



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**

**December 14, 2021 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-134

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the parties failed to reach a fee agreement, and because Complainant’s Co-Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled. N.J.A.C. 5:105-2.13.
2. The Council finds that 10.8 hours at \$300.00 per hour is reasonable for the work performed by Mr. Bermingham in the instant matter. Further, the Council finds that 12.5 hours at \$350.00 per hour is reasonable for the work performed by Mr. Luers in the instant matter. Also, the Council finds that the paralegal’s time of 4 hours at \$75.00 per hour and that reimbursement of \$49.94 for expenses is reasonable. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham in the adjusted amount of \$3,240.00, representing 10.8 hours of service at \$300.00 per hour or a decrease of 2.4 hours and \$25.00 per hour in the overall requested hourly rate. Further, the Executive Director recommends that the Council award fees to Mr. Luers in the amount of \$4,724.94 representing 12.5 hours of service at \$350.00, 4 hours of paralegal service at \$75.00 and \$49.94 for reimbursement of expenses.**

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 14<sup>th</sup> Day of December 2021

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 16, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
December 14, 2021 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-134**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all OPRA requests filed and exact copies of all records disclosed (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

**November 13, 2018 Council Meeting:**

At its November 13, 2018 public meeting, the Council considered the November 7, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Council should accept the Honorable Sarah G. Crowley, Administrative Law Judge's Initial Decision concluding that the Custodian "did not knowingly and willfully" violate OPRA. Further, the Council should accept Judge Crowley's order that this complaint be "**DISMISSED.**"
2. Pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App.

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Also represented by Walter M. Luers, Esq. of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ) (previously of Law Offices of Walter M. Luers, LLC (Clinton, NJ)). Mr. Luers entered his appearance to the Office of Administrative Law on May 14, 2018.

<sup>2</sup> Represented by Jeremy Solomon, Esq., of Bob Smith & Associates (Piscataway, NJ). Previously represented by Francesco Taddeo, Esq. (Somerville, NJ).

Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed additional records not previously provided to the Complainant in response to the Council's October 31, 2017 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On November 15, 2018, the Council distributed its Interim Order to all parties. On December 27, 2018, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that Mr. Bermingham and Mr. Luers ("Complainant's Co-Counsel") had twenty (20) business days to submit a fee application. On January 28, 2019, Complainant's Co-Counsel submitted a consolidated fee application. The fee application and Certification of Services ("Certification") set forth the following:

1. The complaint name and number: Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-134.
2. Co-Counsel's law firm affiliation: Each Counsel is a sole practitioner.
3. A statement of client representation:
  - a. Mr. Bermingham certified to his services, including viewing of documents for filing with the GRC; discussing submissions with the Complainant; reviewing of e-mail correspondence to and/or from the GRC; and preparing his portion of the fee application.
  - b. Mr. Luers certified to his services, including communications with the Office of Administrative Law ("OAL"), conference calls, drafting letters, reviewing the complaint file, traveling to and participating in the hearing, and preparing his portion of the fee application.
4. The hourly rate of all attorneys and support staff involved in the complaint:
  - a. Mr. Bermingham certified that he charged \$325.00 per hour.
  - b. Mr. Luers certified that he charged \$350.00 per hour. Mr. Luers further averred that his paralegal's hourly rate was \$75.00 per hour.

5. Copies of time sheets for each professional involved in the complaint:
  - a. Mr. Bermingham supplied a copy of his time sheet from February 12, 2015 through September 16, 2018 the (“Fee Period”). During the fee period, Mr. Bermingham billed a total of 13.2 hours for a fee of \$4,290.00.
  - b. Mr. Luers supplied a copy of his time sheets from May 4, 2018 through January 28, 2019. During the Fee Period, Mr. Luers billed a total of 12.5 hours for a total fee of \$4,381.70. Mr. Luers also billed 4.0 hours of the paralegal’s time for a total fee of \$300.00.
  
6. Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation:
  - a. Mr. Bermingham certified that he charges “\$325 per hour to individual clients . . . for work in OPRA matters.” Bermingham Cert. ¶ 3. Counsel certified to his education, nine (9) years of legal experience, and teaching law warrant an increase in his hourly rate. Counsel certified that he was previously awarded \$300.00 per hour in 2014 (citing Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-228 (March 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-262 (March 2014)). Counsel requested that this rate be increased to \$325.00 because the prior hourly rate was slightly below market value. See Deloy v. Twp. of Lyndhurst (Bergen), GRC Complaint No. 2012-128 (November 2013); White v. Monmouth Reg’l High Sch., GRC Complaint No. 2012-218 (January 2014); Nevin v. N.J. Dep’t of Health & Senior Serv., GRC Complaint No. 2013-18 (February 2014).
  - b. Mr. Luers certified that he charged “\$350.00 for [his] time.” Mr. Luers certified that he had extensive experience litigating OPRA complaints before the GRC and in Superior Court. See *i.e.* Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016) (reversed 229 N.J. 340 (2017)). Mr. Luers further affirmed that he has appeared in Supreme Court of New Jersey five (5) times and is currently involved in two (2) pending matters. Mr. Luers further noted that he was “counsel of record” in several OPRA matters before both courts that resulted in published opinions. See *i.e.* Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017). Mr. Luers also certified to his educational and teaching experience, as well as his time as President of the New Jersey Foundation for Open Government and extensive activities with the New Jersey State Bar Foundation. Luers Cert. ¶ 7. Mr. Luers averred that the requested fee is reasonable and lower than other attorneys representing clients, such as Richard Gutman, Esq. or the law firm Pashman, Stein. Luers Cert. ¶ 9. Mr. Luers also certified that the paralegal has fifteen (15) years of experience in “coordinating and managing activities of outside counsel,”
  
7. Detailed documentation of expenses:
  - a. Mr. Bermingham did not seek reimbursements for expenses.
  - b. Mr. Luers sought \$49.94 in reimbursements for expenses identified as scanning fees, paper copies, and postage.

On March 7, 2019, Custodian’s Counsel sought a two (2) week extension to file objections. Counsel noted that the fee application was sent to a prior street address. On March 14, 2019, after confirming that Custodian’s Counsel had not previously received the fee application electronically, the GRC granted an extension through March 29, 2019.

On March 29, 2019, Custodian’s Counsel submitted objections to the fee application. Counsel contended that “exorbitant and extraordinary” proposed total fee of \$9,021.64 should be denied because it failed to highlight the Complainant’s “lack of success.” Counsel argued that the cost sought by Co-Counsel is significantly higher than the fees normally sought in a multitude of other complaints filed by the Complainant, in which he rarely prevailed. Counsel thus argued that although the Complainant is a prevailing party, the GRC should significantly reduce Complainant’s Counsel’s hourly rate and overall fee award because same was “both excessive and unwarranted.”

