



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-365

v.

Franklin Fire District No.1 (Somerset)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss the complaint because Complainant’s Counsel withdrew same in a letter to the Honorable Sarah G. Crowley, Administrative Law Judge, dated November 19, 2019. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 7th Day of January 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 9, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-365

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

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

1. Millstone Valley Fire Department's ("MVFD")³ bank account statements for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.
2. MVFD's checks issued for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.

Custodian of Record: Tim Szymborski⁴

Request Received by Custodian: August 6, 2014

Response Made by Custodian: August 14, 2014

GRC Complaint Received: October 29, 2014

Background

August 28, 2018 Council Meeting:

At its August 28, 2018 public meeting, the Council considered the August 21, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian and Chief McDonnell failed to comply with the Council's June 26, 2018 Interim Order. Specifically, although Franklin Fire District No. 1's response, comprised of Chief McDonnell's legal certification, was within the second (2nd) extended time frame, it did not comply with the Council's Order. Further, a review of the post-Order submissions reveals that the current Custodian and Millstone Valley Fire Department again failed to identify and/or provide access to multiple records. Those missing records again included a 2013 statements and checks, the check written

¹ Represented by John A. Birmingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ The MVFD is represented by Aldo J. Russo, Esq. of Lamb, Kretzer, LLC (Secaucus, NJ).

⁴ The current Custodian of Record is Timothy Janho.

in July 2014, and additional bank account statements and checks that may exist. The Council therefore finds the current Custodian and Chief McDonnell in violation of the Council's Order.

2. This complaint should be referred to the Office of Administrative for a fact-finding hearing to determine: 1) whether additional responsive bank accounts and checks existed; 2) whether the current Custodian was obligated to obtain and disclose said records as part of the Franklin Fire District No. 1's supervisory duties over Millstone Valley Fire Department; and 3) whether the current Custodian and/or Chief McDonnell performed a diligent search for all records, inclusive of the missing 2013 statements and Check No. 98. Further, in the interest of efficacy, this complaint shall also be referred to the Office of Administrative Law for determination as to whether the Custodian or any other member of the Franklin Fire District No. 1 or Millstone Valley Fire Department knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Also to be determined is whether the Complainant is a prevailing party entitled to an award of attorney's fees and, if so, the appropriate amount.

Procedural History:

On August 29, 2018, the Council distributed its Interim Order to all parties. On November 21, 2018, the Government Records Council ("GRC") transmitted the complaint to the Office of Administrative Law ("OAL"). On November 19, 2019, Complainant's Counsel sent a letter to the Honorable Sarah G. Crowley, Administrative Law Judge, withdrawing the instant complaint because the parties amicably resolved same. On November 29, 2019, the OAL returned the complaint back to the GRC marked "WITHDRAWAL."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because Complainant's Counsel withdrew same in a letter to the Honorable Sarah G. Crowley, Administrative Law Judge, dated November 19, 2019. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 28, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-365

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian and Chief McDonnell failed to comply with the Council’s June 26, 2018 Interim Order. Specifically, although Franklin Fire District No. 1’s response, comprised of Chief McDonnell’s legal certification, was within the second (2nd) extended time frame, it did not comply with the Council’s Order. Further, a review of the post-Order submissions reveals that the current Custodian and Millstone Valley Fire Department again failed to identify and/or provide access to multiple records. Those missing records again included a 2013 statements and checks, the check written in July 2014, and additional bank account statements and checks that may exist. The Council therefore finds the current Custodian and Chief McDonnell in violation of the Council’s Order.
2. This complaint should be referred to the Office of Administrative for a fact-finding hearing to determine: 1) whether additional responsive bank accounts and checks existed; 2) whether the current Custodian was obligated to obtain and disclose said records as part of the Franklin Fire District No. 1’s supervisory duties over Millstone Valley Fire Department; and 3) whether the current Custodian and/or Chief McDonnell performed a diligent search for all records, inclusive of the missing 2013 statements and Check No. 98. Further, in the interest of efficacy, this complaint shall also be referred to the Office of Administrative Law for determination as to whether the Custodian or any other member of the Franklin Fire District No. 1 or Millstone Valley Fire Department knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Also to be determined is whether the Complainant is a prevailing party entitled to an award of attorney’s fees and, if so, the appropriate amount.



Interim Order Rendered by the
Government Records Council
On The 28th Day of August, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-365

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

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

1. Millstone Valley Fire Department's ("MVFD")³ bank account statements for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.
2. MVFD's checks issued for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.

Custodian of Record: Tim Szymborski⁴

Request Received by Custodian: August 6, 2014

Response Made by Custodian: August 14, 2014

GRC Complaint Received: October 29, 2014

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the June 19, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian failed to comply with the Council's March 27, 2018 Interim Order. Specifically, the current Custodian did not respond to the Order timely, instead providing compliance twenty-nine (29) business days after the expiration of the second (2nd) extended deadline. Further, a review of the records provided reveals that the current Custodian failed to provide multiple records. Those missing records included a whole year's worth of statements and checks, a check written in July 2014, and additional bank account statements and checks that may exist.

