



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 20, 2013 Government Records Council Meeting

John Campbell
Complainant

Complaint No. 2013-114

v.

New Jersey Department of Environmental
Protection
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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, finds that:

1. The Custodian complied with the Council’s October 22, 2013 Interim Order because he responded in the prescribed extended time frame certifying that he had, in effect, already taken the actions required to comply with the Interim Order and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Rather, the record appears to show that the Custodian intended to fulfill the Complainant’s OPRA but, due to confusion on the part of both parties, did not do so prior to the filing of the Denial of Access Complaint. Thus, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.
3. The Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee, as there exists a factual causal nexus between the Complainant’s civil litigation, rather than the instant complaint, and the relief ultimately achieved. *See* N.J.S.A. 47:1A-6, Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008); Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423, 432 (App. Div. 2006).



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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**John Campbell¹
Complainant**

GRC Complaint No. 2013-114

v.

**New Jersey Department of Environmental Protection²
Custodial Agency**

Records Relevant to Complaint: The Complainant seeks copies of the following documents, which relate to either the Wetlands Mitigation Council or Wetlands Mitigation Fund, all of which are part of the New Jersey Department of Environmental Protection's (DEP) Land Use Regulation Program:

1. All Council Public Meeting Agenda(s) and Meeting Minutes for the period 1/1/2000 through the present;
2. All cooperative agreements between the Wetlands Mitigation Council or Fund with the New Jersey Natural Lands Trust;
3. All Audit Reports performed by the N.J. State Auditor for the period 1/1/2003 through the present; and
4. A copy of all Resolutions enacted after 1/1/2003.

Custodian of Record: Matthew J. Coefer

Request Received by Custodian: January 28, 2013

Response Made by Custodian: February 8, 2013

GRC Complaint Received: April 19, 2013

Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian's failure to grant access to the records, which he was ready to disclose following the three (3) day

¹ The Complainant is represented by Dennis A. Scardilli, Esq. (Absecon, NJ).

² The Custodian is represented by Deputy Attorney General Ryan Benson.

extension of time, results in a “deemed” denial of the Complainant’s OPRA request. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2011-158 and 2011-193 (September 2012). The Custodian shall provide to the Complainant copies of the requested records, unless a lawful exemption applies. The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.

2. The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, 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 1:4-4,³ to the Executive Director.⁴
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On October 30, 2013, the Council distributed its Interim Order to all parties. On October 30, 2013, Counsel for the Custodian (“Counsel”) responded in writing to the Interim Order stating that the Custodian had already complied with a subpoena obtained by the Complainant which sought the same documents as the OPRA request at issue. On October 31, 2013, the Government Records Council (“GRC”) contacted the Complainant to confirm whether or not he had already obtained the requested documents through the subpoena.

On November 4, 2013, the Complainant responded to the inquiry from the GRC stating that on July 8, 2013 a subpoena was served on the DEP for the documents that are the subject of this complaint. The Complainant stated that he received documents in response to that subpoena three times, starting on September 12, 2013 and concluding on October 17, 2013. On November 4, 2013, the GRC sought clarification from Counsel as to whether the range of documents provided by the Custodian following the subpoena was the same as, broader than, or more narrow than what would have been provided in response to the Council’s October 29, 2013 Interim Order.

³ “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.”

⁴ 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. The Custodian, however, 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.

On November 12, 2013, the GRC received a certification from the Custodian. The Custodian certifies that there are minor discrepancies between the timeframes of the Complainant's original OPRA request and the requests contained in the subpoenas, such as the dates for sought meeting minutes and agendas. The Custodian further certifies, however, that DEP rendered these differences irrelevant by providing all responsive agendas, meeting minutes, agreements, and resolutions maintained by the DEP irrespective of the requests' timeframes. The Custodian certifies that he responded to the entirety of the original OPRA request when he responded to the subpoenas. The Custodian additionally certifies that the DEP produced over 16,000 pages in response to the subpoenas and that, though a privilege log was developed, on October 17, 2013, the Complainant was provided with all documents initially deemed privileged.

Analysis

Compliance

At its October 22, 2013 meeting, the Council ordered the Custodian to provide copies of the requested records, unless a lawful exemption applied, "within five (5) business days from receipt of the Council's Interim Order . . . and simultaneously provide certified confirmation of compliance . . . to the Executive Director." On October 30, 2013, the Custodian received the Council's Interim Order, which provided 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 November 7, 2013.

