



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Acting Commissioner*

### FINAL DECISION

#### February 29, 2024 Government Records Council Meeting

Steven G. Mlenak, Esq. (o/b/o SJ 660 LLC)  
Complainant

Complaint No. 2021-90

v.

Borough of Edgewater (Bergen)  
Custodian of Record

At the February 29, 2024 public meeting, the Government Records Council (“Council”) considered the February 20, 2024 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 Complainant withdrew the matter via e-mail on December 7, 2023. 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 29<sup>th</sup> Day of February 2024  
Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 4, 2024**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 27, 2024 Council Meeting**

**Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-90**

v.

**Borough of Edgewater (Bergen)<sup>2</sup>  
Custodial Agency**

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

1. The application for tax exemption/PILOT from 615 River Road Partners (“RRP”) pertaining to the redevelopment of 615 River Road;
2. The executed Redevelopment Agreement, including any amendments, between the Borough and RRP;
3. The executed Financial Agreement, including any amendments between the Borough and RRP;
4. Any reports, studies, models, or spreadsheets prepared by either RRP, the Borough, or the Borough consultants pertaining to the tax exemption/PILOT the Borough granted to RRP; and
5. All correspondence between RRP or any of its employees, representatives and agents, and the Borough, or any of its officials, employees, representatives and agents, pertaining to 615 River Road between January 1, 2019 until now.

**Custodian of Record:** Annamarie O’Connor

**Request Received by Custodian:** March 12, 2021

**Response Made by Custodian:** May 10, 2021; June 10, 2021

**GRC Complaint Received:** April 27, 2021

**Background**

**May 30, 2023 Council Meeting:**

At its May 30, 2023 public meeting, the Council considered the May 23, 2023 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:

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<sup>1</sup> The Complainant represents SJ 660 LLC.

<sup>2</sup> Represented by Joseph R. Mariniello, Jr., Esq. of Hartmann, Doherty, Rosa, Berman, & Bulbulbia, LLP (Hackensack, NJ).

1. The Custodian failed to comply with the Council’s September 29, 2022 Interim Order. Specifically, the Custodian failed to timely respond to the Order, and failed to provide nine (9) unredacted copies of records for *in camera* review. Additionally, the Custodian failed to provide certified confirmation of compliance to the Executive Director.
2. The GRC declines to perform the *in camera* review in accordance with the September 29, 2022 Interim Order. Because Gregory Franz certified that a publicly available spreadsheet was the only responsive record to item No. 4, no copies of records were provided for *in camera* review. Thus, this issue is rendered moot.
3. Notwithstanding the Custodian’s failure to comply with the Council’s Order, she did not unlawfully deny access to the Complainant’s OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, Cameron Arabi and Custodian’s Counsel certified that the Borough of Edgewater provided all responsive records to the Complainant. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
4. The Custodian’s failure to respond to the request for more than forty (40) business days 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. 2 and 3 were invalid, the Custodian unlawfully denied access to request item No. 5 seeking e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council’s September 29, 2022 Interim Order by not only failing to timely respond, but failed to provide certified confirmation of compliance to the Executive Director. Furthermore, the Custodian withheld records alleged to be exempt and requested by the Council for *in camera* review, only for Mr. Franz to provide a single record that was already publicly available on the Borough’s website prior to submission of the request. 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.
5. Pursuant to the Council’s September 29, 2022 Interim Order, 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, 432 (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, 76 (2008). Specifically, the Custodian was ordered to disclose responsive records to the Complainant. 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. at 432, and Mason, 196 N.J. at 76. For administrative ease, the OAL should determine the total amount of the award of reasonable attorney’s fees.

Procedural History:

On June 5, 2023, the Council distributed its Interim Order to all parties. On September 21, 2023, the complaint was transmitted to the Office of Administrative Law (“OAL”). On December 7, 2023, Michael J. Coskey, Esq., representing the Complainant at the OAL, e-mailed the OAL of the Complainant’s request to withdraw the matter. On January 25, 2024, the OAL returned the complaint back to the GRC marked “Withdrawal.”

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because the Complainant withdrew the matter via e-mail on December 7, 2023. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado  
Staff Attorney

February 20, 2024



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**

**May 30, 2023 Government Records Council Meeting**

Steven G. Mlenak, Esq. (o/b/o SJ 660 LLC)  
Complainant

Complaint No. 2021-90

v.

