



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

INTERIM ORDER

November 8, 2023 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2022-439

v.

Englishtown Police Department (Monmouth)
Custodian of Record

At the November 8, 2023 public meeting, the Government Records Council (“Council”) considered the October 31, 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 current Custodian failed to comply with the Council’s August 29, 2023 Interim Order because she failed to respond to the Council’s Order in totality.
2. “The complainant 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 August 29, 2023 Interim Order, which reinstated its prior July 25, 2023 Interim Order, is enforceable in the Superior Court if the Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian violated OPRA by failing to respond in writing within the extended time frame to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, neither the Custodian nor Deputy Clerk Christine Robbins submitted a Statement of Information to the GRC in violation of N.J.A.C. 5:105-2.4(a). The current Custodian also failed to respond to the Council’s Order at all, even though the GRC made clear the final business day to respond to said order. As such, the current Custodian is in contempt of said Order, which hindered the GRC’s efforts to “. . . receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b). Accordingly, it is possible that the Custodian, Chief Peter S. Cooke, Jr., Ms. Robbins, and/or the current Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness.



Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the identified parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

4. Pursuant to the Council's July 25, and August 29, 2023 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, 71 (2008). However, it is unclear whether Complainant Counsel's limited involvement absent any additional relief results in an award of prevailing party attorney's fees. Therefore, the GRC refers this issue to the Office of Administrative Law to determine whether Complainant's Counsel should be awarded fees and if so, the quantum of said award. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Interim Order Rendered by the
Government Records Council
On The 8th Day of November 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: November 9, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 8, 2023 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2022-439

v.

**Englishtown Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Links, announcements, posts or messages to or from the Englishtown Police Department's ("EPD") Facebook page and Daniel Francisco, William Lewis, the Village Inn, and Bill Sabin regarding the Borough of Englishtown ("Borough") Inaugural Christmas Light Contest or Village Inn from November 22, 2021 through May 1, 2022.
2. EPD Facebook activity log showing "Your Posts" records, text updates, check-ins, notes, photos, videos, "and more" from November 22, 2021 through May 1, 2022.

Custodian of Record: Gretchen McCarthy³
Request Received by Custodian: May 10, 2022
Response Made by Custodian: May 19, 2022
GRC Complaint Received: August 22, 2022

Background

August 29, 2023 Council Meeting:

At its August 29, 2023 public meeting, the Council considered the August 22, 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 the amended findings and recommendations. The Council, therefore, found that:

Custodian's Counsel has failed to establish in his request for reconsideration of the Council's July 25, 2023 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Custodian's

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ). Mr. Luers entered his appearance on August 25, 2023.

² Represented by James L. Plosia, Jr., of Plosia, Cohen, LLC. (Chester, NJ).

³ The current "custodian of record" is Kerry Killeen, who was appointed to the municipal clerk position on May 15, 2023.

Counsel failed to establish that the complaint should be reconsidered based on a “mistake” or “extraordinary circumstances.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council’s July 25, 2023 Interim remains in effect and the Custodian shall comply accordingly.**

Procedural History:

On August 29, 2023, the Council distributed its Interim Order to all parties. On August 30, 2023, Custodian’s Counsel e-mailed the Government Records Council (“GRC”) asking for clarification of the final deadline date for compliance. On September 1, 2023, the GRC responded advising that the deadline is September 6, 2023. The GRC did not receive any additional correspondence from the Borough.

Analysis

Compliance

At its August 29, 2023 meeting, the Council denied Custodian Counsel’s request for reconsideration and reinstated the July 25, 2023 Interim Order, which ordered the Custodian to disclose the requested EPD Facebook records or certify if none existed, inclusive of additional certifications for those individuals conducting a search. The Order also required the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On August 29, 2023, 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 September 6, 2023.