¹ Represented by John A. Birmingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ The MVFD is represented by Aldo J. Russo, Esq. of Lamb, Kretzer, LLC (Secaucus, NJ).

⁴ The current Custodian of Record is Timothy Janho.

2. Providing the current Custodian a final opportunity to comply is consistent with past case law. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). As such, the current Custodian shall:
 - a. Disclose those bank statements and checks not already provided to the Complainant. As part of this disclosure, the Custodian must ensure that the missing 2013 bank statements and Check No. 98 are included in this disclosure. Alternatively, if no 2013 bank statements or a copy of Check No. 98 do not exist, the current Custodian must certify to this fact; and
 - b. Disclose bank statements and checks for all other accounts linked to Millstone Valley Fire Department. If the current Custodian is asserting that records relating to other Millstone Valley Fire Department bank accounts are exempt from disclosure, he must provide a “a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the Franklin Fire District No. 1 and Millstone Valley Fire Department regarding financial oversight” affecting disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Council Staff.⁶**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian’s compliance with the Council’s Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On June 28, 2018, the Council distributed its Interim Order to all parties. On June 29, 2018, Custodian’s Counsel sought an extension of time to respond to the Council’s Order. On July 5, 2018, the Government Records Council (“GRC”) granted an extension until July 13, 2018. On July 13, 2018, Custodian’s Counsel sought a second (2nd) extension of time to work with MVFD to identify records potentially responsive to the Complainant’s OPRA request. On the same day, the GRC granted said extension until July 18, 2018 based on the reasons provided by Counsel.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On July 19, 2018, Custodian's Counsel responded to the Council's Order attaching Chief Robert McDonnell's legal certification. Therein, Counsel stated that the FFD obtained a legal certification from Chief McDonnell regarding the search he performed to locate responsive records. Counsel noted that the FFD was not in possession of any of the records, nor was it in control of the MVFD's bank accounts. Counsel thus asserted that the current Custodian could only certify to providing the MVFD with the Order. Counsel finally noted that any further records obtained from the MVFD's financial institution would be provided to the Complainant immediately upon receipt.

Regarding the legal certification, Chief McDonnell certified that he performed a search for the missing 2013 bank statements of the "Chief's account" and was unable to locate any records. Chief McDonnell further affirmed that he contacted the financial institution in question, who advised that they were unable to obtain the statements. Chief McDonnell also stated that the MVFD would "execute any authorization that the Complainant asks for" in an attempt to obtain the missing statements.

Chief McDonnell certified that Check No. 98 was not in MVFD's possession after being written. Chief McDonnell noted that it was his understanding that the relevant financial institution did not return checks with their respective statements. Chief McDonnell averred that any checks provided to the Complainant were done so as a courtesy outside of OPRA: MVFD could not retain checks not returned to it. Chief McDonnell certified that, as an additional courtesy, he requested a copy of the check from the relevant financial institution. Chief McDonnell further affirmed that he reviewed MVFD's Quicken account and found that the check was written in the amount of \$375.00 to Somerville Elks for a charity event.

On July 23, 2018, Complainant's Counsel submitted a letter brief to the GRC objecting to compliance. Counsel argued that the current Custodian violated the Order by not providing certified confirmation of compliance. Counsel further argued that neither the current Custodian nor Chief McDonnell addressed the potential existence of additional responsive records from other MVFD bank accounts. Counsel argued that this failure to comply with the Order was "deliberate, intentional, and unreasonable . . ." (citing N.J.S.A. 47:1A-11).

Counsel next contended that a response to an unrelated OPRA request proved that additional records in fact exist. Counsel averred that the unrelated request, submitted by the Complainant, sought checks issued by the FFD to MVFD from 2010 through 2018. Counsel stated that the responsive checks showed at least one MVFD bank account with Bank of America for which records were never disclosed. Counsel thus requested that the GRC order disclosure of these additional checks and then perform an *in camera* review to cross-reference reconcile all bank accounts held by the MVFD.

Regarding the missing 2013 bank statements, Counsel contended that the MVFD failed to take steps to ensure that the records were maintained during pending litigation. Counsel argued that, although FFD argued that they were not "government records" at the time of the denial and filing of this complaint, MVFD was not obviated from securing the relevant records pending the adjudication of this complaint. Counsel thus requested that the GRC require MVFD to provide certifications detailing how they preserved all potentially responsive records when this complaint

was filed in 2014. Counsel further requested that the GRC order MVFD's treasurer to certify to each account held during the relevant request time frame.

Counsel also disputed Chief McDonnell's certified statement that MVFD provided checks as a courtesy and outside of OPRA. Counsel noted that checks were part of the OPRA request and were ordered to be disclosed by the Council. Counsel also disputed that Chief McDonnell never mentioned any other bank accounts. Counsel contended that Chief McDonnell's failure to identify other accounts, for which the Complainant provided evidence of the existence of, was deliberate. Counsel further criticized Complainant's Counsel's statement that the FFD could only send the order to MVFD and provide the response received back from them. Council argued that it was clear that the FFD had supervision over MVFD, but failed to "issue[] a supervisory order . . . compelling . . . their compliance" with either Order. (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017)). Counsel requested that the Council find the FFD in contempt of the Order.