Counsel contended that Mr. Bermingham did not personally handle this complaint and egregiously sought fees anyway. Counsel argued that as an example, the Complainant prepared and filed the complaint, yet Mr. Bermingham charged 1.5 hours to “draft” it. Counsel noted that although records were disclosed to the Complainant, Mr. Bermingham charged 9.2 hours to review and respond to complaint submissions. Counsel further argued that all e-mail reviews charged at 0.2 hours are excessive, and Mr. Bermingham added 1 hour to recreate an invoice. Counsel also contended Mr. Luer’s fee application is more reasonable but still excessive. Counsel asserted that the 6.4 hours Mr. Luers charged to prepare for and attend the OAL hearing was excessive. Counsel also asserted that while expenses for “letters and e-mails should also be reduced . . . Mr. Luers’ billing practices are much more in line with reality.” Counsel thus requested that GRC reduce the fee, as it did in Fisher v. City of Paterson, GRC Complaint No. 2002-46 (August 2003)

Counsel finally contended that this matter was straightforward and required little work. Counsel argued that, contrary to the simplistic nature of the complaint, Complainant’s Co-Counsel charged over 25 hours to research, and communicate on this complaint. Counsel contended that many of the entries were “superfluous” and should be removed from consideration or pared down significantly. Counsel further argued that Co-Counsel failed to support the requested hourly rate with examples beyond Mr. Gutman, and further failed to show that the requested rates were “calculated according to prevailing market rates in the ‘relevant community.’” See Blum v. Stenson, 465 U.S. 886, 896 (1984). Counsel thus requested that the GRC set a fixed rate “not to exceed \$300.00.”<sup>3</sup>

## Analysis

### Compliance

At its November 13, 2018 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On

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<sup>3</sup> The parties submitted additional arguments after Custodian Counsel’s objections that are not contemplated for in N.J.A.C. 5:105

November 15, 2018, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by December 17, 2018.

On December 27, 2018, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant's Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On January 28, 2019, the twentieth (20<sup>th</sup>) business day after the GRC's notification, Complainant's Co-Counsel submitted a consolidated fee application.

Therefore, because the parties failed to reach a fee agreement, and because Complainant's Co-Counsel subsequently submitted a timely consolidated fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled. N.J.A.C. 5:105-2.13.

### **Prevailing Party Attorney Fee Award**

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

OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. See generally NJDPM, 185 N.J. at 137 ("By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian's conduct." Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately

achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney's fee and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties' ability to reach an agreement, the Council provided the Complainant's Counsel an opportunity to file an application for fees.

#### **A. Standards for Fee Award**

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

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney's fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor's Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that



the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a)).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

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

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter, Co-Counsel is seeking a total fee award of \$9,021.64. This total represents Mr. Bermingham’s time of 13.2 hours at \$325.00 per hour, Mr. Luers’ time of 12.5 hours at \$350.00 per hour, paralegal time of 4 hours at \$75.00 per hour, and reimbursement of expenses at \$49.94.

In support of Mr. Bermingham’s hourly rate, he argued that \$325.00 an hour was reasonable for an attorney of his experience (nine (9) years) and geographical location. Mr. Bermingham also contended that increases discussed in a 2005 New Jersey Law Journal review, prevailing party decisions in the courts, and past GRC decisions warrant such an hourly rate.

However, the rate of \$325.00 is not reasonable for a practitioner with Mr. Bermingham’s experience and skill level in this geographical area. Specifically, the Counsel has not provided any evidence to support that the Mr. Bermingham’s OPRA fee award should be increased. In fact, the GRC cases cited in the fee application actually support an hourly rate of \$300.00. See Nevin, GRC 2013-18. See also Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Paff v. Cnty. Of Salem, GRC Complaint No. 2015-342 (June 2017). Complainant’s Counsel here has not shown that his experience in his nine (9) years surpassed the experience presented in those complaints. Further, the submission of this fee application post-dates by eight (8) months Mr. Bermingham’s prior request to increase his fee in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-133 (January 2019). The Council rejected the increase at

that time and there is no evidence supporting a definitive change in Mr. Bermingham's experience or external fees awards warranting a change in that decision.

In support of Mr. Luers' hourly rate of \$350.00, he similarly spoke to his eighteen (18) years of extensive experience in OPRA matters both as a litigator before multiple venues and as an advocate. Further, Mr. Luers included comparative rates for Mr. Gutman and Pashman, Stein, as well as the New Jersey Law Journal article relied upon by Mr. Bermingham. Mr. Luers also spoke on his paralegal's experience in support of her rate of \$75.00 an hour.

It is the case that Mr. Luers has previously asked for and has been awarded an hourly rate of \$300.00 by the Council. *See e.g. Nevin*, 2013-18. However, Mr. Luers experience has grown exponentially and especially as it relates to representing parties before the New Jersey Superior Court on OPRA issues. *See e.g. Paff*, 229 N.J. 340. Thus, the GRC does agree that an increase to the more reasonable rate requested by Mr. Luers here is supported. This position is further supported by a comparison to the same rate Mr. Gutman received in 2013 when his experience was commensurate to Mr. Luers own experience at the time of the fee application.

Based on the foregoing, an hourly rate of \$300.00 for Mr. Bermingham and \$350.00 for Mr. Luers is reasonable for a practitioner with Co-Counsel's experience and skill level in this geographical area.

#### **b. Time Expended**

In support of his request for fees, Co-Counsel submitted a log of their time. The GRC will address each separately for the sake of clarity.

For the period from May 12, 2015 to September 16, 2018, Mr. Bermingham billed a total of 13.2 hours for work on the file. This included drafting the Denial of Access Complaint, reviewing and responding to e-mails, reviewing party submissions, and "create[ing]" an invoice. In accordance with the mandates of N.J.A.C. 105-2.13(b), Mr. Bermingham's time sheet provided basic descriptions of the work performed in the required tenths with a minimum entry of 0.2. N.J.A.C. 105-2.13(b)(5). The time entries identify the type of submission composed or reviewed (e-mail, Interim Order, certifications) and the parties involved. The log does not contain any detailed descriptions of the work performed, leaving the Council to review the complaint file to see if Mr. Bermingham was actively composing or simply reviewing the submission in question.

For the period from May 4, 2018 to January 28, 2019, Mr. Luers billed a total of 12.50 hours for work for himself, 4.0 hours of work for the paralegal on the file, and \$49.94 in expenses. This included reviewing and responding to e-mails, all work associated with arguing the Complainant's position before the OAL and preparing the fee application. In accordance with the mandates of N.J.A.C. 105-2.13(b), Mr. Luers' time sheet provided detailed descriptions of the exact work performed in the required tenths with a minimum entry of 0.1. N.J.A.C. 105-2.13(b)(5). The time entries identify with specificity the work performed, with whom Mr. Luers communicated, and those documents he or his paralegal reviewed or prepared.

Custodian's Counsel objected to the total amount Co-Counsel sought here. Specifically, Counsel argued that many of Mr. Bermingham's entries were superfluous and should be either pared down or altogether removed from consideration. Counsel further argued that Mr. Luers billing, while more realistic, was nonetheless excessive in a few instances.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Co-Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis. However, the GRC notes that it also looks to the Council's prior decision in Verry, GRC 2015-133 for comparisons due to similarities in parties, submissions, and time frames except for Mr. Luers' involvement here.

