



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 24, 2013 Government Records Council Meeting

Robert Verry
Complainant

Complaint No. 2012-143

v.

South Bound Brook (Somerset)
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.2 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$960.00, representing 3.2 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 24th Day of September, 2013

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: September 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**Robert Verry¹
Complainant**

GRC Complaint No. 2012-143

v.

**South Bound Brook (Somerset)
Custodial Agency²**

Records Relevant to Complaint: Electronic copies via e-mail of nonexempt records from the “files” reviewed by the Borough of South Bound Brook’s (“Borough”) Counsel reviewed as noted in his bill for the March 13, 2012 and March 26, 2012 entries to include but not limited to pleadings connected with the Motion to Reconsider associated with Fittin v. South Bound Brook (Citation omitted).

Request Made: April 21, 2012

Response Made: May 1, 2012

GRC Complaint Filed: May 10, 2012³

Background⁴

July 23, 2012 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s May 28, 2013 Interim Order by providing certified confirmation of compliance to the Executive Director within the required five (5) business days. Thus, the Custodian unlawfully denied access to the responsive pleadings. N.J.S.A. 47:1A-6. However, it should be noted that Mr. Taddeo’s July 11, 2013 certification indicated that the Custodian relied on Mr. Taddeo’s advice in certifying that no records existed. Ultimately, Mr. Taddeo

¹ Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).

² No representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The parties may have submitted additional correspondence or made additional statement/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.

admitted his mistake, located the responsive records in a separate file and provided same to the Complainant.

2. The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore the Custodian unlawfully denied access to the responsive "pleading." N.J.S.A. 47:1A-6. However, the portion of the Complainant's OPRA request seeking "files" is invalid and the Custodian, via Mr. Taddeo, disclosed the responsive records to the Complainant on July 11, 2013. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's May 28, 2013 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 (2008). Specifically, Mr. Taddeo disclosed the responsive records to the Complainant on July 11, 2013. 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. 76. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On July 24, 2012, the Council distributed its July 23, 2013 Interim Order ("Interim Order") to all parties.

Compliance:

On August 21, 2012, Walter M. Luers, Esq., Counsel for the Complainant ("Counsel") filed his fee application in accordance with N.J.A.C. 5:105-2.13(b)⁵. The fee application and Certification of Services ("Certification") of counsel set forth the following:

⁵N.J.A.C. 5:105-2.13(b) sets forth the requirements of a fee application, providing in relevant part: (b) . . . [t]he [fee] application must include a certification from the attorney(s) representing the complainant that includes: 1. The Council's complaint reference name and number; 2. Law firm affiliation; 3. A statement of client representation; 4. The hourly rates of all attorneys and support staff involved in the complaint; 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project

- (1) The complaint name and number: Robert A. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143.
- (2) Counsel's law firm affiliation: Law Offices of Walter M Luers, Jr., LLC.
- (3) A statement of client representation: Counsel certified to his services, including reviewing of documents for filing with the GRC; reviewing of e-mail correspondence to and/or from the GRC; communicating with the client regarding the action; and preparing fee application.
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Luers, the sole professional who worked on the file, certified that he charged \$300 per hour.
- (5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from May 9, 2012 through August 21, 2013 (the "Fee Period"). During the Fee Period counsel billed a total of 3.2 hours for a total fee of \$960.00.
- (6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charges "\$300 per hour to clients for work in OPRA matters." Certification of Walter M. Luers, Esq., (hereinafter, "Luers Certif.") at ¶ 3. Counsel certified his education, years of legal experience and representation of clients in OPRA cases before the New Jersey Supreme and Superior Courts, as well as before the GRC. Finally, Mr. Luers certifies to OPRA cases where counsel for the prevailing party were awarded fees in excess of \$300 per hour. Citing, O'Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).
- (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Accordingly, Counsel filed a timely fee application with the Government Records Council ("GRC"). The Custodian did not submit an objection to Complainant's application for fees.

Analysis

In its July 24, 2012 Interim Order, the Council found the Complainant was a prevailing party and thus was entitled to submit an application for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). Counsel timely filed and served⁶ his Certification of Services, seeking a fee award of \$960.00, in the time period provided for pursuant to the Court's Interim Order.

in 0.1 hour (six-minute) increments; 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include: (i) Years of related or similar experience; (ii) Skill level; and (iii) Reputation; and 7. A detailed listing of any expense reimbursements with supporting documentation for such costs..