Borough of Edgewater (Bergen)  
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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 September 29, 2022 Interim Order. Specifically, the Custodian failed to timely respond to the Order, and failed to provide nine (9) unredacted copies of records for *in camera* review. Additionally, the Custodian failed to provide certified confirmation of compliance to the Executive Director.
2. The GRC declines to perform the *in camera* review in accordance with the September 29, 2022 Interim Order. Because Gregory Franz certified that a publicly available spreadsheet was the only responsive record to item No. 4, no copies of records were provided for *in camera* review. Thus, this issue is rendered moot.
3. Notwithstanding the Custodian’s failure to comply with the Council’s Order, she did not unlawfully deny access to the Complainant’s OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, Cameron Arabi and Custodian’s Counsel certified that the Borough of Edgewater provided all responsive records to the Complainant. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
4. The Custodian’s failure to respond to the request for more than forty (40) business days 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. 2 and 3 were invalid, the Custodian unlawfully denied access to request item No. 5 seeking e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council’s September 29, 2022 Interim Order by not only failing to timely respond, but failed to provide certified confirmation of compliance to the Executive Director. Furthermore, the Custodian withheld records alleged to be exempt and requested by the Council for *in camera* review, only for Mr. Franz to provide a single record that was already publicly available on the Borough’s website prior to submission

of the request. 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.

5. Pursuant to the Council's September 29, 2022 Interim Order, 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, 432 (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, 76 (2008). Specifically, the Custodian was ordered to disclose responsive records to the Complainant. 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. at 432, and Mason, 196 N.J. at 76. For administrative ease, the OAL should determine the total amount of the award of reasonable attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of May 2023

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 5, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 30, 2023 Council Meeting**

**Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-90**

v.

**Borough of Edgewater (Bergen)<sup>2</sup>  
Custodial Agency**

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

1. The application for tax exemption/PILOT from 615 River Road Partners (“RRP”) pertaining to the redevelopment of 615 River Road;
2. The executed Redevelopment Agreement, including any amendments, between the Borough and RRP;
3. The executed Financial Agreement, including any amendments between the Borough and RRP;
4. Any reports, studies, models, or spreadsheets prepared by either RRP, the Borough, or the Borough consultants pertaining to the tax exemption/PILOT the Borough granted to RRP; and
5. All correspondence between RRP or any of its employees, representatives and agents, and the Borough, or any of its officials, employees, representatives and agents, pertaining to 615 River Road between January 1, 2019 until now.

**Custodian of Record:** Annamarie O’Connor

**Request Received by Custodian:** March 12, 2021

**Response Made by Custodian:** May 10, 2021; June 10, 2021

**GRC Complaint Received:** April 27, 2021

**Background**

**September 29, 2022 Council Meeting:**

At its September 29, 2022 public meeting, the Council considered the September 22, 2022 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:

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<sup>1</sup> The Complainant represents SJ 660 LLC.

<sup>2</sup> Represented by Joseph R. Mariniello, Jr., Esq. of Mariniello & Mariniello, P.C. (Fort Lee, NJ).

1. 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 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 dated October 31, 2007). However, the Council declines to order disclosure for request item No. 1 since the evidence of record demonstrates that the Custodian responded on June 10, 2021, providing responsive records.
2. Notwithstanding the Custodian's "deemed" denial, she bore her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 seeking specified, executed agreements between the Borough of Edgewater and River Road Partners. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The GRC must conduct an *in camera* review of the located reports responsive to the Complainant's OPRA request item No. 4 to validate the Custodian's assertion that the records were exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 345, 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Complainant's OPRA request item No. 5 seeking correspondence is valid because it identified a sender/recipient, a specific date range, and content matter. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See also Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.

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<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>5</sup> "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."



6. **The Custodian shall comply with conclusion no. 5 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 deliver<sup>6</sup> certified confirmation of compliance, in accordance with R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
7. 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.
8. 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 October 4, 2022, the Council distributed its Interim Order to all parties. On October 13, 2022, the Custodian e-mailed the GRC stating that the Borough's IT expert had left for a planned vacation. The Custodian therefore requested an extension of time until November 10, 2022 to provide a response to the Council's Order. On October 17, 2022, the GRC granted the extension.