As it relates to Mr. Bermingham's portion of the fee application, the GRC finds that the accounting of charges to be excessive and should be reduced accordingly. Specifically, the GRC finds that an accounting of 0.2 for several entries to be excessive. This finding is consistent with the Council's decision to reduce similar entries in Verry, GRC 2015-133. Id. at 8. In each instance, Mr. Bermingham identified a 0.2 for basic routine procedural e-mails that in many instances did not exceed a few sentences. For example, Mr. Bermingham charged a 0.2 to review the Custodian's request for an extension to submit the Statement of Information ("SOI") and the GRC's response on May 28, 2015. He further charged a 0.2 for each of the GRC's meeting notification e-mails. Mr. Bermingham also charged 0.2 to review additional extension e-mails. Such a charge for these types of basic e-mails is not reasonable. Thus, the GRC finds that several entries should be reduced from 0.2 to 0.1 as follows:

- E-mail TO/FROM GRC or Mr. Kazar dated May 20, 2015.
- E-mail TO/FROM GRC or Mr. Kazar dated May 28, 2015.
- E-mail TO/FROM GRC or Mr. Kazar dated May 28, 2015.
- E-mail TO/FROM GRC or Mr. Kazar dated September 22, 2015.
- E-mail TO/FROM GRC or Mr. Kazar dated April 18, 2016.
- E-mail TO/FROM GRC or Mr. Kazar dated May 3, 2016.
- E-mail TO/FROM GRC or Mr. Kazar dated May 3, 2016.
- E-mail TO/FROM GRC or Mr. Kazar dated September 19, 2016.
- E-mail TO/FROM GRC or Mr. Kazar dated October 3, 2017.
- E-mail TO/FROM GRC or Mr. Kazar dated October 4, 2017.
- E-mail TO/FROM GRC or Mr. Kazar dated October 24, 2017.
- E-mail TO/FROM GRC or Mr. Kazar dated November 7, 2017.
- E-mail TO/FROM GRC or Mr. Kazar dated November 9, 2017.

Additionally, the GRC should also remove from consideration Mr. Bermingham's charge for a certification submitted to the GRC on December 14, 2017 and three (3) corresponding e-mail review entries between the GRC and Complainant. This certification, which objected to certifications submitted by the Custodian in this complaint and Verry GRC 2015-133, was submitted to the GRC over a month after the Council voted to send this complaint to the OAL. Further, this submission was discussed considerably in Verry, GRC 2015-133, where the Council outlined the reasons why same should not be considered; those reasons also apply here. Id. at 8.

However, the GRC also rejects Custodian Counsel's assertion that the Complainant, and not Mr. Bermingham filed the Denial of Access Complaint. In fact, the evidence of record supports that Mr. Bermingham did submit the Denial of Access Complaint and included his legal brief therein. Also, the invoice creation entry appears to be connected to preparation of the fee application, which is an allowable charge per Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328, *et seq.* (Interim Order dated November 15, 2016).

As it relates to Mr. Luers' portion of the fee application, the GRC finds that the accounting of charges to be reasonable and should thus remain unaltered. The GRC finds each entry to be reasonably grounded in the work conducted for those entries. This includes, and contrary to Custodian Counsel's objections, the 4.8 hours required to travel to, attend, and confer with the parties regarding the OAL hearing. Mr. Luers also accounted for the additional 4 hours under which he utilized his paralegal to perform certain tasks; thus, reducing the lodestar amount based on a considerably smaller hourly rate of \$75.00. Also, Mr. Luers accounted for those tasks that resulted in his fee application including \$49.94 in reimbursements for expenses. However, the GRC does note that Mr. Luers' fee application calculates the lode star to include additional \$6.70 that is unaccounted for the billing statement. Thus, that overage will not be included in final fee award.

Accordingly, the Council finds that 10.8 hours at \$300.00 per hour is reasonable for the work performed by Mr. Bermingham in the instant matter. Further, the Council finds that 12.5 hours at \$350.00 per hour is reasonable for the work performed by Mr. Luers in the instant matter. Also, the Council finds that the paralegal's time of 4 hours at \$75.00 per hour and that reimbursement of \$49.94 for expenses is reasonable. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham in the adjusted amount of \$3,240.00, representing 10.8 hours of service at \$300.00 per hour or a decrease of 2.4 hours and \$25.00 per hour in the overall requested hourly rate. Further, the Executive Director recommends that the Council award fees to Mr. Luers in the amount of \$4,724.94 representing 12.5 hours of service at \$350.00, 4 hours of paralegal service at \$75.00 and \$49.94 for reimbursement of expenses.**

## **2. Enhancement Analysis**

Co-Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because Complainant's Co-Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled. N.J.A.C. 5:105-2.13.
2. The Council finds that 10.8 hours at \$300.00 per hour is reasonable for the work performed by Mr. Bermingham in the instant matter. Further, the Council finds that

12.5 hours at \$350.00 per hour is reasonable for the work performed by Mr. Luers in the instant matter. Also, the Council finds that the paralegal's time of 4 hours at \$75.00 per hour and that reimbursement of \$49.94 for expenses is reasonable. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Bermingham in the adjusted amount of \$3,240.00, representing 10.8 hours of service at \$300.00 per hour or a decrease of 2.4 hours and \$25.00 per hour in the overall requested hourly rate. Further, the Executive Director recommends that the Council award fees to Mr. Luers in the amount of \$4,724.94 representing 12.5 hours of service at \$350.00, 4 hours of paralegal service at \$75.00 and \$49.94 for reimbursement of expenses.**

Prepared By: Frank F. Caruso  
Executive Director

December 8, 2021



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

November 13, 2018 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2015-134

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should accept the Honorable Sarah G. Crowley, Administrative Law Judge’s Initial Decision concluding that the Custodian “did not knowingly and willfully” violate OPRA. Further, the Council should accept Judge Crowley’s order that this complaint be “**DISMISSED.**”
2. Pursuant to the Council’s October 31, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed additional records not previously provided to the Complainant in response to the Council’s October 31, 2017 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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 13<sup>th</sup> Day of November, 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: November 15, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
November 13, 2018 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-134**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all OPRA requests filed and exact copies of all records disclosed (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

October 31, 2017 Council Meeting:

At its October 31, 2017 public meeting, the Council considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply with the Council’s September 28, 2017 Interim Order. The Custodian timely responded in the extended time frame providing responsive third-party OPRA requests to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, although the Custodian provided to the Complainant some of the records disclosed in response to third party OPRA requests, he failed to provide disclosed tax export files for a number of the requests.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the

---

<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA). Also represented by Walter M. Luers, Esq. of the Law Office of Walter Luers (Clinton, NJ). Mr. Luers entered his appearance to the Office of Administrative Law on May 14, 2018.

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).



Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. The Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue.

3. The Custodian failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply successfully with two (2) Interim Orders. The Custodian’s actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for the limited purpose of conducting proof hearing on whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the evidence of record supports that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, in the interest of expediency the Office of Administrative Law should determine the reasonable amount to which he is entitled.

#### Procedural History:

On November 1, 2017, the Council distributed its Interim Order to all parties. On February 21, 2018, the Government Records Council (“GRC”) transmitted this complaint to the Office of Administrative Law (“OAL”). On September 13, 2018, the Honorable Sarah G. Crowley, Administrative Law Judge (“ALJ”), issued an Initial Decision in this matter. The ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

I **FIND** as **FACT** that [the Custodian] contacted the tax assessor and provided all documents in their possession which were responsive to the [Complainant’s] OPRA request. I further **FIND** as **FACT** that there were no other documents in the Custodian’s possession to be provided. I further **FIND** as **FACT** that the only documents responsive to the request, which was the handwritten note from the tax assessor, had in fact been provided to the petitioner.

[Id. at 3.]

The ALJ therefore held the following:

I hereby **FIND** that [the Borough] did not knowingly and willfully violated OPRA and not unreasonably denied access. Based on this finding, I **ORDER** that the GRC complaint against [the Borough] is **DISMISSED**.

[Id. at 5.]

