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

Robert A. Verry\(^1\) Complainant

v.

Borough of South Bound Brook (Somerset)\(^2\) 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

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\(^1\) 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.

\(^2\) Represented by Francesco Taddeo, Esq. (Somerville, NJ).
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-134 – Supplemental Findings and Recommendations of the Council

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 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $500.00.”
N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (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
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
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 sent 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 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
Date Received at Agency: September 13, 2018 (emailed)
Date Mailed to Parties: September 13, 2018 (emailed)

SARAH G. CROWLEY, ALJ

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
INTERIM ORDER

October 31, 2017 Government Records Council Meeting

Robert A. Verry
Complainant

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 31st 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. Verry1
Complainant

v.

Borough of South Bound Brook (Somerset)2
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, 2) that the records exist and were withheld in error, or 3) that the records are exempt from disclosure under the OPRA.

1 Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
2 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,** to the Executive Director.

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

4 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant 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 (3rd) 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
INTERIM ORDER

September 26, 2017 Government Records Council Meeting

Robert A. Verry
Complainant

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 1:4-4,1 to the Executive Director.2

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

2 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian’s compliance with the Council’s Interim Order.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of 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**
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-134 – Supplemental Findings and Recommendations of the Executive Director

September 26, 2017 Council Meeting

GRC Complaint No. 2015-134

Robert A. Verry
Complainant

v.

Borough of South Bound Brook (Somerset)

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

1 Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
2 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,** \(^3\) to the Executive Director.

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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\(^3\) “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

\(^4\) Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant 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 (4th) 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 note 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 1:4-4,5 to the Executive Director.**

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

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

April 25, 2017 Government Records Council Meeting

Robert A. Verry
Complainant

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2015-134

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 1:4-4,1 to the Executive Director.2

1 "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
2 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.
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 25th 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. Verry1
Complainant

v.

Borough of South Bound Brook (Somerset)2
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

1 Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
2 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:


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 . . . .
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 1:4-4,3 to the Executive Director.4

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

4 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant 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.
INTERIM ORDER

September 29, 2016 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2015-134

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 29th 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**
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-134 – Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting

Robert A. Verry¹
Complainant

v.

Borough of South Bound Brook (Somerset)²
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

Background³

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 (7th) 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),

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
² Represented by Francesco Taddeo, Esq. (Somerville, NJ).
³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-134 – Findings and Recommendations of the Executive Director

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). 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.

Abeyance 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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4 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.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2015-134 – Findings and Recommendations of the Executive Director
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.

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

September 22, 2016