On August 30, 2023, Custodian’s Counsel sought clarification as to the final business day for the Borough to comply with the Council’s Order. The GRC responded confirming that September 6, 2023 was the compliance deadline date. However, the GRC received no further correspondence indicating that records were located and disclosed to the Complainant and also did not receive any certified confirmation of compliance to that effect.

Therefore, the current Custodian failed to comply with the Council’s August 29, 2023 Interim Order because she failed to respond to the Council’s Order in totality.

Council’s October 28, 2014, Interim Order is Enforceable

“The complainant 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 August 29, 2023 Interim Order, which reinstated its prior July 25, 2023 Interim Order, is enforceable in the Superior Court if the Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law (“OAL”) for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the OAL.

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)).

In the instant matter, the Custodian violated OPRA by failing to respond in writing within the extended time frame to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, neither the Custodian nor Deputy Clerk Christine Robbins submitted a Statement of Information (“SOI”) to the GRC in violation of N.J.A.C. 5:105-2.4(a). The current Custodian also failed to respond to the Council’s Order at all, even though the GRC made clear the final business day to respond to same. As such, the current Custodian is in contempt of said Order, which hindered the GRC’s efforts to “. . . receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b). Accordingly, it is possible that the Custodian, Chief Peter S. Cooke, Jr., Ms. Robbins, and/or the current Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness. Therefore, this complaint should be referred to the OAL for a determination of whether the identified parties 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 (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.]

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 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 filed his complaint *pro se*, therein arguing that the Custodian and Chief Cooke unlawfully denied him access to the requested Facebook records. The GRC sent out multiple requests for an SOI and did not receive one from Borough. Based on the evidence of record available to the Council, it held that an unlawful denial of access occurred and ordered disclosure of the requested records. Custodian’s Counsel subsequently entered his appearance and submitted a request for reconsideration; the Complainant submitted an objection thereto on August 22, 2023. On the same day, the GRC notified the parties of the scheduling of this complaint at the August 29, 2023 meeting and advised that no further

submissions would be accepted. On August 25, 2023, Complainant's Counsel entered his appearance and submitted a letter brief. At the August 29, 2023, the Council denied the request for reconsideration and reinstated its July 25, 2023 Interim Order.

The evidence is clear that the Complainant prevailed because the instant Denial of Access Complaint was the catalyst for the Council requiring disclosure here. Further, the Borough has failed to provide any argument to the contrary. However, the question of whether fees should be awarded is decidedly more complicated. Specifically, the Complainant prevailed while unrepresented based on the Council's July 25, 2023 Interim Order. Further, Complainant Counsel's appearance had no effect on the outcome of the Council's August 29, 2023 Interim Order, which reinstated the previous Order requiring disclosure.

For additional perspective on this issue, the GRC looks to Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (February 2020). There, the complainant prevailed as a *pro se* litigant when the Council held that he was unlawfully denied access to GoFundMe records. See Demitroff, GRC 2017-169 (Interim Order dated November 12, 2019). Following distribution of the Order, the custodian responded stating that she could not ascertain the existence of records due to Mayor Chiarello's hospitalization. On December 2, 2019, complainant's counsel entered his appearance via e-mail and asserted that the custodian failed to try and obtain records directly from GoFundMe via WePay, its parent company. Based on complainant counsel's e-mail, the custodian contacted GoFundMe and was able to obtain responsive records. The custodian disclosed said records to the complainant under cover of certification on December 5, 2019. The Council held that the complainant was a prevailing party and that fees should be limited to those "incurred in connection with Complainant's Counsel assistance in obtaining the responsive records." See Demitroff, GRC 2017-169 (February 2020) at 8. In reaching this conclusion, the Council reasoned that:

In weighing whether the Complainant is a prevailing party entitled to attorney's fees, the Council's November 12, 2019 Order is clear that he prevailed in his complaint. However, at the point that the Council ruled in this complaint, the Complainant was not represented. Instead, the Complainant filed his Denial of Access Complaint *pro se* and continued through the adjudication process as such until after the Council's Order. Thus, insofar as the Complainant being entitled to attorney's fees based on the Interim Order, a lack of representation does not support a fee award. See Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (May 2013) (citing New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 152-53 (2005)).