The ALJ's Initial Decision provided the parties thirteen (13) days from mailing to submit to the GRC exceptions to the decision.

### Complainant's Exceptions:

On September 26, 2018, Complainant's Counsel filed exceptions to the ALJ's Initial Decision attaching his closing statement submitted to the ALJ on August 22, 2018 in support of his exceptions. Therein, Counsel contended that the ALJ's finding that "no other documents in the Custodian's possession" was wrong and not based on credible evidence. Counsel contended that such a finding was contrary to the Custodian's testimony that "he had no idea whether there were other documents." Counsel asserted that the Custodian was required to provide all responsive records and not just those physically in his possession. Counsel asserted that instead, the Custodian testified that he never asked if other documents existed. Counsel thus requested that the GRC reject the ALJ's decision and either impose the civil penalty or remand for a new hearing before a different judge.

On October 26, 2018, the GRC contacted the OAL seeking an extension of the forty-five (45) day time frame to accept, reject, or modify the instant complaint. On October 30, 2018, the OAL granted said extension through December 14, 2018.

### Analysis

#### Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they

find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ's Initial Decision, set forth as "Exhibit A," determined that:

I **FIND** as **FACT** that [the Custodian] contacted the tax assessor and provided all documents in their possession which were responsive to the [Complainant's] OPRA request. I further **FIND** as **FACT** that there were no other documents in the Custodian's possession to be provided. I further **FIND** as **FACT** that the only documents responsive to the request, which was the handwritten note from the tax assessor, had in fact been provided to the petitioner.

[Id. at 3.]

The ALJ therefore held the following:

I hereby **FIND** that [the Borough] did not knowingly and willfully violated OPRA and not unreasonably denied access. Based on this finding, I **ORDER** that the GRC complaint against [the Borough] is **DISMISSED**.

[Id. at 5.]

Regarding Complainant Counsel's exception, the Council should reject same. Counsel's Exceptions appear to be rooted in a disagreement over the testimony provided by the Custodian. However, the ALJ determined the Custodian's testimony to be credible. The ALJ found the testimony to sufficiently describe the efforts made to obtain all responsive records from the tax assessor. The Custodian provided the record to the Complainant, which was a handwritten note from the tax assessor. The ALJ further found that the Custodian did not have any other documents in his possession that were responsive to the OPRA request. The Complainant does not present any evidence to demonstrate that the ALJ misinterpreted the Custodian's testimony or arbitrarily determined facts that led to an erroneous conclusion. For these reasons, the GRC accepts the ALJ's factual findings and legal conclusions. Tyler, 236 N.J. Super. 478.

Here, the ALJ fairly summarized the testimony and evidence, explaining how she weighed the proofs before her and explaining why she credited certain testimony. The ALJ's conclusions are aligned and consistent with those credibility determinations. As such, the GRC is satisfied that the ALJ's factual findings and legal conclusion based on the evidence presented are correct.

Therefore, the Council should accept the ALJ's Initial Decision concluding that the Custodian "did not knowingly and willfully" violate OPRA. Further, the Council should accept the ALJ's order that this complaint be "**DISMISSED**."

### **Prevailing Party Attorney's Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.”

N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

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

[Id. at 76.]

Initially, the Council has already determined in its October 31, 2017 Interim Order that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. As part of its referral, the GRC requested that the OAL determine the amount of the award. However, the ALJ did not address the fee issue as part of her Initial Decision, notwithstanding the GRC's request to do so. While this may have previously required the GRC to return this complaint to the OAL, recent procedural changes in its adjudication process support a different outcome. Specifically, the GRC has instituted a new process of providing the parties a chance to settle prevailing party fee awards. For this reason, the GRC finds it reasonable to apply its current procedural policy to this complaint and allow the parties a chance to settle the fee issue. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-57, *et seq.* (Interim Order dated January 30, 2018).

Here, the Complainant filed this Denial of Access Complaint seeking disclosure of the responsive records, a determination that the Custodian knowingly and willfully violated OPRA, and prevailing party attorney's fees. Immediately upon filing the complaint, the Custodian sent responsive records to the Complainant arguing that he believed they were previously sent on May 4, 2015. The Council found that a deemed denial occurred, but abeyed the complaint pending the outcome of Scheeler v. Office of the Governor, 448 N.J. Super. 333 (App. Div. 2017). Following the lifting of the abeyance, the Council ordered the Custodian to disclose all responsive records or certify to when he sent all records and provide supporting documentation. However, in reviewing the Custodian's attempt to comply with the April 25, 2017 Interim Order, the Council held that it was inadequate. Thus, the Council required the Custodian to again comply with an Order to disclose records or certify that no records existed.

In response to the September 28, 2017 Interim Order, the Custodian disclosed to the Complainant additional outstanding records. However, still in question were the potential disclosability of tax export files, which the Council noted that it appeared the Custodian may have failed to disclose. The Council, noting that its Orders were enforceable in Superior Court, referred this complaint to the OAL for a hearing on whether the Custodian knowingly and willfully violated

OPRA. The OAL returned an Initial Decision on September 13, 2018 holding that the Custodian did not knowingly and willfully violate OPRA.

Based on all the forgoing, the evidence of record supports a finding that prevailing party attorney's fees are warranted here. Specifically, the filing of this complaint resulted in the Custodian disclosing additional records not previously provided. While this change in the Custodian's conduct may have been limited, it nonetheless represents a causal nexus between this complaint and the relief achieved.

Therefore, pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian disclosed additional records not previously provided to the Complainant in response to the Council's October 31, 2017 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Council should accept the Honorable Sarah G. Crowley, Administrative Law Judge's Initial Decision concluding that the Custodian "did not knowingly and willfully" violate OPRA. Further, the Council should accept Judge Crowley's order that this complaint be "**DISMISSED.**"
2. Pursuant to the Council's October 31, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed additional records not previously provided to the Complainant in response to the Council's October 31, 2017 Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall**

**promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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

November 7, 2018



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

MEMORANDUM

TO: File

FROM: Sarah G. Crowley, ALJ

RE: Initial Decision  
**Robert A. Verry v. Borough of South Bound Brook**  
OAL Dkt. No. GRC 02750-18

The initial decision rendered on September 13, 2018, contains two errors. The first error is on page two, which is the hearing date. The second error is on page seven in the appendix the exhibit list is not properly recorded. The corrections are as followed:

Page 2 of the Initial Decision:

A hearing was held on July 23, 2018, and the record closed after written submissions were filed by the parties on August 23, 2018 and September 10, 2018.

Page 7 of the Initial Decision (Appendix):

**EXHIBITS:**

**Joint:**

- J-1 May 13, 2015 Denial of Access Complaint
- J-2 June 4, 2015 Statement of Information
- J-3 September 29, 2016 Interim Order and Recommendations
- J-4 April 25, 2017 Interim Order and Recommendations
- J-5 September 26, 2017 Interim Order and Recommendations
- J-6 October 10, 2017 Certification of Donald E. Kazar
- J-7 Tax Export File OPRA Requests
- J-8 October 31, 2017 Interim Order and Recommendations



**For Petitioner:**

None

**For Respondent:**

None



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. GRC 02750-18

AGENCY DKT. NO. 2015-134

**ROBERT A. VERRY,**

Petitioner,

v.

**BOROUGH OF SOUTH BOUND BROOK (SOMERSET),**

Respondent.

