

Council's June 30, 2020 Interim Order is Enforceable

"The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's June 30, 2020 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

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)).

Here, the Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant's OPRA request item Nos. 1 and 2 were invalid, the Custodian unlawfully denied access to records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council's April 28, and June 30, 2020 Interim Orders. Thus, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their

wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied 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.]

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian's failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. at 79.

In the matter before the Council, the Complainant alleged that the Custodian failed to respond to her OPRA request. In the Statement of Information, the Custodian attached a “Detail Vendor Activity Report” identifying potentially responsive records. Thereafter, the Council determined that OPRA request item Nos. 1 and 2 were invalid. However, the Council also ordered the Custodian to disclose all records responsive to OPRA request item No. 3. In response to the

Council's April 28, 2020 Interim Order, the Custodian disclosed three (3) records. However, Complainant's Counsel subsequently provided evidence indicating the existence of additional records. Thus, the Council provided the Custodian a final opportunity to disclose all responsive records. The Custodian did not respond to the supplemental Interim Order.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a causal nexus existed between the filing of this complaint and disclosure of the responsive records. However, in accordance with Mason 196 N.J. 79, the burden shifts to the Custodian to prove that the instant Denial of Access Complaint was not the catalyst for her disclosure. Having reviewed the evidence of record, the GRC finds that a causal nexus exists between this complaint and the Custodian's actions. Specifically, the Custodian did not disclose any responsive records until ordered to do so by the Council. Thereafter, Complainant's Counsel provided additional evidence to support the existence of additional records. Based on this, the Council ordered additional disclosures; however, the Custodian failed to respond to said order.

Accordingly, pursuant to the Council's April 28, and June 30, 2020 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council twice ordered disclosure of those records sought in the Complainant's OPRA request item No. 3. While the Custodian did disclose some of those records on May 5, 2020, the Council ordered additional disclosures on June 30, 2020. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the OAL should determine the total amount of the award of reasonable attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's June 30, 2020 Interim Order because she failed to respond at all.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's June 30, 2020 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant's OPRA request item Nos. 1 and 2 were invalid, the Custodian unlawfully denied access to records responsive to OPRA request item No. 3. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with both the Council's April 28, and June 30, 2020 Interim Orders. Thus, it is possible that the Custodian's actions

were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

4. Pursuant to the Council’s April 28, and June 30, 2020 Interim Orders, the Complainant has 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 Council twice ordered disclosure of those records sought in the Complainant’s OPRA request item No. 3. While the Custodian did disclose some of those records on May 5, 2020, the Council ordered additional disclosures on June 30, 2020. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. For administrative ease, the Office of Administrative Law should determine the total amount of the award of reasonable attorney’s fees.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020



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

June 30, 2020 Government Records Council Meeting

Jessica Bishop
Complainant

Complaint No. 2018-214

v.

County of Salem
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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:

1. The Custodian failed to comply with the Council’s April 28, 2020 Interim Order. Specifically, although the Custodian responded within the prescribed time frame disclosing some responsive records, the evidence of record indicates the existence of additional responsive records. Moreover, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian a final opportunity to conduct a sufficient search based to locate all invoices and purchase orders responsive to the Complainant’s OPRA request item No. 3. Upon conducting said search, the Custodian shall disclose the responsive invoices and purchase orders to the Complainant. It should be noted that the Custodian need not again disclose those two (2) invoices and one (1) purchase order already provided. Should the Custodian believe that any invoices and purchase orders, or portions thereof, fall within an exemption, the Custodian must provide a document index identifying the specific lawful basis for each denial or redaction. Further, should the Custodian’s sufficient search fail to yield the additional responsive invoices and purchase orders, the Custodian must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,² to the Executive Director.³

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 1, 2020

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Jessica Bishop¹
Complainant**

GRC Complaint No. 2018-214

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All text messages between Kevin or Shanna McCann and Melissa DeCastro between April 4 through 26, 2018.
2. All e-mails to/from Ms. DeCastro between September 1, 2017 through September 14, 2018.
3. All purchase orders (“PO”) issued to Chance & McCann, LLC., Kevin McCann, or Shanna McCann and all resulting invoices from the forgoing between August 1, 2018 and September 14, 2018.

Custodian of Record: Stacy Pennington
Request Received by Custodian: September 14, 2018
Response Made by Custodian: None.
GRC Complaint Received: October 2, 2018

Background

April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Council considered the April 3, 2020 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 did not bear her burden of proof that he 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 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.

¹ Represented by Katie B. Coleman, Esq. (Elmer, NJ).

² Represented by Mark Mulligan, Esq. (Salem, NJ).

Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Custodian's failure to immediately respond to the Complainant's OPRA request item No. 3 seeking purchase orders and invoices resulted in a violation of N.J.S.A. 47:1A-5(e). See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

2. The Complainant's request item Nos. 1 and 2 seeking text messages and e-mails are invalid because they failed to include the subject or content of the records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant's request item Nos. 1 and 2. N.J.S.A. 47:1A-6.
3. The Custodian unlawfully denied access to the purchase orders and invoices responsive to the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to disclose the actual records, instead unilaterally deciding to send the Complainant a "Detail Vendor Activity Report." Thus, the Custodian shall disclose the actual responsive purchase orders and invoices identified in the report and, if applicable, provide a specific lawful basis to the Complainant if any records are deemed exempt in part or whole.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

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

Procedural History:

On April 29, 2020, the Council distributed its Interim Order to all parties. On May 5, 2020, the Custodian e-mailed the Government Records Council ("GRC") copies of two (2) invoices and one (1) PO stating that the attached were "the required documents."

On the same day, the GRC replied to the Custodian reiterating that the Council's Order required her to disclose the records to the Complainant and provide certified confirmation of compliance to the GRC within five (5) business days. The GRC further stated that the Complainant and Counsel were copied; thus, they were in possession of the disclosed records. The GRC further reminded the Custodian to copy all parties going forward. Additionally, the GRC noted that the Custodian had until May 6, 2020 to submit certified confirmation of compliance.

Additional Submissions:

On May 6, 2020, Complainant's Counsel e-mailed the GRC advising that she had evidence that additional records responsive to OPRA request item No. 3 existed. Counsel asked whether she should submit the evidence to the GRC. On the same day, the GRC replied advising that Complainant's Counsel may submit a response by close of business on May 13, 2020.

On May 8, 2020, Complainant's Counsel e-mailed the GRC advising that the Custodian's disclosure omitted at least one (1) responsive PO listed in the attached Bill List approved at the County of Salem's ("County") October 3, 2018 Freeholder meeting. Counsel noted that the PO, which was first encumbered on September 7, 2018, falls within the time frame identified in OPRA request item No. 3. Counsel additionally asserted that the Complainant possessed additional evidence from a lawsuit filed by Chance & McCann that another August 2018 invoice existed. Counsel noted that she was not sure whether the County paid said invoice.

On the same day, the Custodian responded advising that she would forward Counsel's e-mail to the County Purchasing Department "for an answer."

Analysis

Compliance

At its April 28, 2020 meeting, the Council ordered the Custodian to disclose the actual responsive purchase orders and invoices identified in the report and, if applicable, provide a specific lawful basis to the Complainant if any records are deemed exempt in part or whole. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On April 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2020.

On May 5, 2020, the fourth (4th) business day after receipt of the Council's Order, the Custodian sent to the GRC copies of two (2) invoices and one (1) PO. On the same day, the GRC reminded the Custodian that, in order to comply with the Order, she was required to disclose the records directly to the Complainant and simultaneously provide certified confirmation of compliance by May 6, 2020. The GRC received no further response from the Custodian.

Upon review of the evidence of record submitted in response to the Council's Order, the GRC is not satisfied that the Custodian fully complied with same. Specifically, although the Custodian provided those records identified in the report within the prescribed time frame, she e-mailed them exclusively to the GRC and not the Complainant and/or Complainant's Counsel. The Complainant did not receive the records until the GRC forwarded them to her. Further, the Custodian failed to also include certified confirmation of compliance. Thus, the evidence supports a finding that the Custodian failed to comply with the Council's Order.

Therefore, the Custodian failed to comply fully with the Council's April 28, 2020 Interim Order. Specifically, although the Custodian responded within the prescribed time frame disclosing some responsive records, the evidence of record indicates the existence of additional responsive records. Moreover, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director.

In the past, the GRC has provided custodians a "final opportunity to disclose [records required to be disclosed] and/or provide comprehensive arguments as to why same are not subject to disclosure." See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016) at 4. In Carter, the custodian submitted compliance in response to the Council's September 29, 2015 Interim Order. However, in reviewing that compliance, it became evident that it was incomplete. Specifically, several attachments were not disclosed, and the custodian did not provide an explanation for the nondisclosure. The Council thus held that the custodian did not comply fully with the its Order and provided him "a 'final opportunity' to comply. Carter, GRC 2014-218 (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated April 28, 2015) at 7).

Here, the Custodian failed to fully comply with the Order because she did not submit certified confirmation of compliance to the Executive Director. Then, on May 8, 2020, Complainant's Counsel provided sufficient evidence that additional invoices and POs responsive to OPRA request item No. 3 existed. Counsel also noted that the Complainant maintained additional evidence that other records existed and were not disclosed. The Custodian responded noting that she would forward Complainant Counsel's e-mail to the County Purchasing Department "for an answer." However, the GRC received no follow-up response from the Custodian.