Analysis

Compliance

At its June 26, 2018 meeting, the Council ordered the current Custodian to disclose to the Complainant all responsive records not already provided him after the March 27, 2018 Order. The Council also reissued its order to, if applicable, provide a document index containing the specific lawful basis for denying access to a particular record along with a detailed explanation as to the supervisory relationship between the FFD and MVFD regarding financial oversight. Further, the Council ordered the current Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Council Staff. On June 28, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the current Custodian's response was due by close of business on July 6, 2018.

On June 29, 2018, the first (1st) business day after receipt of the Order, Custodian's Counsel sought, and the GRC granted, an extension until July 13, 2018. Counsel subsequently sought and received a second extension until July 18, 2018. On July 18, 2018, Counsel submitted a response prepared by Chief McDonnell. In said response, Chief McDonnell certified to his attempts to obtain the 2013 statements and Check No. 98. However, Chief McDonnell made no mention of any other bank accounts. Nor did the current Custodian provide any certifications related to additional bank accounts and the reasons why they were exempt from disclosure or a detailed explanation of FFD's supervisory duties over MVFD.

In reviewing the compliance, two (2) points are immediately apparent. First, Custodian's Counsel referenced the existence of at least two (2) bank accounts (inclusive of the Chief's account) in his April 19, 2018 e-mail to the Complainant. See Verry, GRC 2014-365 (Interim Order dated June 26, 2018) at 2. Second, Complainant's Counsel provided compelling evidence in his July 23, 2018 rebuttal brief of the existence of at least one additional account. However, neither the FFD or MVFD addressed the existence of additional accounts, whether disclosable or otherwise, beyond the one for which records were initially provided. This is notwithstanding

evidence to the contrary and the Council's two (2) orders requiring the FFD to do so. The forgoing is in addition to the fact that the current Custodian provided no document index of exempt records accompanying a certification detailing the FFD's supervisory duties over the MVFD. For these reasons, the current Custodian again failed to comply with the Council's Order.

Therefore, the current Custodian and Chief McDonnell failed to comply with the Council's June 26, 2018 Interim Order. Specifically, although FFD's response, comprised of Chief McDonnell's legal certification, was within the second (2nd) extended time frame, it did not comply with the Council's Order. Further, a review of the post-Order submissions reveals that the current Custodian and MVFD again failed to identify and/or provide access to multiple records. Those missing records again included a 2013 statements and checks, the check written in July 2014, and additional bank account statements and checks that may exist. The Council therefore finds the current Custodian and Chief McDonnell in violation of the Council's Order.

Contested Facts

The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts have arisen from a custodian's compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. See Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In determining the compliance issue, the GRC points to several reasons why the current Custodian and Chief McDonnell failed to comply with the Council's Order. The evidence of record submitted to the GRC in this matter calls into significant question of fact:

1. The existence of the missing 2013 statements and why they cannot be located.
2. The existence of additional bank accounts for which records are disclosable.
3. The FFD's responsibility to demand production from MVFD on the basis of their supervisory obligation.
4. The role individuals from the MVFD, including Chief McDonnell, played in the Custodian's failure to comply with both the March 27, and June 26, 2018 Interim Orders.

As part of its determination that the current Custodian failed to comply with both Interim Orders, the GRC has pointed to his (as well as Chief McDonnell's) failure to explain the existence of additional accounts that may be responsive to the Complainant's OPRA request. Indeed, there is enough evidence to determine that more than one account exists - Custodian's Counsel confirmed this in his April 19, 2018 e-mail, and the Complainant has submitted competent, credible evidence of at least one additional account. Additionally, the Council has twice ordered the FFD to locate, identify, and disclose such records (unless asserting they were exempt) without avail. Thus, these facts should be developed at an administrative hearing in the OAL.