However, Complainant Counsel's involvement following the Custodian's November 27, 2019 compliance response did bring about a change in her actions. Specifically, the Custodian certified that she had no way of determining whether responsive GoFundMe records existed because of Mayor Chiarello's condition. Complainant's Counsel then entered his appearance and argued that the Custodian failed to contact GoFundMe/WePay directly. This led to the Custodian obtaining records and disclosing them to the Complainant on December 5, 2019.

Id. at 7-8.

Here, and as in Demitroff, the Complainant prevailed as a *pro se* litigant per the July 25, 2023 Interim Order and became represented by Complainant's Counsel after the Borough filed a request for reconsideration. However, Counsel's appearance had no effect on the Council's rejection of the request for reconsideration and reinstatement of the July 25, 2023 Interim Order. The facts here appear slightly different from Demitroff in that relief was achieved a month before Complainant's Counsel entered his appearance. Yet, the Borough's failure to comply with the Council's Orders creates a wrinkle in the above analysis. More specifically, while the Council has ordered disclosure, same has yet to occur. It is thus possible that Complainant Counsel's participation will result in a similar outcome to that in Demitroff warranting an award of fees. However, the GRC cannot recommend a definitive decision on the issue at this point due to the outstanding disclosure issue.

Therefore, pursuant to the Council's July 25, and August 29, 2023 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. However, it is unclear whether Complainant Counsel's limited involvement absent any additional relief results in an award of prevailing party attorney's fees. Therefore, the GRC refers this issue to the OAL to determine whether Complainant's Counsel should be awarded fees and if so, the quantum of said award. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian failed to comply with the Council's August 29, 2023 Interim Order because she failed to respond to the Council's Order in totality.
2. "The complainant 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 August 29, 2023 Interim Order, which reinstated its prior July 25, 2023 Interim Order, is enforceable in the Superior Court if the Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian violated OPRA by failing to respond in writing within the extended time frame to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, neither the Custodian nor Deputy Clerk Christine Robbins submitted a Statement of Information to the GRC in

violation of N.J.A.C. 5:105-2.4(a). The current Custodian also failed to respond to the Council's Order at all, even though the GRC made clear the final business day to respond to said order. As such, the current Custodian is in contempt of said Order, which hindered the GRC's efforts to ". . . receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). Accordingly, it is possible that the Custodian, Chief Peter S. Cooke, Jr., Ms. Robbins, and/or the current Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the identified parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

4. Pursuant to the Council's July 25, and August 29, 2023 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, 71 (2008). However, it is unclear whether Complainant Counsel's limited involvement absent any additional relief results in an award of prevailing party attorney's fees. Therefore, the GRC refers this issue to the Office of Administrative Law to determine whether Complainant's Counsel should be awarded fees and if so, the quantum of said award. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

October 31, 2023



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
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SHEILA Y. OLIVER
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KIMBERLY K. HOLMES
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INTERIM ORDER

August 29, 2023 Government Records Council Meeting

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Complainant

Complaint No. 2022-439

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Englishtown Police Department (Monmouth)
Custodian of Record

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Interim Order Rendered by the
Government Records Council
On The 29th Day of August 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: August 29, 2023



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
August 29, 2023 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2022-439

v.

**Englishtown Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Links, announcements, posts or messages to or from the Englishtown Police Department’s (“EPD”) Facebook page and Daniel Francisco, William Lewis, the Village Inn, and Bill Sabin regarding the Borough of Englishtown (“Borough”) Inaugural Christmas Light Contest or Village Inn from November 22, 2021 through May 1, 2022.
2. EPD Facebook activity log showing “Your Posts” records, text updates, check-ins, notes, photos, videos, “and more” from November 22, 2021 through May 1, 2022.