⁶ N.J.A.C. 5:105-2.13(c) provides in relevant part: (c) The complainant, or his or her attorney, must serve all parties with the application for attorney's fees and all attachments thereto.

Council's Interim Order further provided that the Custodian was afforded ten (10) business days, from the date of service of the application for attorney's fees, to object to Counsel's fee request. N.J.A.C. 5:105-2.13(d). The Custodian did not file or submit an objection to the Complainant's application for fees.

Prevailing Party Attorney Fee Award

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrections, ("NJMDP") 185 N.J. 137, 152 (2005) (quoting, Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (quoting, Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

New Jersey public policy, as codified in OPRA, is that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." NJDPM, 185 N.J. at 153 (citing, N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. 137. "By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." Id. at 153. (quoting, Courier News v. Hunterdon Cty. Prosec. Off., 378 N.J. Super. 539, 546 (App. Div.2005)).

In the instant matter, the Council found the Complainant 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. Further, the Council found 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 73. Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney's fee and was directed to file an application for attorney's fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153. (quoting, Rendine, 141 N.J. at 324 (quoting, Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting, Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing party has to pay for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing, Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker, 415 N.J. Super. at 606 (citing, Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cty. Prosec., 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing, NJDPM, 185 N.J. at 157 (applying, Rendine, 141 N.J. 292 (1995) to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

“[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting, Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting, Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success. . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting, Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that “unusual circumstances may occasionally justify and upward adjustment of the lodestar,” but cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant and enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing, Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing, R.P.C. 1.5(a)). In addition, N.J.A.C. 5:105-2.13 sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the appellate court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature ... intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting, Furey v. County of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter Counsel is seeking a fee award of \$960.00, representing 3.2 hours at \$300 per hour. In support of this hourly rate Counsel submits legal precedent of comparable rates for attorneys that were ruled as reasonable. Citing, O’Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325) and Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).

With respect to Counsel’s request for a \$300 hourly rate, he cites to his experience representing clients in OPRA matters at the Supreme and Superior Courts of New Jersey as well as before the GRC. Luers Certif. at ¶ 10. The Council also takes notice of the thirty plus published and unpublished decisions of the Supreme Court, Appellate and Law Divisions as well as the numerous GRC cases wherein Mr. Luers appeared.

The rate of \$300 is reasonable for a practitioner with experience and skill level of Mr. Luers in this geographical area.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the year period from “May 9, 2012 to August 21, 2012” Counsel billed a total of 3.2 hours for work on the file. This included reviewing the complaint, pleadings and communications; reviewing draft documents for filing; responding to correspondence and other communications, reviewing interim orders and preparing the fee application.

Further in accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s time-sheets provide detailed descriptions of the exact work performed and when, in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). Most entries are broken into time increments of one or two tenths of an hour, with an accompanying description of the work performed. Time entries of exchanges identify the entity or individual with whom Mr. Luers communicated. Similarly, notations for reviewing of pleadings identify the specific document examined.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application, conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.2 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$960.00, representing 3.2 hours of service at \$300 per hour.**

2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.2 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$960.00, representing 3.2 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

September 17, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 23, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2012-143

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that he needed until May 8, 2012 to respond to same, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The portion of the Complainant’s request seeking “files” is invalid under OPRA because it fails to identify specific government records. *See* Redden v. Cape May County Prosecutor’s Office, GRC Complaint No. 2007-206 (September 2009); Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (July 2008)...” *See also* Toscano v. NJ Dept. of Labor, Div. of Vocational Rehabilitation Services, GRC Complaint No. 2010-293 (March 2012). Therefore, notwithstanding the Custodian’s “deemed” denial, he did not unlawfully deny access to this portion of the request.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to the responsive “... pleadings connected with the Motion to Reconsider ...” regarding Fittin v. South Bound Brook, if any exist. Thus, the Custodian must provide the records responsive to this portion of the Complainant’s OPRA request. If no



records responsive during the relative time frame identified in the OPRA request exist, the Custodian must certify to same.

4. **The Custodian shall comply with item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of July, 2013

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 24, 2013

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2012-143

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of nonexempt records from the “files” reviewed by the Borough of South Bound Brook’s (“Borough”) Counsel reviewed as noted in his bill for the March 13, 2012 and March 26, 2012 entries to include but not limited to pleadings connected with the Motion to Reconsider associated with Fittin v. South Bound Brook (Citation omitted).