Accordingly, this complaint should be referred to the OAL for a fact-finding hearing to determine: 1) whether additional responsive bank accounts and checks existed; 2) whether the current Custodian was obligated to obtain and disclose said records as part of the FFD's supervisory duties over MVFD; and 3) whether the current Custodian and/or Chief McDonnell performed a diligent search for all records, inclusive of the missing 2013 statements and Check No. 98. Further, in the interest of efficacy, this complaint shall also be referred to the OAL for determination as to whether the Custodian or any other member of the FFD or MVFD knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Also to be determined is whether the Complainant is a prevailing party entitled to an award of attorney's fees and, if so, the appropriate amount.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian and Chief McDonnell failed to comply with the Council's June 26, 2018 Interim Order. Specifically, although Franklin Fire District No. 1's response, comprised of Chief McDonnell's legal certification, was within the second (2nd) extended time frame, it did not comply with the Council's Order. Further, a review of the post-Order submissions reveals that the current Custodian and Millstone Valley Fire Department again failed to identify and/or provide access to multiple records. Those missing records again included a 2013 statements and checks, the check written in July 2014, and additional bank account statements and checks that may exist. The Council therefore finds the current Custodian and Chief McDonnell in violation of the Council's Order.
2. This complaint should be referred to the Office of Administrative for a fact-finding hearing to determine: 1) whether additional responsive bank accounts and checks existed; 2) whether the current Custodian was obligated to obtain and disclose said records as part of the Franklin Fire District No. 1's supervisory duties over Millstone Valley Fire Department; and 3) whether the current Custodian and/or Chief McDonnell performed a diligent search for all records, inclusive of the missing 2013 statements and Check No. 98. Further, in the interest of efficacy, this complaint shall also be referred to the Office of Administrative Law for determination as to whether the Custodian or any other member of the Franklin Fire District No. 1 or Millstone Valley Fire Department knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Also to be determined is whether the Complainant is a prevailing party entitled to an award of attorney's fees and, if so, the appropriate amount.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

August 21, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-365

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian failed to comply with the Council’s March 27, 2018 Interim Order. Specifically, the current Custodian did not respond to the Order timely, instead providing compliance twenty-nine (29) business days after the expiration of the second (2nd) extended deadline. Further, a review of the records provided reveals that the current Custodian failed to provide multiple records. Those missing records included a whole year’s worth of statements and checks, a check written in July 2014, and additional bank account statements and checks that may exist.
2. Providing the current Custodian a final opportunity to comply is consistent with past case law. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). As such, the current Custodian shall:
 - a. Disclose those bank statements and checks not already provided to the Complainant. As part of this disclosure, the Custodian must ensure that the missing 2013 bank statements and Check No. 98 are included in this disclosure. Alternatively, if no 2013 bank statements or a copy of Check No. 98 do not exist, the current Custodian must certify to this fact; and
 - b. Disclose bank statements and checks for all other accounts linked to Millstone Valley Fire Department. If the current Custodian is asserting that records relating to other Millstone Valley Fire Department bank accounts are exempt from disclosure, he must provide a “a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the Franklin Fire District No. 1 and Millstone Valley Fire Department regarding financial oversight” affecting disclosure.



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

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 28, 2018

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-365

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

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

1. Millstone Valley Fire Department's ("MVFD")³ bank account statements for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.
2. MVFD's checks issued for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.

Custodian of Record: Tim Szymborski⁴

Request Received by Custodian: August 6, 2014

Response Made by Custodian: August 14, 2014

GRC Complaint Received: October 29, 2014

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). The Council should thus address whether the Custodian properly responded to the Complainant's OPRA request seeking bank account statements and checks issued over a four (4) year and seven (7) month period of time.

¹ Represented by John A. Birmingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ The MVFD is represented by Aldo J. Russo, Esq. of Lamb, Kretzer, LLC (Secaucus, NJ).

⁴ The current Custodian of Record is Timothy Janho.

2. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. The Custodian must either: 1) disclose all responsive records; and/or 2) if records are denied or redacted, provide a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the Franklin Fire District No. 1 and Millstone Valley Fire Department regarding financial oversight.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Council Staff.⁶**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On March 28, 2018, the Council distributed its Interim Order to all parties. On April 2, 2018, Custodian's Counsel sought an extension of time to respond to the Council's Order. On April 4, 2018, the Government Records Council ("GRC") granted an extension until April 12, 2018. On April 12, 2018, Custodian's Counsel sought a second (2nd) extension of time to work with MVFD's attorney to identify records potentially responsive to the Complainant's OPRA request. On April 13, 2018, the GRC granted said extension until April 20, 2018 based on the reasons provided by Counsel.

On April 19, 2018, Custodian's Counsel e-mailed the Complainant and Complainant's Counsel seeking clarification regarding the records sought. Counsel stated that the OPRA request sought MVFD bank account statements and checks. Counsel stated that MVFD advised that it maintained two accounts: the "Chief's" account and the "Association" account. Counsel noted that MVFD did not maintain a generic account and needed clarification as to whether the Custodian sought records from a particular account or both. Counsel noted that he sought clarification to ensure that Franklin Fire District No. 1 ("FFD") was not denying access to records being sought. Counsel stated that the FFD would provide records once clarification has been provided.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On June 1, 2018, Complainant's Counsel e-mailed Custodian's Counsel contending that the Complainant's OPRA request was explicit and did not require clarification. Counsel averred that the FFD's request for clarification was a "deceptive and disingenuous" attempt to shift the burden of disclosure to the Complainant. Counsel argued that the onus remained on the FFD to determine which "bank account statements" and "checks issued" fell within the specified time frame and disclose them. Counsel reiterated that the Complainant sought "all checks and bank account statements" linked to MVFD, which "is a statutorily subordinate entity under the supervision of the [FFD]."