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**Walter M. Luers, Esq.,** for petitioner (Walter M. Luers, LLC, attorneys)

**Francesco Taddeo, Esq.,** for respondent (Francesco Taddeo, LLC, attorneys)

Record Closed: September 10, 2018

Decided: September 13, 2018

BEFORE **SARAH G. CROWLEY, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On April 24, 2014, Robert A. Verry (petitioner) filed an Open Public Records Act (OPRA) request with the Borough of South Bound Brook (Bound Brook) seeking all OPRA requests filed and "an exact copy of all responses records released, excluding those filed by Robert A. Verry, from September 23, 2014 to April 25, 2015. After no response was received, a denial of Access Complaint was filed on May 13, 2015. Three interim orders were issued by the Government Records office (GRC), and on February 27, 2018, the

GRC transmitted the complaint to the Office of Administrative Law (OAL) as a contested case. N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52L14F-1 to -13. The matter was referred for the limited purpose of conducting a proof hearing on whether the Custodian knowingly and willfully violate OPRA and unreasonably denied access under the totality of circumstances. A hearing was held on July 23, 2018, and the record closed after written submissions were filed by the parties on August 23, 2018 and September 10, 2018.

### **STATEMENT OF FACTS**

The essential facts in this case are not disputed. On April 24, 2015, petitioner submitted an OPRA request to Bound Brook seeking “All Open Public Records Act requests filed, and an exact copy of the response records releases, excluding those filed by Robert A. Verry, from September 23, 2014 to April 25, 2015.” On May 13, 2015, a Denial of Access Complaint was filed by the petitioner with the New Jersey Government Records Council (GRC). In response to the complaint, respondent advised that a response had been send on April 28, 2018 and resent sent again on May 13, 2015.

On September 29, 2016, April 25, 2017, September 27, 2017, and October 31, 2017, Interim Orders were entered by the GRC finding that the respondent had not timely responded to the OPRA request but deferred the analysis of whether the custodian knowingly and willfully violated OPRA for a factual finding before the undersigned.

### **TESTIMONY OF FINDINGS OF FACT**

#### **Donald Kazar**

Donald Kazar was the only witness called by the respondent. He was the Bound Brook Borough Clerk at the time the cause of action arose. He testified that he had received the requests from Mr. Verry on or about April 24, 2014. He testified that he provided response to all the request and emailed them to petitioner on May 4, 2015. When he received the OPRA Complaint, he realized they were sent to an incorrect email address and resent all the documents to the petitioner. One of the requests was for tax export files. He explained that these are tax records that come from an online company

and they are just forwarded to the requested. In this case, he reached out to the tax assessor, who provided a copy of all of the requests. The requests contained a notation from the tax assessor “done” and the date upon which they had been provided. There was no such documentation other than this notation to memorialize the completion of these requests. He went on to explain that this was an online service for tax records and there was no copy of what was forwarded that was retained, nor was there an email which reflected same. Accordingly, everything that they had in their possession had been provided, as reflected on the documents which were provided to the petitioner

### **FINDING OF FACTS**

The resolution of this matter, requires that I make a credibility determination with regard to some of the critical facts. The choice of accepting or rejecting the witnesses’ testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. Super. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses’ story in light of its rationality, internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. Super. 514, 521–22 (1950); see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that Mr. Kazar, the witness for Bound Brook was sincere and credible. I **FIND** as **FACT** that he contacted the tax assessor and provided all documents in their possession which were responsive to the petitioner’s OPRA request. I further **FIND** as

**FACT** that there were no other documents in the Custodian's possession to be provided. I further **FIND** as **FACT** that the only documents responsive to the request, which was the handwritten note from the tax assessor, had in fact been provided to the petitioner.

Therefore, I **FIND** that there has been no evidence presented to establish that Mr. Kazar or Bound Brook knowingly and willfully violated OPRA and unreasonably denied access to the petitioner of the tax export information.

### **CONCLUSIONS OF LAW**

In its transmittal to the OAL, the GRC stated that, "The Office of Administrative Law is asked to conduct fact-finding to determine whether the unlawful denial of access (if there is an unlawful denial of access) is unreasonable under the totality of the circumstances pursuant to N.J.S.A. 47:1A-7.e. and N.J.S.A. 47:1A-11, and thus warrants the imposition of the statutory penalty on the records custodian [GRC Transmittal, Appendix to Exhibit 1]," and noted that such was to be accomplished by conducting a fact-finding hearing to determine whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The GRC has already determined that there was an unlawful denial of access (P-9) and the scope of this tribunal's inquiry is limited to whether such denial was knowing and willful.

The New Jersey Supreme Court has defined "willful misconduct" as "the commission of a forbidden act with actual knowledge that the act is forbidden. Fielder v. Stonack, 141 N.J. 101(1995). The phrase involves "'much more' than negligent conduct." Alston v. City of Camden, 168 N.J. 170 (2001). In civil cases the most general rule is that in most causes of action, whether judicial or administrative, the party asserting a claim has the burden to prove it. WCI-Westinghouse, Inc. v. Edison Tp., 7 N.J. Tax 610, 630 (Tax Ct. 1985), aff'd 9 N.J. Tax 86 (App.Div.1986). Thus, the burden of establishing the existence of a fact or circumstance [necessary to support the claim] is on the party relying thereon." Snyder v. I. Jay Realty Co., 53 N.J. Super. 336, 347 (App.Div.1958), aff'd in part, rev'd in part 30 N.J. 303 (1959).

The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). Thus, petitioner bears the burden of proving that the custodian knowingly and willfully violated OPRA and unreasonably denied access to the ESP report. In this case, I have found that Mr. Kazar provided all documents in his possession, and there was no willful and knowing non-compliance with OPRA.

Therefore, I **CONCLUDE** that neither Mr. Kazar or Bound Brook knowingly and willfully violated OPRA and not unreasonably denied access under the totality of the circumstances.

### **DECISION AND ORDER**

Based on the foregoing, I hereby **FIND** that Bound Brook did not knowingly and willfully violated OPRA and not unreasonably denied access. Based on this finding, I **ORDER** that the GRC compliant against Bound Brook is **DISMISSED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



September 13, 2018

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

September 13, 2018 (emailed)

Date Mailed to Parties:

September 13, 2018 (emailed)

SGC/mel

**APPENDIX**

**WITNESSES:**

**For Petitioner:**

None

**For Respondent:**

Donald Kazar

**EXHIBITS:**

**Joint:**

- J-1 May 13, 2015 Denial of Access Complaint
- J-2 June 4, 2015 Statement of Information
- J-3 September 29, 2016 Interim Order and Recommendations
- J-4 April 25, 2017 Interim Order and Recommendations
- J-5 September 26, 2017 Interim Order and Recommendations
- J-6 October 10, 2017 Certification of Donald E. Kazar
- J-7 Tax Export File OPRA Requests
- J-8 October 31, 2017 Interim Order and Recommendations

**For Petitioner:**

None

**For Respondent:**

None





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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**October 31, 2017 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-134

v.