Request Made: April 21, 2012

Response Made: May 1, 2012

GRC Complaint Filed: May 10, 2012³

Background

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that he needed until May 8, 2012 to respond to same, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Donald E. Kazar, Custodian of Records. No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

2. The portion of the Complainant's request seeking "files" is invalid under OPRA because it fails to identify specific government records. *See Redden v. Cape May County Prosecutor's Office*, GRC Complaint No. 2007-206 (September 2009); *Morgano v. Essex County Prosecutor's Office*, GRC Complaint No. 2007-156 (February 2009), and *Feiler-Jampel v. Somerset County Prosecutor's Office*, GRC Complaint No. 2007-190 (July 2008)..." *See also Toscano v. NJ Dept. of Labor, Div. of Vocational Rehabilitation Services*, GRC Complaint No. 2010-293 (March 2012). Therefore, notwithstanding the Custodian's "deemed" denial, he did not unlawfully deny access to this portion of the request.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to the responsive "... pleadings connected with the Motion to Reconsider ..." regarding *Fittin v. South Bound Brook*, if any exist. Thus, the Custodian must provide the records responsive to this portion of the Complainant's OPRA request. If no records responsive during the relative time frame identified in the OPRA request exist, the Custodian must certify to same.
4. **The Custodian shall comply with item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 31, 2013, the Council distributed its Interim Order to all parties. On June 7, 2013, the Custodian requested an extension of time until June 14, 2013 to respond to the Council's Interim Order. On the same day, the GRC granted an extension of time until June 12, 2013.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records 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.

Compliance:

On June 12, 2013, the Custodian submitted certified confirmation of compliance with the Council's Interim Order. The Custodian certifies that he made an inquiry to the Borough's Labor Counsel and was advised that no Motion to Reconsider was filed in Fittin, thus, no records responsive exist.

Additional Submissions

On July 8, 2013, the Complainant disputed the Custodian's certified confirmation of compliance arguing that the Court's opinion in Fittin v. Borough of South Bound Brook, Docket No. SOM-L-1950-09, was rendered based on the Borough's motion for reconsideration. The Complainant further states that plaintiff filed opposition on March 22, 2012, and the Borough replied on March 26, 2012. The Complainant contends that the Court's opinion is competent, credible evidence that records exist and that the Custodian falsely certified otherwise.

On July 11, 2013, Francesco Taddeo, Esq., certified that he is Labor Counsel for the Borough and at times works with the Custodian to respond to OPRA requests. Mr. Taddeo certifies that upon receipt of the Complainant's OPRA request, the Custodian referred the request to him at which time he did not remember filing a motion for reconsideration because the main legal issue in Fittin involved a protective order and the case was dismissed during discovery. Mr. Taddeo did not locate any responsive records and informed the Custodian of this. Mr. Taddeo certifies that after receiving the Complainant's July 8, 2013 submission, he checked his records and found the motion papers in a separate file. He misplaced the records internally and takes full responsibility for failing to locate and send the records to the Custodian for disclosure. Mr. Taddeo certifies that the responsive records have been disclosed to the Complainant.⁶

Analysis

Compliance

On May 28, 2013, the Council ordered the Custodian to disclose to the Complainant "... pleadings connected with the Motion to Reconsider ..." regarding Fittin v. South Bound Brook, or provide a certification if no records exist. The Council also ordered the Custodian to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 31, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On June 12, 2013, within the extended time frame to respond, the Custodian provided certified confirmation of compliance to the Executive Director that no records responsive exist because no Motion to Reconsider was filed in Fittin. On July 8, 2013, the Complainant submitted evidence indicating that responsive records existed. On July 11, 2013, Mr. Taddeo disclosed the responsive records to the Complainant and advised the GRC that he was responsible for the Custodian's initial failure to produce same.

⁶ Mr. Taddeo amended his legal certification to include two (2) additional records responsive to the Complainant's OPRA request.

Therefore, the Custodian complied with the Council's May 28, 2013 Interim Order by providing certified confirmation of compliance to the Executive Director within the required five (5) business days. Thus, the Custodian unlawfully denied access to the responsive pleadings. N.J.S.A. 47:1A-6. However, it should be noted that Mr. Taddeo's July 11, 2013 certification indicated that the Custodian relied on Mr. Taddeo's advice in certifying that no records existed. Ultimately, Mr. Taddeo admitted his mistake, located the responsive records in a separate file and provided same to the Complainant.