On the same day, the current Custodian responded to the Council's March 27, 2018 Interim Order. Therein, the current Custodian certified that he was not the custodian of record at the time of the subject OPRA request; he was designated during the abeyance of this complaint. The current Custodian affirmed that the FFD initially sought an extension until April 20, 2018 to comply with the Council's Order and sought clarification from the Complainant during that time frame. The current Custodian affirmed that, having not received clarification, he was providing access to those records believed to be responsive to the subject OPRA request. The current Custodian noted that he was simultaneously providing his response, along with responsive records and a redaction index, to the GRC and Complainant. The current Custodian also noted that he redacted account numbers (except the last four (4) digits) on both the statements and checks in accordance with N.J.S.A. 47:1A-1.

On June 4, 2018, Complainant's Counsel e-mailed the GRC objecting to compliance. Counsel initially questioned how Custodian's Counsel would require clarification on April 19, but be able to disclose records on May 30, 2018. Counsel contended that such an action required additional investigation.

Counsel next contended that the FFD failed to disclose all records responsive to the Complainant's OPRA request. Counsel contended that after reviewing the statements, at least the FFD's annual payment to MVFD (estimated at \$109,000 in the 2016 budget) was not recorded as a deposit in any of the statements. Further, Counsel stated that the statements appear to be from one bank account, suggesting that the current Custodian only disclosed the Chief's account. To support this conclusion, Counsel pointed to two (2) checks written to "MVFD" in August 2012. Counsel noted that there was no indication in the statements or on the checks as to who cashed the checks, nor could he determine whether the checks were deposited into "another MVFD account." Counsel noted that no statements or checks for 2013 were provided.

Counsel thus requested that the GRC order disclosure of all bank accounts under MVFD's control, along with a certification from the FFD attesting to the exact number and types of bank accounts under MVFD's control.

Analysis

Compliance

At its March 27, 2018 meeting, the Council ordered the Custodian to disclose the responsive records to the Complainant. The Council also ordered the Custodian to, if applicable,

provide a document index containing the specific lawful basis for denying access to a particular record along with a detailed explanation as to the supervisory relationship between the FFD and MVFD regarding financial oversight. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On March 28, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on April 5, 2018.

On April 2, 2018, the second (2nd) business day after receipt of the Order, Custodian's Counsel sought, and the GRC granted, an extension until April 12, 2018. Counsel subsequently sought and received a second extension until April 20, 2018. During the second extended time frame, Custodian's Counsel sought clarification from the Complainant regarding his OPRA request. On June 1, 2018, twenty-nine (29) business days after the expiration of the second (2nd) extended time frame, the current Custodian submitted compliance. Therein, he provided to the Complainant a series of statements (with check images for the applicable months), a redaction index, and certified confirmation of compliance. The compliance package, submitted hours after Complainant's Counsel's e-mail objecting to any needed clarification, indicated that the current Custodian and Counsel actually prepared the records and certification on May 30, 2018.

Regarding the clarification request, such an action at the eleventh hour of the extended compliance time frame appeared to resemble an attempt to shift the Custodian's obligation to comply with the Order to the Complainant. If the Custodian and/or Counsel believed that certain account information was exempt or did not exist under OPRA, the Order allowed for such an argument. The Order did not require the Complainant to take any action, nor did it allow for an open-ended compliance time frame. Simply put: seeking clarification of an OPRA request during the compliance time frame does not amount to an indefinite stay of an Interim Order. Based on evidence of record before the GRC, the current Custodian failed to comply timely with the Order.

Moreover, the Council ordered the Custodian to comply by disclosing responsive records. The Council provided the Custodian an explicit opportunity to "provide a document index containing the specific lawful basis for denying access . . . along with a detailed explanation as to the supervisory relationship between the [FFD] and [MVFD] regarding financial oversight." Counsel sought two (2) extensions initially, but later sought clarification from the Complainant just prior to the expiration of the second deadline.

Thereafter, on June 1, 2018, the current Custodian responded to the Order. However, the disclosure was untimely and woefully incomplete. Specifically, the current Custodian did not provide 2013 statements and no explanation for the omission. Further, the July 2014 statement identifies a cashed check (Check No. 98), but no image was included. Also, Custodian's Counsel identified two (2) separate accounts in his April 19, 2018 e-mail, but the current Custodian clearly only provided statements and checks for one account. In omitting records from disclosure, the current Custodian did not include any explanation as to why he did not disclose any other account records. Thus, the current Custodian failed to comply with the substance of the Order.

Therefore, the current Custodian failed to comply with the Council's March 27, 2018 Interim Order. Specifically, the current Custodian did not respond to the Order timely, instead

providing compliance twenty-nine (29) business days after the expiration of the second (2nd) extended deadline. Further, a review of the records provided reveals that the current Custodian failed to provide multiple records. Those missing records included a 2013 statements and checks, a check written in July 2014, and additional bank account statements and checks that may exist.