Custodian of Record: Gretchen McCarthy³

Request Received by Custodian: May 10, 2022

Response Made by Custodian: May 19, 2022

GRC Complaint Received: August 22, 2022

Background

July 25, 2023 Council Meeting:

At its July 25, 2023 public meeting, the Council considered the July 18, 2023 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 Borough’s collective failure to provide a completed Statement of Information [(“SOI”)] to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Borough’s failure to respond additionally obstructed the

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ). Mr. Luers entered his appearance on August 25, 2023.

² Represented by James L. Plosia, Jr., of Plosia, Cohen, LLC. (Chester, NJ).

³ The current “custodian of record” is Kerry Killeen, who was appointed to the municipal clerk position on May 15, 2023.

GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian may have unlawfully denied access to the requested Englishtown Police Department Facebook records related to the Christmas Light Contest and the requested activity log for a specific period of time. N.J.S.A. 47:1A-6. The current Custodian shall disclose the responsive records. Should certain records not exist, the current Custodian must certify to this fact and include certifications from those specific individuals tasked with searching for responsive records providing an explanation of their search process.
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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**

Procedural History:

On July 27, 2023, the Council distributed its Interim Order to all parties. On August 7, 2023, Custodian’s Counsel e-mailed the Government Records Council (“GRC”) submitting a formal letter of representation and asserted that he assumed the Council would consider his request for reconsideration “filed by the Borough last week.”⁷ On August 10, 2023, Custodian’s Counsel forwarded a letter brief dated August 3, 2023 seeking reconsideration of Interim Order. On August 14, 2023, the GRC e-mailed Custodian’s Counsel advising that the last day to submit a request for reconsideration was August 10, 2023. The GRC confirmed that while it was unable to locate any

⁴ 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.

⁵ “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 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.

⁷ The GRC did not receive a request for reconsideration on August 3, 2023 and was further unable to confirm receipt upon reviewing Custodian Counsel’s formal letter of representation.

correspondence dated August 3, 2023, it did receive Counsel's August 10, 2023 e-mail attaching a letter brief. The GRC noted that it was rejecting the August 10, 2023 filing because same did not include the required "Request for Reconsideration" form. N.J.A.C. 5:105-2.10(d). The GRC thus provided Custodian's Counsel three (3) additional business days, or until August 17, 2023, to correct the deficiency.

Later on August 14, 2023, Custodian's Counsel filed a request for reconsideration of the Council's Interim Order based on a "mistake" and "extraordinary circumstances." Counsel confirmed his understanding that the Borough effectively "defaulted" by failing to submit an SOI. Counsel argued that the Borough "regret[ted] these failures" and granting a request for reconsideration would allow the Custodian the opportunity "to belatedly respond to the OPRA request." Counsel further asserted that permitting reconsideration would allow the Custodian to, if necessary, submit an SOI in this complaint. Counsel noted that at present, the Borough does not understand the request for a "Facebook activity log" and is unclear on from which account the information is being sought.

On August 22, 2023, the Complainant e-mailed the GRC objecting to "any attempt" by the Borough to assert that the Custodian did not "process this [OPRA request] correctly." The Complainant noted that Chief Cooke sought an extension and subsequently failed to respond any further. The Complainant also questioned "where and when" the request was "filed" and when he would receive the responsive records.⁸

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Counsel filed a request for reconsideration of the Council's July 25, 2023 Interim Order on August 14, 2023, two (2) business days before the expiration of additional time to do so.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent

⁸ On August 25, 2023, as part of his appearance notification, Complainant's Counsel included a letter brief containing additional objections to the Borough's request for reconsideration.

evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

The GRC has reviewed the submission and rejects the request for reconsideration. Briefly, the Council did not make a “mistake” in their decision: the Borough’s admitted mistake does not constitute a valid basis on which to reconsider a decision. Further, there is no evidence that “extraordinary circumstances” exist here that warrant reconsideration. That a custodian may need but fails to seek clarification⁹ of an OPRA request does not present “extraordinary circumstances” warranting reconsideration of this Interim Order.