Borough of South Bound Brook  
(Somerset)  
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s September 28, 2017 Interim Order. The Custodian timely responded in the extended time frame providing responsive third-party OPRA requests to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, although the Custodian provided to the Complainant some of the records disclosed in response to third party OPRA requests, he failed to provide disclosed tax export files for a number of the requests.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. The Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue.
3. The Custodian failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply successfully with two (2) Interim Orders. The Custodian’s actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for the limited purpose of conducting proof hearing on whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the evidence of



record supports that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, in the interest of expediency the Office of Administrative Law should determine the reasonable amount to which he is entitled.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of October, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 1, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 31, 2017 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-134**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all OPRA requests filed and exact copies of all records disclosed (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

**Custodian of Record:** Donald E. Kazar  
**Request Received by Custodian:** April 28, 2015  
**Response Made by Custodian:** None  
**GRC Complaint Received:** May 13, 2015

**Background**

**September 26, 2017 Council Meeting:**

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian has not fully complied with the Council's April 25, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame providing evidence of his May 4, 2015 response and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not provide all records the Complainant sought in his OPRA request.
2. Although the Custodian did not unlawfully deny access to those records he provided to the Complainant on May 4, 2015, the Custodian did unlawfully deny access to at least some of the third party disclosure records. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose those records provided in response to the third party OPRA requests unless he certifies: 1) that no records existed to a particular third party OPRA request,

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

- or 2) that he did not provide records because he denied access to the third party requestor.
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,<sup>3</sup> to the Executive Director.<sup>4</sup>**
  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 September 28, 2017, the Council distributed its Interim Order to all parties. On October 3, 2017, the Custodian e-mailed the Government Records Council ("GRC"), seeking an extension of five (5) business days to comply with the Council's Order. On October 4, 2017, the GRC granted an extension until October 13, 2017.

On October 11, 2017, the Custodian responded to the Council's Interim Order. The Custodian certified that he searched his files and was producing all responsive records to the Complainant to ensure compliance with the Council's Order. The Custodian noted that he did not redact any of the disclosed records.

### Analysis

#### Compliance

At its September 28, 2017 meeting, the Council ordered the Custodian to disclose records provided in response to the third party OPRA requests unless he certified that: 1) no records to a particular request existed or 2) he denied access to the request. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On September 28, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 5, 2017.

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<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>4</sup> 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 October 3, 2017, the third (3<sup>rd</sup>) business day after receipt of the Order, the Custodian sought an extension of time, which the GRC granted through October 13, 2017. On October 11, 2017, within the extended time frame to comply with the Order, the Custodian provided to the Complainant and GRC all third party OPRA requests and a number of responses with the records disclosed. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

However, upon review of the compliance in total, the GRC notes that the Custodian still did not provide all documents disclosed in response to the third party OPRA requests. This failure is limited to third party requests for tax export files. The evidence of record indicates that the Custodian provided the files to the requestors as each OPRA request is marked “Done” with the date of completion. However, the Custodian did not attach the files to his compliance and did not certify that he provided them in another medium. The Custodian also did not certify to their non-existence within the Borough, if applicable. For this reason, the Custodian has failed to comply with the Council’s Order a second time.

Therefore, the Custodian failed to comply with the Council’s September 28, 2017 Interim Order. The Custodian timely responded in the extended time frame providing responsive third-party OPRA requests to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, although the Custodian provided to the Complainant some of the records disclosed in response to third party OPRA requests, he failed to provide disclosed tax export files for a number of the requests.

### **Council’s October 31, 2017 Interim Order is Enforceable**

“The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. The Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue.

### **Knowing & Willful**

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated

OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian failed to respond timely to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply successfully with two (2) Interim Orders. The Custodian's actions thus might be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. Therefore, this complaint should be referred to the OAL for the limited purpose of conducting a proof hearing on whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the evidence of record supports that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, in the interest of expediency the OAL should determine the reasonable amount to which he is entitled.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's September 28, 2017 Interim Order. The Custodian timely responded in the extended time frame providing responsive third-party OPRA requests to the Complainant. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. However, although the Custodian provided to the Complainant some of the records disclosed in response to third party OPRA requests, he failed to provide disclosed tax export files for a number of the requests.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. The Council stresses that the issue as to the disclosure of the records responsive to the request has already been determined by the Council and thus is not an outstanding issue.
3. The Custodian failed to respond timely to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply successfully with two (2) Interim Orders. The Custodian's actions thus might

be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for the limited purpose of conducting proof hearing on whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Additionally, the evidence of record supports that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, in the interest of expediency the Office of Administrative Law should determine the reasonable amount to which he is entitled.

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

October 24, 2017



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

September 26, 2017 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2015-134

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not fully complied with the Council’s April 25, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame providing evidence of his May 4, 2015 response and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not provide all records the Complainant sought in his OPRA request.
2. Although the Custodian did not unlawfully deny access to those records he provided to the Complainant on May 4, 2015, the Custodian did unlawfully deny access to at least some of the third party disclosure records. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose those records provided in response to the third party OPRA requests unless he certifies: 1) that no records existed to a particular third party OPRA request, or 2) that he did not provide records because he denied access to the third party requestor.
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,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

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





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 26<sup>th</sup> Day of September, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 28, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 26, 2017 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-134**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all OPRA requests filed and exact copies of all records disclosed (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

**April 25, 2017 Council Meeting:**

At its April 25, 2017 public meeting, the Council considered the April 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. The Council will address whether the Custodian properly disclosed the responsive OPRA requests and disclosed records (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.
2. The Custodian might have unlawfully denied access to the records responsive to the Complainant's April 25, 2015 OPRA request. N.J.S.A. 47:1A-6; Scheeler v. Office of the Governor, 2017 N.J. Super. LEXIS 9, 17-18 (App. Div. 2017). The Custodian must either: 1) disclose all responsive records by the requested method of delivery; or 2) certify to whether he sent the records on a prior date and provide supporting documentation of the disclosure. Further, should any responsive third party OPRA

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

requests fall under the exemption in N.J.S.A. 47:1A-1.1, the Custodian must certify to the exact number of exempt third party OPRA requests.

3. **The Custodian shall comply with item 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,<sup>3</sup> to the Executive Director.<sup>4</sup>**
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 April 27, 2017, the Council distributed its Interim Order to all parties. On May 3, 2017, the Custodian sought an extension of time until May 10, 2017, to comply with the Order, which the Government Records Council ("GRC") granted.

On May 10, 2017, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he provided all responsive records to the Complainant on May 4, 2015. The Custodian certified that, contrary to the Complainant's assertions in the Denial of Access Complaint, he did not deny access to any responsive records.

#### Analysis

#### Compliance

At its April 25, 2017 meeting, the Council ordered the Custodian to: 1) disclose the responsive records to the Complainant; or 2) certify that he sent the records on a prior date and provide supporting documentation. Further, the Council required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 27, 2017, 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 May 4, 2017.

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<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>4</sup> 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 May 3, 2017, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian sought an extension of time until May 10, 2017, which the GRC granted. On May 10, 2017, the Custodian certified that he previously provided all responsive records to the Complainant on May 4, 2015. The Custodian attached copies of two (2) e-mails in support of his disclosure, as well as the attached records provided. The Custodian also included certified confirmation of compliance to the Executive Director.

Initially, the GRC notes that the Complainant filed the instant complaint, asserting that he did not receive a response. A review of the two (2) e-mails indicates that the Custodian sent the first one to the proper e-mail address. However, the Custodian did not send the second e-mail to the correct e-mail address. This fact may have caused confusion during the initial response time frame. Further, in reviewing the supporting documentation submitted, the Custodian did not disclose to the Complainant all copies of the "records disclosed." Specifically, the Complainant sought copies of disclosed records for all OPRA requests (excluding his own OPRA requests) during the applicable time frame. The Custodian did include some responses and disclosed records but appears to have failed to disclose others. By way of example, requestors in a majority of OPRA requests sought access to tax export files. However, the Custodian provided no evidence supporting that he included those files (if same were disclosed) in his response to the Complainant. In another instance, the Custodian disclosed an e-mail response to an anonymous requestor but did not include the attached documents as part of his disclosure here. Based on the foregoing, the Custodian has not fully complied with the Council's Order.