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

Accordingly, providing the current Custodian a final opportunity to comply is consistent with past case law. See Carter, GRC 2014-218. As such, the current Custodian shall:

- a. Disclose those bank statements and checks not already provided to the Complainant. As part of this disclosure, the Custodian must ensure that the missing 2013 bank statements and Check No. 98 are included in this disclosure. Alternatively, if no 2013 bank statements or a copy of Check No. 98 do not exist, the current Custodian must certify to this fact; and
- b. Disclose bank statements and checks for all other accounts linked to MVFD. If the current Custodian is asserting that records relating to other MVFD bank accounts are exempt from disclosure, he must provide a “a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the [FFD] and [MVFD] regarding financial oversight” affecting disclosure.

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 Council Staff respectfully recommends the Council find that:

1. The current Custodian failed to comply with the Council's March 27, 2018 Interim Order. Specifically, the current Custodian did not respond to the Order timely, instead providing compliance twenty-nine (29) business days after the expiration of the second (2nd) extended deadline. Further, a review of the records provided reveals that the current Custodian failed to provide multiple records. Those missing records included a whole year's worth of statements and checks, a check written in July 2014, and additional bank account statements and checks that may exist.
2. Providing the current Custodian a final opportunity to comply is consistent with past case law. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016). As such, the current Custodian shall:
 - a. Disclose those bank statements and checks not already provided to the Complainant. As part of this disclosure, the Custodian must ensure that the missing 2013 bank statements and Check No. 98 are included in this disclosure. Alternatively, if no 2013 bank statements or a copy of Check No. 98 do not exist, the current Custodian must certify to this fact; and
 - b. Disclose bank statements and checks for all other accounts linked to Millstone Valley Fire Department. If the current Custodian is asserting that records relating to other Millstone Valley Fire Department bank accounts are exempt from disclosure, he must provide a "a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the Franklin Fire District No. 1 and Millstone Valley Fire Department regarding financial oversight" affecting disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Council Staff.⁸**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

June 19, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

March 27, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-365

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). The Council should thus address whether the Custodian properly responded to the Complainant’s OPRA request seeking bank account statements and checks issued over a four (4) year and seven (7) month period of time.
2. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. The Custodian must either: 1) disclose all responsive records; and/or 2) if records are denied or redacted, provide a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the Franklin Fire District No. 1 and Millstone Valley Fire Department regarding financial oversight.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously 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.



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-365

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

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

1. Millstone Valley Fire Department's ("MVFD")³ bank account statements for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.
2. MVFD's checks issued for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.

Custodian of Record: Tim Szymborski

Request Received by Custodian: August 6, 2014

Response Made by Custodian: August 14, 2014

GRC Complaint Received: October 29, 2014

Background

September 29, 2015 Council Meeting:

At its September 29, 2015 public meeting, the Council considered the September 22, 2015 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. This complaint should be held in abeyance until after the Appellate Division has ruled on the Franklin Fire District No. 1's appeal in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ The MVFD is represented by Aldo J. Russo, Esq. of Lamb, Kretzer, LLC (Secaucus, NJ).

2. The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.
3. The Council defers analysis of whether the Complainant is a prevailing party, pending the conclusion of proceedings before the Appellate Division.

Procedural History:

On October 1, 2015, the Council distributed its Interim Order to all parties. On April 23, 2015, the Appellate Division granted defendant's motion for leave to appeal in Verry, GRC 2013-196. On March 15, 2016, plaintiff e-mailed the GRC advising that the Appellate Division affirmed the Government Records Council's ("GRC") decision and remanded the matter back for further proceedings. Verry v. Franklin Fire Dist. No. 1 (Somerset), 2016 N.J. Super. Unpub. LEXIS 569 (App. Div. 2016). On April 4, 2016, defendant sought a second stay and filed for certification at the Supreme Court. The GRC granted defendant's request for a stay and asked that the parties provide notification upon conclusion of the Supreme Court's review.

On June 1, 2016, the Supreme Court granted defendant's motion for leave to appeal and *sua sponte* certified the entire matter. Verry v. Franklin Fire Dist. No. 1 (Somerset), 226 N.J. 206 (2016). On August 7, 2017, the Supreme Court's majority affirmed the GRC's decision in part and modified in part. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017).

Analysis

Abeyance of Complaint

At its September 29, 2015 meeting, the Council held the instant complaint in abeyance, pending the outcome of Verry. Thereafter, on March 15, 2016, the Appellate Division affirmed the trial court's decision. The Supreme Court subsequently *sua sponte* certified the entire matter. On August 7, 2017, the Supreme Court released a majority decision affirming Verry, GRC 2013-196 in part and modifying in part. In affirming the GRC's ruling, the majority Court held that defendant had an obligation to disclose, or obtain from a member fire company and subsequently disclose, those records "necessary to the [defendant's] performance of its responsibilities." Id. at 304. The Court reasoned that:

[Defendant] supervises the MVFD and has certain responsibilities under OPRA to provide public access to records relating to that supervision . . . In order for a fire district's commissioners to perform the oversight function expected by the legislative mandate, a fire district must have authority to review basic documents relating to the internal organization and functioning of volunteer squads working with that district. In this instance, the documents requested from the MVFD must be either on file with the District or subject to the District's demand for production.