On November 14, 2021, the Complainant e-mailed the GRC. The Complainant asserted that as of that date, the Custodian has not responded to the Council's Interim Order. The Complainant asserted that the Borough's failure to timely provide responsive records caused the Complainant additional cost to enforce its rights. The Complainant requested the GRC immediately demand compliance from the Borough, to award counsel fees, and to find the Borough's conduct intentional and deliberate.

On November 18, 2022, the sixth (6<sup>th</sup>) business day past the extended deadline, the Custodian's Counsel responded to the Council's Interim Order, providing records and certifications from the Borough Administrator, Gregory Franz; the President of the Borough's outside IT vendor, Cameron Arabi; and Custodian's Counsel. However, no certified confirmation of compliance from the Custodian was included.

Mr. Franz certified that he searched for reports, studies, models or spreadsheets responsive to item No. 4 of the request and located one spreadsheet provided by the Borough's Financial Advisor, which had been available to the public for years via the Borough's website.

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<sup>6</sup> 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.

<sup>7</sup> "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."

<sup>8</sup> 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.

Mr. Arabi certified that he conducted a search of the Borough's e-mail system for e-mails containing the subject "615 River Road" and for e-mails containing the phrase "615 River Rd" within the body for the period between January 1, 2019 until March 12, 2021. Mr. Arabi certified that in October 2020 the Borough suffered a hack of its e-mail system and could not confirm that every e-mail dated prior to the hack was available to be located. Mr. Arabi certified that the search returned several hundred e-mails which contain the search terms and he provided the relevant e-mails to Custodian's Counsel for review.

Custodian's Counsel certified that he reviewed the hundreds of e-mails he received from Mr. Arabi for potential redactions. Custodian's Counsel also certified that in reviewing the e-mails, only three (3) e-mails were between the Borough and RRP. Custodian's Counsel certified that the e-mails did not contain any privileged information and were therefore released to the Complainant.

On November 22, 2022, the GRC e-mailed Custodian's Counsel to inquire whether the Complainant was simultaneously provided a copy of the response, excluding records submitted for *in camera* review. That same day, Custodian's Counsel responded to the GRC stating that the response and records were all provided to the Complainant, and no records were submitted for *in camera* review. The Complainant then e-mailed Custodian's Counsel and the GRC stating he has not received any response. On November 28, 2022, the GRC provided the Complainant with a copy of the Custodian's response.

On November 29, 2022, the Complainant submitted a letter to the GRC in response to the Custodian's response. The Complainant initially noted that the response was untimely, as the extended deadline had already passed. The Complainant next argued that the response was deficient and failed to comply with the Council's Interim Order.

The Complainant contended that the Custodian was required under the Order to provide nine (9) unredacted copies of records responsive to item No. 4 for *in camera* review and to provide a certification in accordance with R. 1:4-4. The Complainant asserted that the Custodian failed to comply with either requirement, as she provided no certification herself, and instead provided a copy of a spreadsheet responsive to item No. 4.

The Complainant also argued that the Custodian failed to comply with the Council's Order with respect to records responsive to item No. 5. The Complainant asserted that the certifications from Mr. Arabi and Custodian's Counsel failed to include a document index explaining the basis for why hundreds of e-mails were withheld from disclosure in favor of the three (3) that were released. The Complainant also asserted that the Custodian again failed to provide a signed certification regarding this issue.

## Analysis

### Compliance

At its September 29, 2022 meeting, the Council ordered the Custodian to provide the GRC with nine (9) unredacted copies of reports responsive to request item No. 4 for *in camera* review. The Council also ordered the Custodian to locate and produce e-mail correspondence responsive

to item No. 5. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On October 4, 2022, 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 October 12, 2023.

On October 13, the sixth (6<sup>th</sup>) business day after receipt of the Council's Order, the Custodian's Counsel e-mailed the GRC requesting an extension of time until November 10, 2022 to provide a response. On October 17, 2022, the GRC granted the extension, but noted that no further extensions shall be granted absent exigent circumstances.

On November 18, 2022, the sixth (6<sup>th</sup>) business day past the extended deadline, the Custodian's Counsel provided a response to the Council's Interim Order. Therein, Mr. Arabi and Custodian's Counsel certified that a search for records responsive to item No. 5 were located and produced to the Complainant. However, Custodian's Counsel failed to provide records for *in camera* review, and instead disclosed a spreadsheet to the Complainant that was responsive to request item No. 4. Furthermore, the Custodian failed to provide certified confirmation of compliance as explicitly required by the Council's Order.