On November 1, 2013, two (2) business days after receipt of the Council's Order, the five (5) business day compliance deadline was stayed following the Complainant's statement that he had received documents in response to the subpoenas, and the GRC's request that the Custodian provide a certification regarding the scope of the disclosed documents. The Custodian then certified on November 12, 2013 that the documents provided to the Complainant in response to the subpoena represented all documents responsive to the Custodian's OPRA request.

Therefore, the Custodian complied with the Council's October 22, 2013 Interim Order because he responded in the prescribed extended time frame certifying that he had, in effect, already taken the actions required to comply with the Interim Order and simultaneously provided certified confirmation of compliance to the Executive Director.

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 that "[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 the Council to determine that a custodian "knowingly and willfully" violated OPRA: the custodian's actions must have been much more than negligent conduct; the custodian must have had some knowledge that his actions were wrongful; the custodian's actions must have had a positive element of conscious wrongdoing; the custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; and the custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. *See Alston v. City of Camden*, 168 N.J. 170, 185 (2001); *Fielder v. Stonack*, 141 N.J. 101, 124 (1995); *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962); *ECES v. Salmon*, 295 N.J. Super. 86, 107 (App. Div. 1996).

Here, the DEP properly responded to the Complainant within seven (7) business days by seeking a three (3) day extension of time and by informing the Complainant within those three (3) days that responsive records were available. It is apparent that both the Custodian and the staff at the DEP's Office of Records Access communicated with the Complainant several times between when the Complainant granted the extension of time on February 6, 2013 and when the Complainant emailed the DEP on February 27, 2013 regarding the status of his request. Following these emails, there appears to have been some confusion on the part of both parties stemming from the creation of a document CD for the Complainant. It is unclear why the Complainant stated in his February 27, 2013 email that he had "heard nothing further" since February 6, 2013 about the OPRA request at issue here. At the same time, there is a lack of evidence to support the Custodian's SOI certification that records responsive to this request were sent to the Complainant on February 21, 2013 or, for that matter, at any point prior to the filing of the Denial of Access Complaint.

Therefore, although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Rather, the record appears to show that the Custodian intended to fulfill the Complainant's OPRA request but, due to confusion on the part of both parties, did not do so prior to the filing of the Denial of Access Complaint. Thus, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA 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. Div. of Youth & Family Servs., 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he or 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 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.” Id. at 71 (quoting Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598 (2001)). In Buckhannon, the U.S. 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.” Buckhannon, 532 U.S. at 603 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court there 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,” but also over a concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 605, 609.

However, the Mason Court noted that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. Mason, 196 N.J. at 72 (citing Teeters, 387 N.J. Super. at 429). The Court stated that when 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.” Mason, 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA:

OPRA itself contains broader language on attorney’s fees than the former [Right to Know Law (“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.

Id. 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."

Id. at 76 (citing Singer v. State, 95 N.J. 487, 495 (1984)).

On July 8, 2013 and August 7, 2013, approximately three (3) to four (4) months after the Council received the Denial of Access Complaint, the Complainant served subpoenas on the DEP ordering production of documents almost identical to those described in the initial OPRA request. The Custodian certified that the DEP provided all documents responsive to the entirety of the OPRA request when it responded to those subpoenas. The Custodian further certified that it disclosed the last group of responsive documents to the Complainant on October 17, 2013, approximately thirteen (13) days before the Council issued its Interim Order.

Thus, the Complainant has not 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. A factual causal nexus does not exist between the Complainant's filing of his Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Complainant filed his complaint on April 19, 2013, and on October 29, 2013, the Council issued its Interim Order requiring disclosure of the requested documents. During the intervening months, however, the Complainant had served two (2) subpoenas on the DEP as part of the civil case W. Pleasant-CPGT, Inc. v. U.S. Home Corp., d/b/a Lennar Homes, No. OCN-L-2417-11 (N.J. Super.), demanding production of the same records the Complainant sought under OPRA. The Custodian, in turn, finished disclosing all records responsive to the subpoenas on October 17, 2013, almost two (2) weeks before the parties received notice of the Council's Interim Order. These disclosures represent the same documents that the Custodian would have provided to the Complainant following receipt of the Interim Order, had he not already done so in response to the Complainant's separate subpoenas.

Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee, as there exists a factual causal nexus between the Complainant's civil litigation, rather than the instant complaint, and the relief ultimately achieved. See N.J.S.A. 47:1A-6, Mason, 196 N.J. at 76; Teeters, 387 N.J. Super. at 432.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 22, 2013 Interim Order because he responded in the prescribed extended time frame certifying that he had, in effect, already taken the actions required to comply with the Interim Order and simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Rather, the record appears to show that the Custodian intended to fulfill the Complainant's OPRA but, due to confusion on the part of both parties, did not do so prior to the filing of the Denial of Access Complaint. Thus, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.

3. The Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee, as there exists a factual causal nexus between the Complainant's civil litigation, rather than the instant complaint, and the relief ultimately achieved. *See* N.J.S.A. 47:1A-6, Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008); Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423, 432 (App. Div. 2006).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

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

December 10, 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

October 29, 2013 Government Records Council Meeting

John Campbell
Complainant

Complaint No. 2013-114

v.

New Jersey Department of Environmental
Protection
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council ("Council") considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian's failure to grant access to the records, which he was ready to disclose following the three (3) day extension of time, results in a "deemed" denial of the Complainant's OPRA request. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2011-158 and 2011-193 (September 2012). The Custodian shall provide to the Complainant copies of the requested records, unless a lawful exemption applies. The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.
2. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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**

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 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.

3. 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.
4. 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 29th Day of October, 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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**John Campbell¹
Complainant**

GRC Complaint No. 2013-114

v.

**New Jersey Department of Environmental Protection²
Custodial Agency**

Records Relevant to Complaint: The Complainant seeks copies of the following documents, which relate to either the Wetlands Mitigation Council or Wetlands Mitigation Fund, all of which are part of the New Jersey Department of Environmental Protection's (DEP) Land Use Regulation Program:

1. All Council Public Meeting Agenda(s) and Meeting Minutes for the period 1/1/2000 through the present;
2. All cooperative agreements between the Wetlands Mitigation Council or Fund with the New Jersey Natural Lands Trust;
3. All Audit Reports performed by the N.J. State Auditor for the period 1/1/2003 through the present; and
4. A copy of all Resolutions enacted after 1/1/2003.

Custodian of Record: Matthew J. Coefer

Request Received by Custodian: January 28, 2013

Response Made by Custodian: February 8, 2013

GRC Complaint Received: April 19, 2013

Background³

Request and Response:

On January 28, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the DEP seeking the above-mentioned records. The DEP assigned the request the internal tracking number "132306." On February 6, 2013, seven (7) business days later, the DEP responded in writing requesting an extension of time until February 11, 2013. The Complainant granted that request on February 6, 2013. On February 8, 2013, the DEP informed the

¹ The Complainant is represented by Dennis A. Scardilli, Esq. (Absecon, NJ).

² The Custodian is represented by Deputy Attorney General Ryan Benson.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complainant that responsive records had been identified and that he could contact DEP's Office of Record Access to schedule a pick-up, obtain hard copies, or seek further information.

On February 19, 2013, the Complainant called the Custodian in order to arrange for the production of copies of the above-referenced records. The Custodian memorialized the conversation that day in an email stating that he had requested copies of the responsive records. The Custodian also discussed the payment of a special service charge owed by the Complainant for three (3) previous OPRA requests. On February 20, 2013, the Complainant responded to the Custodian regarding both the delivery of the documents at issue here and the payment of the service charge for his previous requests.

On February 27, 2013, the Complainant emailed the DEP indicating he had "heard nothing further" after granting the February 6, 2013 request for an extension of time. On February 28, 2013, the Complainant received a responsive email from the DEP stating that a CD of the requested records was being created. Both party's emails had subject lines referencing "OPRA 132306." On March 4, 2013, the DEP sent the Complainant an email stating that the CD was ready. The Complainant responded, asking to retrieve the CD from the DEP's offices. Each party's emails now had subject lines referencing the DEP tracking numbers assigned to the Complainant's three (3) earlier OPRA requests. On March 5, 2013, the Complainant obtained the CD from the DEP. The CD contained only records responsive to the Complainant's previous OPRA requests, rather than to the request at issue here.

Denial of Access Complaint:

On April 19, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he never received any records responsive to the request assigned tracking number 132306 by the DEP. The Complainant states that, after obtaining the document CD on March 5, 2013, he called the telephone number provided by the DEP for scheduling document appointments. The Complainant further contends the DEP then advised him that request number 132306 had been assigned to a supervisor. The Complainant asserts that he filed his Denial of Access Complaint after not receiving a reply to his attempts to contact this supervisor.