As in Carter, the Custodian's compliance appeared incomplete based on the existence of additional responsive records. Such a fact indicates that the Custodian did not, either by insufficient search or otherwise, identify the full universe of responsive records. An additional order should ensure that the Custodian conducts an accurate search to locate and disclose all invoices and POs responsive to OPRA request item No. 3. Should the Custodian locate any

additional responsive invoices and POS, she shall either disclose those that exist, or certify as to why those records could not be disclosed.

Accordingly, and pursuant to Carter, GRC 2014-218, the Council is giving the Custodian a final opportunity to conduct a sufficient search based to locate all invoices and POs responsive to the Complainant's OPRA request item No. 3. Upon conducting said search, the Custodian shall disclose the responsive invoices and POs to the Complainant. It should be noted that the Custodian need not again disclose the two (2) invoices and one (1) PO already provided. Should the Custodian believe that any invoices and POs, or portions thereof, fall within an exemption, the Custodian must provide a document index identifying the specific lawful basis for each denial or redaction. Further, should the Custodian's sufficient search fail to yield the additional responsive invoices and POs, the Custodian must certify to this fact.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's April 28, 2020 Interim Order. Specifically, although the Custodian responded within the prescribed time frame disclosing some responsive records, the evidence of record indicates the existence of additional responsive records. Moreover, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian a final opportunity to conduct a sufficient search based to locate all invoices and purchase orders responsive to the Complainant's OPRA request item No. 3. Upon conducting said search, the Custodian shall disclose the responsive invoices and purchase orders to the Complainant. It should be noted that the Custodian need not again disclose those two (2) invoices and one (1) purchase order already provided. Should the Custodian believe that any invoices and purchase orders, or portions thereof, fall within an exemption, the Custodian must provide a document index identifying the specific lawful basis for each denial or redaction. Further, should the Custodian's sufficient search fail to yield the additional responsive invoices and purchase orders, the Custodian must certify to this fact.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁷ to the Executive Director.⁸**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

June 23, 2020

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ "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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 28, 2020 Government Records Council Meeting

Jessica Bishop
Complainant

Complaint No. 2018-214

v.

County of Salem
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 2020 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 did not bear her burden of proof that he 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 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). Further, the Custodian’s failure to immediately respond to the Complainant’s OPRA request item No. 3 seeking purchase orders and invoices resulted in a violation of N.J.S.A. 47:1A-5(e). See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).
2. The Complainant’s request item Nos. 1 and 2 seeking text messages and e-mails are invalid because they failed to include the subject or content of the records sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant’s request item Nos. 1 and 2. N.J.S.A. 47:1A-6.
3. The Custodian unlawfully denied access to the purchase orders and invoices responsive to the Complainant’s OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to disclose the actual records, instead unilaterally deciding to send the



Complainant a "Detail Vendor Activity Report." Thus, the Custodian shall disclose the actual responsive purchase orders and invoices identified in the report and, if applicable, provide a specific lawful basis to the Complainant if any records are deemed exempt in part or whole.

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of April 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 29, 2020

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Jessica Bishop¹
Complainant**

GRC Complaint No. 2018-214

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All text messages between Kevin or Shanna McCann and Melissa DeCastro between April 4 through 26, 2018.
2. All e-mails to/from Ms. DeCastro between September 1, 2017 through September 14, 2018.
3. All purchase orders (“PO”) issued to Chance & McCann, LLC., Kevin McCann, or Shanna McCann and all resulting invoices from the forgoing between August 1, 2018 and September 14, 2018.

Custodian of Record: Stacy Pennington
Request Received by Custodian: September 14, 2018
Response Made by Custodian: None.
GRC Complaint Received: October 2, 2018

Background³

Request and Response:

On September 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On October 2, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to her OPRA request.

¹ Represented by Katie B. Coleman, Esq. (Elmer, NJ).

² Represented by Mark Mulligan, Esq. (Salem, 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.

Statement of Information:

On October 20, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 14, 2018. The Custodian certified that her search included contacting Verizon to obtain text message. The Custodian averred that Verizon advised that they did not keep actual messages. The Custodian certified that she did not respond to the Complainant’s OPRA request, noting that “[a] case folder was never established for the request” and thus “never placed in the que [sic] for processing.”

The Custodian averred that no text messages responsive to the Complainant’s OPRA request item No. 1 existed. The Custodian further contended that the Complainant’s OPRA request item No. 2 was invalid. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005). The Custodian finally certified that she was disclosing as part of the SOI a “Detail Vendor Activity Report” responsive to the Complainant’s OPRA request item No. 3 (listing potentially responsive POs and invoices for Chance & McCann, LLC).