Therefore, the Custodian failed to comply with the Council's September 29, 2022 Interim Order. Specifically, the Custodian failed to timely respond to the Order, and failed to provide nine (9) unredacted copies of records for *in camera* review. Additionally, the Custodian failed to provide certified confirmation of compliance to the Executive Director.

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

#### **Request Item No. 4**

As noted above, the Custodian was required to provide nine (9) unredacted copies of "reports" responsive to the Complainant's OPRA request item No. 4 that were supposedly withheld pursuant to OPRA's exemption for advisory, consultative, and deliberative material. N.J.S.A. 47:1A-1. Instead, Mr. Franz certified that he conducted a search and located a spreadsheet that had been publicly accessible on the Borough's website for years. He then certified that the spreadsheet was disclosed to the Complainant as the only responsive record and without redactions.

Therefore, the GRC declines to perform the *in camera* review in accordance with the September 29, 2022 Interim Order. Because Mr. Franz certified that a publicly available spreadsheet was the only responsive record to item No. 4, no copies of records were provided for *in camera* review. Thus, this issue is rendered moot.

### Request Item No. 5

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (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 addition to providing responsive records, the Custodian was required to locate and produce e-mail correspondence responsive to request item No. 5. Custodian's Counsel provided a certification from Mr. Arabi, who certified he conducted a search using the subject matter and date range identified in the OPRA request. Mr. Arabi certified that the search resulted in several hundred e-mails being turned over to Custodian's Counsel for review. However, Mr. Arabi certified that due to a data breach in October 2020, he could not confirm that every relevant e-mail beforehand was available to be searched.

In turn, Custodian's Counsel certified that he reviewed the e-mails he received from Mr. Arabi for privilege purposes. Custodian's Counsel then certified that although he received hundreds of e-mails from Mr. Arabi, he determined that three (3) e-mails were responsive to the Complainant's request, as they had the requisite sender and recipient. Custodian's Counsel certified that those e-mails did not contain any privileged information and were therefore disclosed to the Complainant without redactions.

The Complainant argued that the Custodian failed to comply with this portion of the Council's Order because she did not provide a document index explaining why only three (3) out of the several hundred e-mails were responsive. However, the requirement of a document index is reserved for records that were responsive but were either withheld entirely or redacted pursuant to a stated OPRA exemption. Based on Mr. Arabi's certification, the hundreds of e-mails he located did not specify the sender and recipient. Custodian's Counsel certified that once the e-mails were filtered to contain only those parties as senders and recipients, three (3) e-mails remained. Thus, the several hundred e-mails were not withheld due to a stated exemption under OPRA, but on the basis that they were not responsive to the request. Therefore, the Custodian was not required to provide a document index for same. Without additional evidence to refute the submitted certifications, the GRC is satisfied that Custodian's Counsel provided all responsive records to item No. 5. See Danis, GRC 2009-156, *et seq.*

Accordingly, notwithstanding the Custodian's failure to comply with the Council's Order, she did not unlawfully deny access to the Complainant's OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, Mr. Arabi and Custodian's Counsel certified that the Borough provided all responsive records to the Complainant. See Danis, GRC 2009-156, *et seq.*

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly and

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1983)); 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 respond to the request for more than forty (40) business days 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. 2 and 3 were invalid, the Custodian unlawfully denied access to request item No. 5 seeking e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council’s September 29, 2022 Interim Order by not only failing to timely respond, but failed to provide certified confirmation of compliance to the Executive Director. Furthermore, the Custodian withheld records alleged to be exempt and requested by the Council for *in camera* review, only for Mr. Franz to provide a single record that was already publicly available on the Borough’s website prior to submission of the request. 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 Appellate Division 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, 71 (2008), the 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.” (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 (7<sup>th</sup> 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, 196 N.J. at 73-76.]

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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the matter before the Council, the Complainant alleged that the Custodian unlawfully denied access to his OPRA request. Thereafter, the Council determined that a portion of the OPRA request was invalid. However, the Council also ordered the Custodian to locate and provide all records responsive to the valid portions of the OPRA request. Further, the Council ordered the Custodian to provide records withheld from disclosure for *in camera* review. In response, the Custodian provided some e-mail correspondence, but instead of providing records for *in camera* review, the Custodian disclosed a record that was already available to the public.