Knowing & Willful

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

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

The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian unlawfully denied access to the responsive "pleading." N.J.S.A. 47:1A-6. However, the portion of the Complainant's OPRA request seeking "files" is invalid and the Custodian, via Mr. Taddeo, disclosed the responsive records to the Complainant on July 11, 2013. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 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, but also over 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, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 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. (Footnote omitted.)

Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, *cert denied* (1984)."

Here, the Council determined that the portion of the Complainant's OPRA request seeking "files" was invalid. The Council further determined that the Custodian may have unlawfully denied access to "pleadings" sought by the Complainant and ordered the Custodian to either disclose the responsive records or certify that no records exist. The Custodian responded on June 12, 2013 certifying that no records existed. However, subsequent to the Complainant's July 8, 2013 letter providing evidence that records exist, Mr. Taddeo located and disclosed the responsive records to the Complainant. Therefore, the Complainant is a prevailing party subject to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's May 28, 2013 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, *supra*, 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, *supra*. Specifically, Mr. Taddeo disclosed the responsive records to the Complainant on July 11, 2013. 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, *supra*, and Mason, *supra*. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 28, 2013 Interim Order by providing certified confirmation of compliance to the Executive Director within the required five (5) business days. Thus, the Custodian unlawfully denied access to the responsive pleadings. N.J.S.A. 47:1A-6. However, it should be noted that Mr. Taddeo's July 11, 2013 certification indicated that the Custodian relied on Mr. Taddeo's advice in certifying that no records existed. Ultimately, Mr. Taddeo admitted his mistake, located the responsive records in a separate file and provided same to the Complainant.
2. The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore the Custodian unlawfully denied access to the responsive "pleading." N.J.S.A. 47:1A-6. However, the portion of the Complainant's OPRA request seeking "files" is invalid and the Custodian, via Mr. Taddeo, disclosed the responsive records to the Complainant on July 11, 2013. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's May 28, 2013 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 (App. Div. 2006), 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 v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, Mr. Taddeo disclosed the responsive records to the Complainant on July 11, 2013. 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, supra, and Mason, supra. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. *N.J.A.C.* 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. *N.J.A.C.* 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2012-143

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that he needed until May 8, 2012 to respond to same, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The portion of the Complainant’s request seeking “files” is invalid under OPRA because it fails to identify specific government records. *See* Redden v. Cape May County Prosecutor’s Office, GRC Complaint No. 2007-206 (September 2009); Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (July 2008)...” *See also* Toscano v. NJ Dept. of Labor, Div. of Vocational Rehabilitation Services, GRC Complaint No. 2010-293 (March 2012). Therefore, notwithstanding the Custodian’s “deemed” denial, he did not unlawfully deny access to this portion of the request.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to the responsive “... pleadings connected with the Motion to Reconsider ...” regarding Fittin v. South Bound Brook, if any exist. Thus, the Custodian must provide the records responsive to this portion of the Complainant’s OPRA request. If no records responsive during the relative time frame identified in the OPRA request exist, the Custodian must certify to same.



4. **The Custodian shall comply with item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: May 29, 2013

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records 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
May 28, 2013 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2012-143

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of nonexempt records from the “files” reviewed by the Borough of South Bound Brook’s (“Borough”) Counsel reviewed as noted in his bill for the March 13, 2012 and March 26, 2012 entries to include but not limited to pleadings connected with the Motion to Reconsider associated with Fittin v. South Bound Brook (Citation omitted).

Request Made: April 21, 2012

Response Made: May 1, 2012

GRC Complaint Filed: May 10, 2012³

Background⁴

Request and Response:

On April 21, 2012, the Complainant submitted his Open Public Record Act (“OPRA”) request to the Custodian. On May 1, 2012, the Custodian responded requesting an extension of time until May 8, 2012. There is no evidence in the record that the Custodian responded within the extended time frame.

Denial of Access Complaint:

On May 10, 2012, the Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) arguing that the Custodian failed to respond within the extended time frame. The Complainant thus requests the following: (1) a determination that the Custodian violated OPRA by failing to respond; (2) a determination ordering disclosure of the responsive records; (3) a determination that the Custodian knowingly and willfully violated

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Donald E. Kazar, Custodian of Records. No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

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.