Therefore, the Custodian has not fully complied with the Council's April 25, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame by providing evidence of his May 4, 2015 response and simultaneously providing certified confirmation of compliance to the Executive Director. However, the Custodian did not provide all records the Complainant sought in his OPRA request.

### **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 Council previously held that the Custodian may have unlawfully denied access to the records responsive to the Complainant's April 25, 2015 OPRA request. Thus, the Council ordered the Custodian either to disclose the responsive records or provide a legal certification and supporting documentation that he previously provided them. Upon review of the Custodian's compliance submission, it appears that the Custodian did provide records to the Complainant in May 2015. The attachment to the May 4, 2015 e-mail included a number of third party OPRA requests, some of the Custodian's responses, and a few of the records disclosed (such as a permit log and permit application). However, as noted above, the Custodian's disclosure did not include all responsive records. Specifically, a review of compliance indicates that the Custodian did not

provide certain records disclosed in response to the third party OPRA requests to the Complainant.

As an example of the failure to disclose said records, the Custodian included in his response an anonymous request dated October 1, 2014. He also included his e-mail response dated October 2, 2014, attaching multiple records. The Custodian provided both the OPRA request and his response to the Complainant but did not include copies of those records disclosed. Additionally, the Custodian did not include copies of any tax export files provided to two (2) requestors who routinely sought same. Further, the Custodian provided no lawful basis for not disclosing the records, whether that none existed or that the disclosed records were exempt for some reason. Also, with the exception of one (1) instance, the Custodian did not advise whether he denied access to the third party OPRA requests at that time, thus negating the need to provide those third party OPRA disclosed records.

Accordingly, although the Custodian did not unlawfully deny access to those records he provided to the Complainant on May 4, 2015, the Custodian did unlawfully deny access to at least some of the third party disclosure records. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose those records provided in response to the third party OPRA requests unless he certifies: 1) that no records existed to a particular third party OPRA request, or 2) that he did not provide records because he denied access to the third party requestor.

### **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 has not fully complied with the Council's April 25, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame providing evidence of his May 4, 2015 response and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian did not provide all records the Complainant sought in his OPRA request.
2. Although the Custodian did not unlawfully deny access to those records he provided to the Complainant on May 4, 2015, the Custodian did unlawfully deny access to at least some of the third party disclosure records. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose those records provided in response to the third party OPRA

- requests unless he certifies: 1) that no records existed to a particular third party OPRA request, or 2) that he did not provide records because he denied access to the third party requestor.
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,<sup>5</sup> to the Executive Director.<sup>6</sup>**
  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

September 19, 2017

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

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



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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

April 25, 2017 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2015-134

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council ("Council") considered the April 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. The Council will address whether the Custodian properly disclosed the responsive OPRA requests and disclosed records (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.
2. The Custodian might have unlawfully denied access to the records responsive to the Complainant's April 25, 2015 OPRA request. N.J.S.A. 47:1A-6; Scheeler v. Office of the Governor, 2017 N.J. Super. LEXIS 9, 17-18 (App. Div. 2017). The Custodian must either: 1) disclose all responsive records by the requested method of delivery; or 2) certify to whether he sent the records on a prior date and provide supporting documentation of the disclosure. Further, should any responsive third party OPRA requests fall under the exemption in N.J.S.A. 47:1A-1.1, the Custodian must certify to the exact number of exempt third party OPRA requests.
3. **The Custodian shall comply with item 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

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

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 25<sup>th</sup> Day of April, 2017

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: April 27, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 25, 2017 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-134**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all OPRA requests filed and exact copies of all records disclosed (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

**Custodian of Record:** Donald E. Kazar

**Request Received by Custodian:** April 28, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 13, 2015

**Background**

**September 29, 2016 Council Meeting:**

At its September 29, 2016 public meeting, the Council considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The issue of whether the Custodian properly disclosed any responsive records should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

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 removal of the standing abeyance and full adjudication of this complaint.
4. The Council defers analysis of whether the Complainant is a prevailing party, pending the removal of the standing abeyance and full adjudication of this complaint.

#### Procedural History:

On October 3, 2016, the Council distributed its Interim Order to all parties. On January 27, 2017, the Appellate Division decided Scheeler, Jr. v. Office of the Governor, 2017 N.J. Super. LEXIS 9, 17-18 (App. Div. 2017) in a published opinion.

#### Analysis

#### Abeyance of Complaint

At its September 29, 2016 meeting, the Council held the instant complaint in abeyance, pending the outcome of Scheeler, Jr. Thereafter, on January 27, 2017, the Appellate Division affirmed the trial court's decision, reasoning that:

[A] citizen submitting an OPRA request ordinarily would not have a reasonable expectation that the request will not be disclosed to others. As noted, OPRA requests are "government records" and there is no OPRA exemption, legislative resolution, executive order or court rule that precludes their disclosure.

Even so, there may be individual cases in which a citizen may have a reasonable expectation of privacy regarding that citizen's OPRA request. However, the agency may deny the public access to the OPRA request only after it has considered and applied the [Burnett v. Cnty. of Bergen, 198 N.J. 408, 414 (2009)] balancing test. Nevertheless, there is no justification for denying the public access to all third-party OPRA requests merely because of the possibility that a requestor might have an interest in preserving the confidentiality of a particular request.

Finally, we note that under OPRA, the records custodian has the burden to show that the denial of access was authorized by law. *See* Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (September 28, 2004) (*citing* N.J.S.A. 47:1A-6) Here, defendants did not deny access on the basis of any exemption in OPRA. Instead, as previously noted, defendants relied exclusively on the dicta in Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). Thus, defendants did not carry their burden to show that the denials were based on any exemptions in OPRA . . . .

Scheeler v. Office of the Governor, 2017 N.J. Super. LEXIS 9, 17-18 (App. Div. 2017).

Accordingly, the Council should lift the abeyance order and proceed with adjudication of the complaint. The Council will address whether the Custodian properly disclosed the responsive OPRA requests and disclosed records (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

### **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 GRC notes that the Court in Scheeler, Jr., stated that “there is no OPRA exemption, legislative resolution, executive order or court rule that precludes” disclosure of third party OPRA requests. However, OPRA does provide for one such exemption. Specifically, OPRA provides that:

A government record shall not include . . . any written request by a crime victim for a record to which the victim is entitled to access as provided in this section, including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order . . . .

N.J.S.A. 47:1A-1.1.

Therefore, when responsive third party OPRA requests include those submitted by crime victims seeking access to records regarding the crime committed against them, the victims’ requests are expressly exempt.

Here, the Complainant contended that the Custodian initially failed to respond to his OPRA request for all third party OPRA requests and responses submitted between September 23, 2014, and April 25, 2015. Upon the filing of the Denial of Access Complaint, the Custodian e-mailed the Complainant, stating that he scanned the responsive records on May 4, 2015, and thought they were sent to the Complainant. The Custodian also stated that he would resend the responsive records to the Complainant.