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. Having reviewed the evidence of record here, the GRC finds that a causal nexus exists between this complaint and the relief achieved by the Complainant. Specifically, the Council ordered disclosure of records responsive to the valid portions of the subject OPRA request. In turn, although the Custodian failed to comply with the Council’s Order, the Borough disclosed records to the Complainant in accordance therewith.

Therefore, pursuant to the Council’s September 29, 2022 Interim Order, 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. at 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. at 76. Specifically, the Custodian was ordered to disclose responsive records to the Complainant. 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. at 432, and Mason, 196 N.J. at 76. 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 September 29, 2022 Interim Order. Specifically, the Custodian failed to timely respond to the Order, and failed to provide nine (9) unredacted copies of records for *in camera* review. Additionally, the Custodian failed to provide certified confirmation of compliance to the Executive Director.

2. The GRC declines to perform the *in camera* review in accordance with the September 29, 2022 Interim Order. Because Gregory Franz certified that a publicly available spreadsheet was the only responsive record to item No. 4, no copies of records were provided for *in camera* review. Thus, this issue is rendered moot.
3. Notwithstanding the Custodian's failure to comply with the Council's Order, she did not unlawfully deny access to the Complainant's OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, Cameron Arabi and Custodian's Counsel certified that the Borough of Edgewater provided all responsive records to the Complainant. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
4. The Custodian's failure to respond to the request for more than forty (40) business days 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. 2 and 3 were invalid, the Custodian unlawfully denied access to request item No. 5 seeking e-mail correspondence. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council's September 29, 2022 Interim Order by not only failing to timely respond, but failed to provide certified confirmation of compliance to the Executive Director. Furthermore, the Custodian withheld records alleged to be exempt and requested by the Council for *in camera* review, only for Mr. Franz to provide a single record that was already publicly available on the Borough's website prior to submission of the request. 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.
5. Pursuant to the Council's September 29, 2022 Interim Order, 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, 432 (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, 76 (2008). Specifically, the Custodian was ordered to disclose responsive records to the Complainant. 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. at 432, and Mason, 196 N.J. at 76. For administrative ease, the OAL should determine the total amount of the award of reasonable attorney's fees.

Prepared By: Samuel A. Rosado  
Staff Attorney

May 23, 2023





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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**September 29, 2022 Government Records Council Meeting**

Steven G. Mlenak, Esq. (o/b/o SJ 660 LLC)  
Complainant

Complaint No. 2021-90

v.

Borough of Edgewater (Bergen)  
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 2022 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 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 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 dated October 31, 2007). However, the Council declines to order disclosure for request item No. 1 since the evidence of record demonstrates that the Custodian responded on June 10, 2021, providing responsive records.
2. Notwithstanding the Custodian’s “deemed” denial, she bore her burden of proof that she lawfully denied access to the Complainant’s OPRA request item Nos. 2 and 3 seeking specified, executed agreements between the Borough of Edgewater and River Road Partners. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The GRC must conduct an *in camera* review of the located reports responsive to the Complainant’s OPRA request item No. 4 to validate the Custodian’s assertion that the records were exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 345, 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

4. **The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Complainant's OPRA request item No. 5 seeking correspondence is valid because it identified a sender/recipient, a specific date range, and content matter. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See also Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.
6. **The Custodian shall comply with conclusion no. 5 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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "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."

<sup>4</sup> 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.

<sup>5</sup> "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."

<sup>6</sup> 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.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of September 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: October 4, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2022 Council Meeting**

**Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-90**

**v.**

**Borough of Edgewater (Bergen)<sup>2</sup>  
Custodial Agency**

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

1. The application for tax exemption/PILOT from 615 River Road Partners (“RRP”) pertaining to the redevelopment of 615 River Road;
2. The executed Redevelopment Agreement, including any amendments, between the Borough and RRP;
3. The executed Financial Agreement, including any amendments between the Borough and RRP;
4. Any reports, studies, models, or spreadsheets prepared by either RRP, the Borough, or the Borough consultants pertaining to the tax exemption/PILOT the Borough granted to RRP; and
5. All correspondence between RRP or any of its employees, representatives and agents, and the Borough, or any of its officials, employees, representatives and agents, pertaining to 615 River Road between January 1, 2019 until now.