[Id.]

While the Supreme Court affirmed the Council's ruling regarding disclosure of the responsive records, the majority disagreed that MVFD was itself a "public agency" for purposes of OPRA and thus modified accordingly.

Accordingly, the Council should lift the abeyance order and proceed with adjudication of the complaint. Verry, 230 N.J. 285. The Council should thus address whether the Custodian properly responded to the Complainant's OPRA request seeking bank account statements and checks issued over a four (4) year and seven (7) month period of time.

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 records at issue here are MVFD bank account statements and checks issued for 2010, 2011, 2012, 2013 and from January 1, to July 31, 2014. Custodian's Counsel originally denied access to the instant OPRA request arguing that MVFD was not a "public agency." Although the Supreme Court ultimately agreed that MVFD was not a "public agency" for purposes of OPRA, it affirmed the Council's decision that Franklin Fire District No. 1 ("FFD") was required to obtain and disclose records relating to its supervision of MVFD. Verry, 230 N.J. Super. at 304. Currently, there is no evidence in the record identifying the FFD's supervisory duties pertaining to financial oversight of a member fire company. Based on this, the Custodian may have unlawfully denied access to the records sought here if those financial documents should have been available for disclosure as part of the FFD's supervisory duties.

Accordingly, the Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. The Custodian must either: 1) disclose all responsive records; and/or 2) if records are denied or redacted, provide a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the FFD and MVFD regarding financial oversight.

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 Council Staff respectfully recommends the Council find that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). The Council should thus address whether the Custodian properly responded to the Complainant's OPRA request seeking bank account statements and checks issued over a four (4) year and seven (7) month period of time.
2. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. The Custodian must either: 1) disclose all responsive records; and/or 2) if records are denied or redacted, provide a document index containing the specific lawful basis for denying access to a particular record (in part or whole) along with a detailed explanation as to the supervisory relationship between the Franklin Fire District No. 1 and Millstone Valley Fire Department regarding financial oversight.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

March 20, 2018

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

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

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

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 28, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-365

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 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. This complaint should be held in abeyance until after the Appellate Division has ruled on the Franklin Fire District No. 1’s appeal in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division’s decision to this complaint.
2. The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.
3. The Council defers analysis of whether the Complainant is a prevailing party, pending the conclusion of proceedings before the Appellate Division.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September, 2015

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 1, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-365

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

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

1. Millstone Valley Fire Department's ("MVFD") bank account statements for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.
2. MVFD's checks issues for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.

Custodian of Record: Tim Szymborski

Request Received by Custodian: August 6, 2014

Response Made by Custodian: August 14, 2014

GRC Complaint Received: October 29, 2014

Background³

Request and Response:

On August 6, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian, seeking the above-mentioned records.

On August 14, 2014, the Custodian's Counsel responded in writing on behalf of the Custodian, advising that the responsive records do not fall within the definition of a "government record" because MVFD is not subject to OPRA. The Custodian's Counsel noted that the issue of MVFD designation as a "public agency" is pending adjudication before the Government Records Council ("GRC") and may ultimately be appealed to the Appellate Division.⁴ For that reason, the

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

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

⁴ At the time of Custodian Counsel's response, the GRC was in the process of reviewing a request for reconsideration in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196. The Council adjudicated the matter at its February 24, 2015, meeting. Thereafter, in March 2015, Franklin Fire District No. 1 appealed the Council's decision.

Custodian's Counsel requested that the Complainant not file a complaint either with the GRC or Superior Court until the "public agency" issue is fully resolved.

Denial of Access Complaint:

On October 29, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant disputed the Franklin Fire District No. 1's ("FFD") denial of access, noting that the GRC previously determined that MVFD is a "public agency" for purposes of OPRA. Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014)(citing Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013)). The Complainant further noted that pending litigation is not a lawful basis for denying access to responsive records.

The Complainant thus requested that the GRC: 1) determine that the Custodian violated OPRA by failing to provide all responsive records within seven (7) business days; 2) order immediate disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) order any further relief deemed to be appropriate.

Statement of Information:

On November 18, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 6, 2014, and responded in writing on August 14, 2014, by advising the Complainant that the FFD still considers MVFD not a "public agency." The Custodian affirmed that the Custodian's Counsel reminded the Complainant that it was awaiting the resolution of all issues in Verry and requested that the Complainant take no further action here until that time. However, without waiving his position, the Custodian certified that he did reach out to MVFD. The Custodian affirmed that MVFD's chief advised him that it had "no response."

The Custodian argued that the FFD still maintains its position from Verry, GRC 2013-196, that MVFD is not a "public agency" subject to OPRA. The Custodian thus contended that MVFD's records do not constitute "government records" under OPRA. The Custodian requested that the GRC hold this case in abeyance pending resolution of Verry.