As the moving party, Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a “mistake” or “extraordinary circumstances.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. **Thus, the Council’s July 25, 2023 Interim remains in effect and the Custodian shall comply accordingly.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s July 25, 2023 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a “mistake” or “extraordinary circumstances.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.

⁹ The GRC notes that Custodian’s Counsel asserted that the request was “unclear” because he was unaware of what a “Facebook activity log” encompassed and did not know from whose account the Complainant sought records. To the latter, the Complainant’s OPRA request was clear that the records sought were from EPD’s Facebook account. *Anonymous v. Englishtown Police Department (Monmouth)*, 2022-439 – Supplemental Findings and Recommendations of the Executive Director

2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council's July 25, 2023 Interim remains in effect and the Custodian shall comply accordingly.**

Prepared By: Frank F. Caruso
Executive Director

August 22, 2023



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

July 25, 2023 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2022-439

v.

Englishtown Police Department (Monmouth)
Custodian of Record

At the July 25, 2023 public meeting, the Government Records Council (“Council”) considered the July 18, 2023 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 Borough’s collective failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Borough’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian may have unlawfully denied access to the requested Englishtown Police Department Facebook records related to the Christmas Light Contest and the requested activity log for a specific period of time. N.J.S.A. 47:1A-6. The current Custodian shall disclose the responsive records. Should certain records not exist, the current Custodian must certify to this fact and include certifications from those specific individuals tasked with searching for responsive records providing an explanation of their search process.
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

Interim Order Rendered by the
Government Records Council
On The 25th Day of July 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: July 27, 2023

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
July 25, 2023 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2022-439

v.

**Englishtown Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Links, announcements, posts or messages to or from the Englishtown Police Department's ("EPD") Facebook page and Daniel Francisco, William Lewis, the Village Inn, and Bill Sabin regarding the Borough of Englishtown ("Borough") Inaugural Christmas Light Contest or Village Inn from November 22, 2021 through May 1, 2022.
2. Facebook activity log showing "Your Posts" records, text updates, check-ins, notes, photos, videos, "and more" from November 22, 2021 through May 1, 2022.

Custodian of Record: Gretchen McCarthy³
Request Received by Custodian: May 10, 2022
Response Made by Custodian: May 19, 2022
GRC Complaint Received: August 22, 2022

Background⁴

Request and Response:

On May 10, 2022, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 19, 2022, the Custodian responded in writing stating that Police Chief Peter S. Cooke, Jr. has advised that an extension until June 16, 2022 was required to respond to the OPRA request.

On July 28, 2022, the Complainant e-mailed the Custodian stating that the requested extension of time expired over a month ago. The Complainant noted that they understand that Chief Cooke, and not the Custodian, controls EPD's Facebook page. The Complainant stated that

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The current "custodian of record" is Kerry Killeen, who was appointed to the municipal clerk position on May 15, 2023.

⁴ 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.

they are willing to provide Chief Cooke until July 29, 2022 to disclose records or they would be forced to “seek immediate legal relief through the courts.”

Denial of Access Complaint:

On August 22, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that EPD failed to disclose responsive records within the extended time frame. The Complainant argued that they were aware that Chief Cooke, and not the Custodian, maintained EPD’s Facebook page. The Complainant further noted that Chief Cooke could not deny a lack of knowledge in the Christmas Light Contest because he advertised it on the EPD Facebook page.