**Custodian of Record:** Annamarie O’Connor

**Request Received by Custodian:** March 12, 2021

**Response Made by Custodian:** May 10, 2021; June 10, 2021

**GRC Complaint Received:** April 27, 2021

**Background<sup>3</sup>**

**Request:**

On March 12, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 26, 2021, the Complainant sent a follow-up e-mail and fax to the Custodian requesting an update on the request

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<sup>1</sup> The Complainant represents SJ 660 LLC.

<sup>2</sup> Represented by Joseph R. Mariniello, Jr., Esq. of Mariniello & Mariniello, P.C. (Fort Lee, NJ).

<sup>3</sup> 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.

Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC) v. Borough of Edgewater (Bergen), 2021-90 – Findings and Recommendations of the Executive Director

### Denial of Access Complaint:

On April 27, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted despite requesting a follow-up on their OPRA request on March 26, 2021, no correspondence has been received from the Custodian as of April 27, 2021. The Complainant noted that the Custodian did not request an extension or assert that the request was deficient.

### Response:

On May 10, 2021, the fortieth (40<sup>th</sup>) business day after receipt of the subject OPRA request, Custodian’s Counsel responded to the Complainant’s request in writing. Counsel first stated that the attorneys assigned to handle the request were unavailable due to COVID-19 and only recently returned to the office. In response to the OPRA request, Counsel provided the following:

1. The Borough was in the process of copying the requested documents.
2. The Redevelopment Agreement has not yet been executed. There are no responsive records at this time.
3. No financial or PILOT agreement has been executed yet. There are no responsive records at this time.
4. All reports provided to the Borough are protected under the deliberative process privilege.
5. This request is overbroad as your request does not specify a subject, time frame or individuals to be searched. Please include the sender and recipient, a date (date range) and subject(s), so that the Borough can conduct its search.

On June 10, 2021, Counsel provided an additional response to the Complainant, attaching records responsive to item No. 1.

### Statement of Information:<sup>4</sup>

On July 6, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 12, 2021. The Custodian certified that her search included reviewing the Borough’s files and the Borough Administrator’s e-mail account. The Custodian also certified that the OPRA request was sent to the Borough Attorney’s office after receipt. The Custodian noted that both attorneys were out of the office due to COVID-19 and the OPRA request was not seen until the complaint filing. The Custodian argued that the Complainant did not contact the Borough or Borough Attorney about the request’s status prior to filing the complaint. The Custodian certified that Custodian’s Counsel responded on her behalf in writing on May 10, 2021 and June 10, 2021.

The Custodian asserted that since the complaint filing, the Borough provided two (2) responses to the OPRA request. The Custodian also argued that the Borough did not deny the request but instead sought clarification for item No. 5.

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<sup>4</sup> On May 25, 2021, the matter was transferred to mediation. On June 9, 2021, the matter was transferred back to the GRC for adjudication.  
Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC) v. Borough of Edgewater (Bergen), 2021-90 – Findings and Recommendations of the Executive Director

## 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).<sup>5</sup> 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 dated October 31, 2007).

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i)(2) now provides that:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, *provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.*

[Id. (Emphasis added).]

Although adjudicated during the pendency of this matter, the GRC finds Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022) pertinent. There, the complainant asserted that the custodian failed to timely provide immediate access records under OPRA. The custodian certified that at the time she received the OPRA request, the municipality was operating with reduced staff and subsequently shutdown temporarily due to the pandemic and PHE and could not provide a response until the fifth (5<sup>th</sup>) business day after receipt. The Council held that although the request was submitted prior to the enactment of N.J.S.A. 47:1A-5(i)(2), the custodian provided sufficient facts and circumstances to reasonably justify the delay in providing access to the immediate access records.

Here, the Custodian acknowledged receiving the instant OPRA request on March 12, 2021 and forwarded it to the Borough Attorney's office that same day. However, because the Custodian failed to request status updates from the office, she did not realize that the office was empty due to the attorneys contracting COVID-10. Nor did the Custodian regularly updated the Complainant

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<sup>5</sup> 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.  
Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC) v. Borough of Edgewater (Bergen), 2021-90 – Findings and Recommendations of the Executive Director

on the status of the OPRA request within the statutory period. Accordingly, and in contrast to Dunwell, GRC 2020-64, there's sufficient evidence to find a "deemed" denial of access occurred.