Statement of Information:

On June 5, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that the DEP received the Complainant's OPRA request on January 28, 2013. The Custodian further certifies that the DEP responded on February 8, 2013, after the Complainant granted a three (3) day extension, indicating that responsive records existed and giving instructions to arrange for delivery. The Custodian additionally certifies that, in response to the Complainant's call of February 19, 2013 requesting copies of the responsive documents, he memorialized their conversation via email and requested production of the records. The Custodian certifies that the DEP copied the records responsive to the above-referenced request onto a CD and sent it to the Complainant on February 21, 2013.

The Custodian contends that the Complainant's February 27, 2013 email, which states that he had "heard nothing" concerning request number 132306, confused the DEP records staff because of the multiple records requests and lines of communication the Complainant had open with the DEP. The Custodian certifies that the records staff mistakenly identified and provided a CD of records responsive to the Complainant's three (3) earlier OPRA requests. The Custodian asserts that the Complainant mistakenly believed this CD should have contained records responsive to the request at issue here.⁴

Analysis⁵

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).⁶ 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). Further, a custodian shall advise the requestor when a record can be made available. N.J.S.A. 47:1A-5(i).

In Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2011-158 and 2011-193 (September 2012), the complainant argued that the custodian requested an extension of time but never provided the record within that time frame. Upon receiving the Denial of Access Complaint:

[T]he Custodian e-mailed the Complainant stating that he sent the responsive record to the Complainant The Custodian subsequently certified to this fact in the SOI. However, the Custodian provided no supporting documentation rising to the level of competent, credible evidence establishing by a preponderance of the evidence that the Custodian faxed the requested record to the Complainant [within the required time period], as would a cover sheet or letter, transmission confirmation page or even a facsimile journal. Thus, the Custodian failed to provide competent, credible evidence in either the SOI or certification to support his response to the Complainant's . . . OPRA request.

⁴ The Custodian's SOI asserts that the Complainant's Denial of Access Complaint sought "email records requested in OPRA # 132306." (Quotations omitted). While the Complainant incorrectly lists specific emails between himself, the Custodian, and a DEP employee as records denied to him, it is clear from the original request and Denial of Access Complaint that the Complainant is not seeking any email records.

⁵ 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.

⁶ 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.

Verry, 2011-158 and 2011-193.

Here, the DEP properly responded to the Complainant within seven (7) business days by seeking a three (3) day extension of time and by informing the Complainant within those three (3) days that responsive records were available. It is apparent that both the Custodian and the staff at the DEP's Office of Records Access communicated with the Complainant several times between when the Complainant granted the extension of time on February 6, 2013 and when the Complainant emailed the DEP on February 27, 2013 regarding the status of his request. For example, on February 19, 2013, the Custodian memorialized via email a phone conversation with the Complainant that confirmed and described the available responsive records. Moreover, on February 20, 2013, the Complainant replied to the Custodian's email and gave specific delivery instructions regarding the documents responsive to request number 132306.

Following these emails, there appears to have been some confusion on the part of both parties stemming from the creation of a document CD for the Complainant. The parties' communications prior to that point seem to have successfully separated discussions of the different requests. As such, it is unclear why the Complainant stated in his February 27, 2013 email that he had "heard nothing further" since February 6, 2013 about request number 132306. At the same time, there is a lack of evidence to support the Custodian's certification that records responsive to this request were sent to the Complainant on February 21, 2013 or, for that matter, at any point after the Custodian's initial response requesting an extension of time.

Thus, 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. Although the Custodian timely responded to the Complainant's request in writing seeking an extension of time until February 11, 2013, the Custodian's failure to grant access to the records, which he was ready to disclose, results in a "deemed" denial of the Complainant's OPRA request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, 2007-11; Verry, 2011-158 and 2011-193. The Custodian shall provide copies of the requested records to the Complainant unless a lawful exemption applies. The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian's failure to grant access to the records, which he was ready to disclose following the three (3) day extension of time, results in a "deemed" denial of the Complainant's OPRA request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2011-158 and 2011-193 (September 2012). The Custodian shall provide to the Complainant copies of the requested records, unless a lawful exemption applies. The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.
2. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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 1:4-4,⁷ to the Executive Director.⁸**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Robert T. Sharkey
Staff Attorney

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

October 22, 2013

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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