Statement of Information:⁵

On March 27, 2023, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On the same day, Interim Municipal Clerk Christine Robbins e-mailed the GRC advising that the Custodian no longer worked for the Borough. Ms. Robbins sought direction on how to proceed with the complaint. On March 28, 2023, the GRC responded noting that in situations where a custodian is no longer available to complete an SOI, the duty transfers to the current custodian.⁶

On May 4, 2023, the GRC sent a “No Defense” letter to Ms. Robbins, requesting a completed SOI within three (3) business days of receipt. The GRC noted that Ms. Robbins’s failure to submit an SOI could lead to an adjudication based solely on the Complainant’s submission. N.J.A.C. 5:105-2.4(f). The GRC did not receive any further correspondence from Ms. Robbins or anyone else in the Borough thereafter.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed [SOI] form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than 10 business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

⁵ On September 26, 2022, this complaint was referred to mediation. On March 21, 2023, this complaint was referred back to the GRC for adjudication.

⁶ The GRC also noted that if the Borough is being represented in this complaint, the attorney is required to submit a formal letter of representation. N.J.A.C. 5:105-2.4(f).

[N.J.A.C. 5:105-2.4(g).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the GRC sent an SOI request to the original Custodian on March 27, 2023, which prompted Ms. Robbins to contact the GRC for guidance. In response, the GRC advised that the designated current custodian is reasonable for filing an SOI. Notwithstanding, the Borough did not comply with the GRC’s initial request for an SOI. On May 4, 2023, after the expiration of the ten (10) business day deadline and as part of ongoing communications with the parties, the GRC sent Ms. Robbins a “No Defense” letter providing her an additional three (3) business days to submit the requested SOI. The transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The GRC never received a completed SOI from Ms. Robbins or the current Custodian thereafter. The GRC notes that changes in the Borough’s municipal clerk position during the SOI request period had an impact here; however, the GRC made clear that the designated current custodian was required to submit an SOI. Further, at no point did the Borough seek extensions to comply with the SOI request predicated on those changes.

Accordingly, the Borough’s collective failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Borough’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

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).⁷ 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).

⁷ 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.

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

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

[Id.]

Here, the Custodian initially responded in writing to the Complainant on May 19, 2022, the same business day as receipt of the OPRA request, obtaining an extension of through June 16, 2022. However, the Custodian never responded again thereafter, which prompted the Complainant to e-mail the Borough on July 28, 2022 seeking a response under threat of legal action. Thus, in keeping with Kohn, GRC 2007-124, the Custodian’s failure to respond prior to the extension expiration resulted in a “deemed” denial.

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 extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

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.

Initially, the GRC notes that existent case law supports that social media records falling within OPRA’s definition of a “government record” are subject to disclosure. N.J.S.A. 47:1A-1.1; Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018); Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019).

Here, the Complainant sought access to multiple records from EPD’s Facebook page related to a Christmas Light Contest and activity log for a specific period of time. After not

receiving a response, the Complainant filed the instant complaint noting that Chief Cooke, and not the original Custodian, had direct access to EPD's Facebook page. The GRC subsequently sent two (2) requests for an SOI and received no response in return. Thus, the Borough has not provided any arguments supporting the potential denial of records sought by the Complainant. Based on this, the GRC is persuaded that an unlawful denial of access may have occurred and that the requested records should be disclosed to the extent they exist.

Accordingly, the Custodian may have unlawfully denied access to the requested EPD Facebook records related to the Christmas Light Contest and the requested activity log for a specific period of time. N.J.S.A. 47:1A-6. The current Custodian shall disclose the responsive records. Should certain records not exist, the current Custodian must certify to this fact and include certifications from those specific individuals tasked with searching for responsive records providing an explanation of their search process.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Borough's collective failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Borough's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian may have unlawfully denied access to the requested Englishtown Police Department Facebook records related to the Christmas Light Contest and the requested activity log for a specific period of time. N.J.S.A. 47:1A-6. The current Custodian shall disclose the responsive records. Should certain records not exist, the current Custodian must certify to this fact and include certifications from those specific individuals tasked with searching for responsive records providing an explanation of their search process.
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 deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰

Prepared By: Frank F. Caruso
Executive Director

July 18, 2023

⁸ 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.

⁹ "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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