Therefore, 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 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. However, the Council declines to order disclosure for request item No. 1 since the evidence of record demonstrates that the Custodian responded on June 10, 2021, providing responsive records.

### **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.

#### *Item Nos. 2 & 3*

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the instant matter, the Custodian responded on May 10, 2021, and subsequently certified that no responsive records exist pertaining to the Complainant's OPRA request item Nos. 2 and 3, which sought executed agreements between RRP and the Borough. To date, the Complainant has not submitted any evidence contradicting the Custodian's certification.

Therefore, notwithstanding the Custodian's "deemed" denial, she bore her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 seeking specified, executed agreements between the Borough and RRP. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer, GRC 2005-49.

#### *Item No. 4*

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 345, 355 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and

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<sup>6</sup> Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).  
Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC) v. Borough of Edgewater (Bergen), 2021-90 – Findings and Recommendations of the Executive Director

hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the instant matter, the Custodian denied access to “reports” responsive to the Complainant’s OPRA request item No. 4 under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. However, a “meaningful review” is necessary to determine whether the denied reports fall within the asserted exemptions. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts similar to the present complaint. See e.g. Roykovich v. West Milford Bd. of Educ. (Passaic), GRC Complaint No. 2011-258 (April 2013). Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the located reports responsive to the Complainant’s OPRA request item No. 4 to validate the Custodian’s assertion that the records were exempt from disclosure under the ACD material exemption. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

### **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 Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (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);<sup>7</sup> 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).

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request such records in 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 email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated 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. See e.g. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) (invalid request omitting the “subject and/or content”); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016) (invalid request omitting “date or range of dates”).

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<sup>7</sup> Affirmed on appeal from Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004). Steven G. Mlenak, Esq. (on Behalf of SJ 660 LLC) v. Borough of Edgewater (Bergen), 2021-90 – Findings and Recommendations of the Executive Director

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

In the instant matter, the Complainant’s OPRA request item No. 5 sought correspondence between RRP and the Borough pertaining to “615 River Road” between January 1, 2019 through present. The Custodian responded to the Complainant on May 10, 2021, stating that the request was overly broad and failed to provide a subject matter, time frame, or individuals to be searched.

Upon review, the evidence demonstrates that the Complainant’s request item met the requirements outlined in Elcavage and Armenti. The request item identified the sender and recipients as RRP and the Borough, which are valid identifiers in accordance with Burke, 429 N.J. Super. at 176. Furthermore, the request identified “615 River Road” as the subject matter, and identified a date range of January 1, 2019 through present, or March 12, 2021. Therefore, the request was a valid request for correspondence.

Accordingly, the Complainant’s OPRA request item No. 5 seeking correspondence is valid because it identified a sender/recipient, a specific date range, and content matter. See Burke, 429 N.J. Super. at 176; Elcavage, GRC 2009-07. See also Armenti, GRC 2009-154. Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.

### **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 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 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 dated October 31, 2007). However, the Council declines to order disclosure for request item No. 1 since the evidence of record demonstrates that the Custodian responded on June 10, 2021, providing responsive records.
2. Notwithstanding the Custodian’s “deemed” denial, she bore her burden of proof that she lawfully denied access to the Complainant’s OPRA request item Nos. 2 and 3 seeking specified, executed agreements between the Borough of Edgewater and River Road Partners. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
  3. The GRC must conduct an *in camera* review of the located reports responsive to the Complainant’s OPRA request item No. 4 to validate the Custodian’s assertion that the records were exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 345, 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
  4. **The Custodian shall deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>10</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
  5. The Complainant’s OPRA request item No. 5 seeking correspondence is valid because it identified a sender/recipient, a specific date range, and content matter. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See also Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.
  6. **The Custodian shall comply with conclusion no. 5 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**

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<sup>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "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."

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**redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>11</sup> certified confirmation of compliance, in accordance with R. 1:4-4,<sup>12</sup> to the Executive Director.<sup>13</sup>**

7. 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.
8. 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: Samuel A. Rosado  
Staff Attorney

September 22, 2022

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<sup>11</sup> 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.

<sup>12</sup> "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."

<sup>13</sup> 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.

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