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).⁴ 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).

OPRA further provides that “[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiation agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A5(e).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant. . .” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, a custodian still has an obligation to respond to

⁴ 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.

immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Here, the Complainant filed the instant complaint contending that the Custodian failed to respond to her OPRA request, inclusive of OPRA request item No. 3 seeking certain POs and invoices. The Custodian confirmed this fact in the SOI, noting that the subject request was never processed for response. Thus, the evidence clearly supports a “deemed” denial here. Also, part and parcel of the Custodian’s failure to respond included a violation of N.J.S.A. 47:1A-5(e) for failing to respond immediately to OPRA request item No. 3.

Therefore, the Custodian did not bear her burden of proof that he 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 statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. Further, the Custodian’s failure to immediately respond to the Complainant’s OPRA request item No. 3 seeking POs and invoices resulted in a violation of N.J.S.A. 47:1A-5(e). See Kohn, GRC 21011-330.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

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

The Court reasoned that:

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

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. For example, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant’s OPRA request sought all e-mails to or from a particular e-mail account for a specific time period. The custodian’s counsel responded advising the complainant that his OPRA request was invalid because it represented an open-ended search of the Borough’s files. The Council held that the complainant’s request was invalid under Elcavage, GRC 2009-07 because it did not include a subject or content. Id. at 7.

Here, the Complainant’s request item Nos. 1 and 2 sought text messages and e-mails with identifiable individuals over a specific time frame but contained no subject or content. The Custodian failed to respond to the request prior the Denial of Access Complaint. In the SOI, the Custodian did not argue that request item No. 1 was invalid, instead asserting that no records existed.⁶ She further argued in the SOI that request item No. 2 was invalid. However, both request items are invalid pursuant to Elcavage and Verry. Because the request items failed to identify a subject matter or content, the Custodian’s search for responsive text message and e-mails would

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ Although the Custodian certified that no text messages existed, she failed to provide sufficient detail as to whether she contacted the identified parties to attempt to obtain responsive records. See *e.g.* Carter v. Franklin Fire Dist. No. 1 (Somerset), 2019 N.J. Super. Unpub. LEXIS 590 (App. Div. 2019) at 13-15.

have constituted research that OPRA does not authorize. The GRC is thus satisfied that these request items are invalid, as it clearly omitted required criteria provided for in precedential case law.

Accordingly, the Complainant's request item Nos. 1 and 2 seeking text messages and e-mails are invalid because they failed to include the subject or content of the records sought. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37, N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Armenti, GRC 2009-154. See also Verry, GRC 2009-124. Thus, the Custodian lawfully denied access to the Complainant's request item Nos. 1 and 2. N.J.S.A. 47:1A-6.

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.

In the instant complaint, the Complainant's OPRA request item No. 3 sought POs issued to and invoices received from Chance and McCann, LLC. As part of the SOI, the Custodian included a "Detail Vendor Activity Report" showing two (2) entries. However, there is no evidence in the record showing that the Custodian provided copies of the actual POs and invoices to the Complainant. Instead, the evidence of record indicates that the Custodian unilaterally chose to provide the Complainant the "Detail Vendor Activity Report" as part of the SOI. For this reason, the GRC is persuaded that the Custodian unlawfully denied access to the actual records the Complainant sought in OPRA request item No. 3.

Accordingly, the Custodian unlawfully denied access to the POs and invoices responsive to the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to disclose the actual records, instead unilaterally deciding to send the Complainant a "Detail Vendor Activity Report." Thus, the Custodian shall disclose the actual responsive POs and invoices identified in the report and, if applicable, provide a specific lawful basis to the Complainant if any records are deemed exempt in part or whole.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that he 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 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). Further, the Custodian's failure to immediately respond to the Complainant's OPRA request item No. 3 seeking purchase orders and invoices resulted in a violation of N.J.S.A. 47:1A-5(e). See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).
2. The Complainant's request item Nos. 1 and 2 seeking text messages and e-mails are invalid because they failed to include the subject or content of the records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant's request item Nos. 1 and 2. N.J.S.A. 47:1A-6.
3. The Custodian unlawfully denied access to the purchase orders and invoices responsive to the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to disclose the actual records, instead unilaterally deciding to send the Complainant a "Detail Vendor Activity Report." Thus, the Custodian shall disclose the actual responsive purchase orders and invoices identified in the report and, if applicable, provide a specific lawful basis to the Complainant if any records are deemed exempt in part or whole.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁷**

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

April 3, 2020

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.