OPRA and unreasonably denied access to the responsive records under the totality of the circumstances warranting a civil penalty pursuant to N.J.S.A. 47:1A-11; and (4) a determination that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.⁵

Analysis⁶

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). As also prescribed under 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. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Kohn v. Township 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 OPRA request, seeking an extension of time until April 20, 2007, to fulfill the complainant's OPRA request. However, the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

"[t]he 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, as in Kohn, *supra*, the Custodian responded in writing to the Complainant's OPRA request in a timely manner stating that he needed until May 8, 2012, to respond to said request. However, the Custodian failed to respond in writing to the Complainant within that time. *See also* Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

⁵ The GRC sent the Custodian a request for a Statement of Information ("SOI") on June 1, 2012. After not receiving an SOI, the GRC sent a letter of no defense to the Custodian on June 15, 2012. However, the GRC never received an SOI from the Custodian.

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁷ It is the GRC's position that 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.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed until May 8, 2012, to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn, supra. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

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.

The Complainant filed this complaint after the Custodian failed to respond to his OPRA request within the extended time frame. Thereafter, the Custodian failed to submit an SOI, thus the GRC proceeds with only the evidence submitted in the record. N.J.A.C. 5:105-2.4(i).

Part of the OPRA analysis requires a determination as to whether a request for "files" is a valid OPRA request.

The New Jersey Superior Court has held that "[w]hile 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." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court reasoned that:

"[m]ost 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." (Emphasis added.) *Id.* at 549.

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.*" (Emphasis added.) *Id.* See also Bent v. Stafford Police

Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Further, in Redden v. Cape May County Prosecutor's Office, GRC Complaint No. 2007-206 (September 2009), the complainant sought the entire criminal file for Indictment No. 86-0101-I. The Council held that the complainant's request was invalid because it was "... a blanket request for a class of various documents rather than a request for specific government records pursuant to Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008)..." See also Toscano v. NJ Dept. of Labor, Div. of Vocational Rehabilitation Services, GRC Complaint No. 2010-293 (March 2012).

Here, the first part of the Complainant's request sought "... nonexempt records from the 'files' reviewed by the [Borough's] Counsel reviewed as noted in his bill for the March 13, 2012 and March 26, 2012 entries ..." The Complainant's request seeking "nonexempt records" from "files"⁹ is a blanket request for a class of various documents.

Thus, the portion of the Complainant's request seeking "files" is invalid under OPRA because it fails to identify specific government records. See Redden, *supra*; Morgano, *supra*; Feiler-Jampel, *supra*; Toscano, *supra*. Therefore, notwithstanding the Custodian's "deemed" denial, he did not unlawfully deny access to this portion of the request.

However, the second part of the request sought "... pleadings connected with the Motion to Reconsider associated with Fittin v. South Bound Brook." This portion of the OPRA request is valid as it seeks pleadings in response to a complaint identified by the Complainant within a somewhat definitive time frame.¹⁰

Therefore, the Custodian may have failed to bear his burden of proving a lawful denial of access to the responsive "... pleadings connected with the Motion to Reconsider ..." regarding Fittin, if any exist. Thus, the Custodian must provide the records responsive to this portion of the OPRA request. If no records responsive during the relative time frame identified in the OPRA request exist, 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.

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ The GRC acknowledges that the term "files" was taken directly from entries in an invoice.

¹⁰ The GRC acknowledges that it is possible that responsive records are not dated similarly as the entries contained on Counsel's billing records. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated May 29, 2012).

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 his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed until May 8, 2012 to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The portion of the Complainant's request seeking "files" is invalid under OPRA because it fails to identify specific government records. *See* Redden v. Cape May County Prosecutor's Office, GRC Complaint No. 2007-206 (September 2009); Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008)... *See also* Toscano v. NJ Dept. of Labor, Div. of Vocational Rehabilitation Services, GRC Complaint No. 2010-293 (March 2012). Therefore, notwithstanding the Custodian's "deemed" denial, he did not unlawfully deny access to this portion of the request.
3. The Custodian may have failed to bear his burden of proving a lawful denial of access to the responsive "... pleadings connected with the Motion to Reconsider ..." regarding Fittin v. South Bound Brook, if any exist. Thus, the Custodian must provide the records responsive to this portion of the Complainant's OPRA request. If no records responsive during the relative time frame identified in the OPRA request exist, the Custodian must certify to same.
4. **The Custodian shall comply with item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.¹²**

¹¹ "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."

¹² Satisfactory compliance requires that the Custodian deliver the records 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

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

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Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013

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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