Additional Submissions:

On February 13, 2015, the Complainant's Counsel submitted a letter brief to the GRC, arguing that the Custodian's denial of access was unlawful. Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011)(holding that pending litigation is not a lawful basis for denying access under OPRA); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014). The Complainant's Counsel further argued that the Custodian, Custodian's Counsel, FFD, and MVFD all had direct knowledge of the Council's decision in

Verry, GRC 2013-196, which deemed MVFD a “public agency” but nonetheless knowingly chose to deny access to the Complainant’s OPRA request.

The Complainant’s Counsel further asserted that the Custodian failed to submit the required document index as part of the SOI. Paff v. NJ Dep’t of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007). The Complainant’s Counsel contended that the Custodian has also failed to provide document indexes on several other occasions, to which he has continuously objected.

The Complainant’s Counsel also asserted that all of the requested records are “government records.” The Complainant’s Counsel also argued that the MVFD’s Chief’s assertion that they had “no response” is problematic, given that the Council has already determined that same is a “public agency.” The Complainant’s Counsel reiterated all requests for relief and further asked that the Council determine that MVFD’s Chief also knowingly and willfully violated OPRA.

Analysis

Abeyance of Complaint

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 complaint currently before the Council presents a novel issue. Specifically, the Complainant sought access to records from MVFD through the FFD. The Complainant’s assertion that MVFD must comply with his OPRA request was based on the Council’s prior decision in Verry, GRC 2013-196 (holding that, as a matter of first impression, volunteer fire companies within a fire district are public agencies subject to the provisions of OPRA).⁵ However, the FFD has appealed the decision, maintaining that there is no distinction between non-district and district volunteer fire companies. Based on the forgoing, the Custodian’s Counsel denied the request and asked the Complainant not to file a complaint until the “public agency” issue was fully resolved.

Notwithstanding Custodian Counsel’s request, the Complainant filed the instant complaint on October 29, 2014, arguing that pending litigation was not a lawful basis for denial. Subsequent to FFD’s reiteration, as stated in the SOI, of FFD’s position and request for abeyance of the instant complaint, the Complainant’s Counsel cited to Darata, GRC 2009-312, and Carter, GRC 2013-328, in support of the unlawful denial of access assertion.

The GRC begins by acknowledging that, as noted by the Complainant and Complainant’s Counsel, pending litigation is not a lawful basis for denying access to an OPRA request. The custodians in Darata, GRC 2009-312, and Carter, GRC 2013-328, attempted to use pending

⁵ The GRC notes that the Council’s decision in Verry, GRC 2013-196, was the first decision on the novel issue of whether a fire district member volunteer fire company met the definition of a “public agency” under OPRA.

litigation as a reason for not providing records or not responding to an OPRA request respectively. However, those complaints did not address whether the agencies were considered public agencies under OPRA, thus calling into question whether the responsive records met OPRA's definition of a "government record." Specifically in Darata, the complainant sought attorney-billing records from the County, which were clearly disclosable based on a plain reading of N.J.S.A. 47:1A-1.1 (providing that attorney bills are not exempt under the attorney-client privilege exemption but may be redacted as might be appropriate). Moreover, in Carter, the custodian contended that he was waiting for the GRC to determine the reasonableness of a special service charge before responding to a similarly worded OPRA request.

The FFD's response in the instant complaint could arguably be construed as denying access based solely on pending litigation. However, a fundamentally different issue is at play in this complaint. Specifically, the FFD still contends that MVFD is not a "public agency" under the law and – more important – is challenging the Council's prior decision in Verry, GRC 2013-196, in the Appellate Division. The GRC recognizes that the FFD is not asserting that access should be denied based on pending litigation. Rather, the FFD is instead requesting that the "public agency" issue be resolved at the Appellate Division prior to deciding this complaint. Thus, the GRC must decide whether the parties should be reasonably required to incur additional time, effort, and cost to litigate an issue that is currently before the Appellate Division.

The GRC begins by noting that the Administrative Procedures Act gives the GRC broad latitude to effectuate the purposes of OPRA. N.J.S.A. 52:14B-1 et seq. In considering all the issues presented, as well as the overriding question of MVFD's status as a "public agency," the instant complaint should be held in abeyance pending the Appellate Division's decision in Verry, GRC 2013-196. Notwithstanding the Council's prior decision as a matter of first impression, adjudication of this complaint will likely cause all parties more time, effort, and additional cost than is reasonably necessary. Any decision to the contrary would lead to additional litigation via appeals, reconsiderations, *etc.*, and implicates unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve precious public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved.

Accordingly, the instant complaint should be held in abeyance until the Appellate Division has ruled on the FFD's appeal in Verry, GRC 2013-196. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's ultimate decision properly to this complaint.

Knowing & Willful

The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the

conclusion of proceedings before the Appellate Division.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. This complaint should be held in abeyance until after the Appellate Division has ruled on the Franklin Fire District No. 1's appeal in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.
2. The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.
3. The Council defers analysis of whether the Complainant is a prevailing party, pending the conclusion of proceedings before the Appellate Division.

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September 22, 2015