In the SOI, the Custodian certified that he provided the responsive records to the Complainant, although any delay was inadvertent. Subsequent to the SOI, Complainant’s Counsel sent a letter brief to the GRC, arguing that the Custodian never sent the responsive records. Moreover, Counsel argued that the Custodian failed to support that he again disclosed same on May 13, 2015.

As noted by Complainant's Counsel, the evidence of record does not support that the Custodian initially or subsequently disclosed the records responsive to the subject request. Specifically, the Custodian did not include documentation showing that he sent the records to the Complainant on or around May 4, 2015. Further, aside from the Custodian's May 13, 2015 e-mail advising that he would resend the records, he provided no additional documentation to indicate that he did so. Based on the foregoing, and in tandem with the Court's decision in Scheeler, Jr., the GRC is not satisfied that the Custodian provided access to any records, even if he intended to do so.

Therefore, the Custodian might have unlawfully denied access to the records responsive to the Complainant's April 25, 2015 OPRA request. N.J.S.A. 47:1A-6; Scheeler, Jr., 2017 N.J. Super. LEXIS 9. The Custodian must either: 1) disclose all responsive records by the requested method of delivery; or 2) certify to whether he sent the records on a prior date and provide supporting documentation of the disclosure. Further, should any responsive third party OPRA requests fall under the exemption in N.J.S.A. 47:1A-1.1, the Custodian must certify to the exact number of exempt third party OPRA requests.

### **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 Council should lift the abeyance order and proceed with adjudication of the complaint. The Council will address whether the Custodian properly disclosed the responsive OPRA requests and disclosed records (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.
2. The Custodian might have unlawfully denied access to the records responsive to the Complainant's April 25, 2015 OPRA request. N.J.S.A. 47:1A-6; Scheeler v. Office of the Governor, 2017 N.J. Super. LEXIS 9, 17-18 (App. Div. 2017). The Custodian must either: 1) disclose all responsive records by the requested method of delivery; or 2) certify to whether he sent the records on a prior date and provide supporting documentation of the disclosure. Further, should any responsive third party OPRA requests fall under the exemption in N.J.S.A. 47:1A-1.1, the Custodian must certify to the exact number of exempt third party OPRA requests.

3. **The Custodian shall comply with item 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,<sup>3</sup> to the Executive Director.<sup>4</sup>**
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

April 18, 2017

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<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>4</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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Commissioner

**INTERIM ORDER**

**September 29, 2016 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2015-134

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The issue of whether the Custodian properly disclosed any responsive records should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division’s decision to this complaint.
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 removal of the standing abeyance and full adjudication of this complaint.
4. The Council defers analysis of whether the Complainant is a prevailing party, pending the removal of the standing abeyance and full adjudication of this complaint.



Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of September, 2016

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 3, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-134**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all OPRA requests filed and exact copies of all records disclosed (excluding those filed by the Complainant) from September 23, 2014, through April 25, 2015.

**Custodian of Record:** Donald E. Kazar  
**Request Received by Custodian:** April 28, 2015  
**Response Made by Custodian:** None  
**GRC Complaint Received:** May 13, 2015

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

**Request and Response:**

On April 25, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

**Denial of Access Complaint:**

On May 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request in a timely manner. Specifically, the Complainant contended that the Custodian failed to respond at all by May 6, 2015, which the Complainant calculated to be the seventh (7<sup>th</sup>) business day. The Complainant contended that the Custodian, who is well-versed in the statutory response time based on numerous prior GRC decisions against him, knowingly and willfully failed to respond timely to the subject OPRA requests. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset),

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

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



GRC Complaint No. 2009-233 (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160 *et seq.* (Final Decision dated September 25, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-161 *et seq.* (Interim Order dated August 28, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013).

The Complainant stated that given the Custodian's twenty-five (25) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

The Complainant thus requested that the GRC: 1) determine that the Custodian's responses resulted in a "deemed" denial; 2) order disclosure of all records responsive to the Complainant's "validly submitted OPRA request;" 3) determine that the Custodian knowingly and willfully violated OPRA, 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 appropriate.

#### Supplemental Response:

On May 13, 2015, the Custodian e-mailed the Complainant, advising that he received the instant complaint. The Custodian stated that he believed he sent the responsive records to the Complainant, as they were scanned on May 4, 2015. The Custodian noted that he would resend the records but that he was not sure why the Complainant did not initially receive them.

#### Statement of Information:

On June 4, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 28, 2015. The Custodian certified that he believed he provided all responsive records on May 4, 2015 because "they were scanned on May 4 [2015]." Further, the Custodian certified that he again provided the responsive records to the Complainant on May 13, 2015, after receiving the instant complaint.

#### Additional Submissions

On June 12, 2015, the Complainant's Counsel submitted a letter brief refuting that the Custodian ever sent the Complainant the responsive records. Counsel contended that, contrary to the Custodian's SOI certification that he resent the responsive records on May 13, 2015, the Complainant has not received the responsive records to date.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records

within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant contended that the Custodian failed to respond timely to his OPRA request. Upon receipt of the Denial of Access Complaint, the Custodian e-mailed the Complainant, advising that he believed that records were disclosed because "they were scanned on May 4, [2015]." In the SOI, the Custodian certified that he received the Complainant's OPRA request on April 28, 2015, and "thought" he responded on May 4, 2015. However, the Custodian provided no evidence proving that he did, in fact, provide a written response to the Complainant prior to the expiration of the statutory time frame. Thus, the evidence of record supports that the Complainant's OPRA request was "deemed" denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Abeance of Complaint**

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. Regarding the disclosability of OPRA request forms pursuant to an OPRA request, the Appellate Division is currently addressing that issue in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. There, defendants are arguing that they lawfully denied access to OPRA requests based on the court's holding in Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). The GRC notes that it has issued a few decisions regarding the disclosability of OPRA requests in the past. *See* Wolosky v. Twp. of Parsippany-Troy Hills (Morris), GRC Complaint No. 2010-317 (March 27, 2012); Anonymous v. NJ State Police, GRC Complaint No. 2014-78 (Interim Order January 30, 2015). However, the pending decision from the Appellate Division might affect the GRC's analysis on this issue going forward.

The records responsive to the Complainant's OPRA request here involve OPRA requests excluding those the Complainant filed with the Borough. Considering all the issues presented, as well as the prevailing question of disclosure currently being reviewed by the Appellate Division, the instant complaint should be held in abeyance pending the Appellate Division's decision in

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<sup>4</sup> A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Scheeler, Docket No. A-1236-14T3. Any decision to the contrary might lead to additional litigation and could entail unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved. *See, e.g. Verry v. Franklin Fire District No. 1 (Somerset)*, GRC Complaint No. 2014-365 (Interim Order dated September 29, 2015); *Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016).

Accordingly, the issue of whether the Custodian properly disclosed any responsive records should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division’s decision to this complaint.

### **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 removal of the standing abeyance and full adjudication of this complaint.

### **Prevailing Party Attorney’s Fees**

The Council defers analysis of whether the Complainant is a prevailing party, pending the removal of the standing abeyance and full adjudication of this complaint.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The issue of whether the Custodian properly disclosed any responsive records should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division’s decision to this complaint.
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 removal of the standing abeyance and full adjudication of this complaint.

4. The Council defers analysis of whether the Complainant is a prevailing party, pending the removal of the standing abeyance and full adjudication of this complaint.

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