



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 26, 2017 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-147

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 complied with the Council’s April 25, 2017 Interim Order because he responded in the extended time frame by certifying that another search revealed that he provided to the Complainant all responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian’s initial search was insufficient, the Custodian ultimately did not unlawfully deny access to any records beyond the Paff OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian initially responded to the Complainant’s OPRA request within the statutorily mandated time frame and subsequently complied timely with the Council’s April 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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 Complainant already possessed the only outstanding responsive record at the time that he filed the complaint. Moreover, the Custodian certified that no other records existed, thus negating any further disclosure. Therefore, the Complainant is not a prevailing party and is not 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.

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 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 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-147

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all Open Public Records Act (“OPRA”) requests filed (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: January 15, 2014
Response Made by Custodian: January 27, 2014
GRC Complaint Received: May 27, 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 the adjudication of the complaint. The Council will address whether the Custodian properly conducted a search of his computer to locate additionally responsive OPRA requests (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.
2. The Custodian might have unlawfully denied access to the records responsive to the Complainant’s January 25, 2014 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 perform a second search for all responsive records, inclusive of those received electronically, and either: 1) disclose those OPRA requests not previously provided in his initial response via the requested method of delivery; or 2) certify that no additionally responsive records exist. The Custodian must also certify to this search.

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

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

Further, should any responsive third party OPRA requests not previously provided 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.

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, attaching one (1) OPRA request filed by John Paff. Therein, the Custodian certified that the subject of this complaint was the Paff OPRA request for which disclosure was delayed due to its location. The Custodian certified that he conducted another search and confirmed that all responsive records in the Borough's possession were provided at the time of his response.

The Custodian also asserted that the complaint should be dismissed because all records were provided. Further, the Complainant asserted that the Complainant already possessed the Paff OPRA request because he received it as part of an unrelated OPRA request. The Custodian thus asserted that he twice produced the Paff request, although doing so was redundant.

Analysis

Compliance

At its April 25, 2017 meeting, the Council ordered the Custodian to: 1) disclose to the Complainant responsive records not previously provided in his original response; or 2) certify

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.

that no additional records exist. 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.

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 conducted a second search and determined that he provided to the Complainant all records responsive to the subject OPRA request.

Therefore, the Custodian complied with the Council's April 25, 2017 Interim Order because he responded in the extended time frame by certifying that another search revealed that he provided to the Complainant all responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “[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)).

Although the Custodian's initial search was insufficient, the Custodian ultimately did not unlawfully deny access to any records beyond the Paff OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian initially responded to the Complainant's OPRA request within the statutorily mandated time frame and subsequently complied timely with the Council's April 25,

2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he 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.

Here, the Complainant filed this complaint, asserting that the Custodian unlawfully denied access to at least the Paff OPRA request. The Complainant noted that he received the record in response to an unrelated OPRA request. In the SOI, the Custodian argued that his failure to produce the Paff OPRA request was an oversight based on its location and other circumstances at that time. Following a nine (9) month abeyance of this complaint, the Council ordered the Custodian either to provide any additional third party OPRA requests not previously provided or certify that none existed. The Custodian responded to the Order, attaching the Paff OPRA request and certifying that no other records existed.

In determining whether the Complainant is a prevailing party entitled to an award of attorney’s fees, the evidence of record supports that the instant complaint did not bring about a change in the Custodian’s conduct. Nor was it the causal nexus for relief.

First, the Complainant filed the complaint after receiving the Paff OPRA request in response to an unrelated OPRA request. Thus, he was already in possession of the Paff OPRA request at the time he filed this complaint, which negated any need for additional disclosure. *See* Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008) (holding that requiring a custodian to disclose a record already in a requestor’s possession does not advance

the purposes of OPRA). Indeed, the Council has routinely declined to order disclosure of a record when the evidence supports that a custodian provided it to the complainant prior to a decision. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2010-86 (Interim Order dated June 28, 2011); *Frye v. Kenilworth Police Dep't (Union)*, GRC Complaint No. 2013-326 (July 2014); *Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May)*, GRC Complaint No. 2014-204 (January 2015); *Giambri v. Sterling High Sch. Dist. (Camden)*, GRC Complaint No. 2014-394 (July 2015).

Second, the Custodian complied with the Council's Order by certifying that no additional records responsive to the Complainant's OPRA request existed. Thus, beyond the Paff OPRA request (which the Complainant already possessed), the Complainant did not achieve any relief through the filing of the complaint. Further, such a conclusion is also consistent with the Council's decision on the prevailing party fee issue in *Verry*, GRC 2010-86 (October 2011). There, the Council declined to order disclosure of the records at issue because the Complainant received them in response to another OPRA request. Further, the Council determined that the Complainant was not a prevailing party because the disclosure was unrelated to that complaint. It should also be noted that the instant complaint departs from *Verry*, GRC 2010-86, in that the Complainant here possessed the Paff OPRA request when he filed this complaint. This is contrary to *Verry*, GRC 2010-86, in that the complainant there received the records from the unrelated OPRA request during the pendency of that complaint. Thus, the GRC finds that the facts here wholly support that the Complainant is not prevailing party and is not entitled to an award of attorney's fees.

Accordingly, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. *See Teeters*, 387 *N.J. Super.* 432. Additionally, no 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 Complainant already possessed the only outstanding responsive record at the time that he filed the complaint. Moreover, the Custodian certified that no other records existed, thus negating any further disclosure. Therefore, the Complainant is not a prevailing party and is not 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 25, 2017 Interim Order because he responded in the extended time frame by certifying that another search revealed that he provided to the Complainant all responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian's initial search was insufficient, the Custodian ultimately did not unlawfully deny access to any records beyond the Paff OPRA request. *N.J.S.A.* 47:1A-6. Further, the Custodian initially responded to the Complainant's OPRA

request within the statutorily mandated time frame and subsequently complied timely with the Council's April 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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 Complainant already possessed the only outstanding responsive record at the time that he filed the complaint. Moreover, the Custodian certified that no other records existed, thus negating any further disclosure. Therefore, the Complainant is not a prevailing party and is not 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.

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

September 19, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 25, 2017 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-147

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

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

1. The Council should lift the abeyance order and proceed with the adjudication of the complaint. The Council will address whether the Custodian properly conducted a search of his computer to locate additionally responsive OPRA requests (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.
2. The Custodian might have unlawfully denied access to the records responsive to the Complainant's January 25, 2014 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 perform a second search for all responsive records, inclusive of those received electronically, and either: 1) disclose those OPRA requests not previously provided in his initial response via the requested method of delivery; or 2) certify that no additional responsive records exist. The Custodian must also certify to this search. Further, should any responsive third party OPRA requests not previously provided 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



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**

GRC Complaint No. 2015-147

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all Open Public Records Act (“OPRA”) requests filed (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.

Custodian of Record: Donald E. Kazar

Request Received by Custodian: January 15, 2014

Response Made by Custodian: January 27, 2014

GRC Complaint Received: May 27, 2015

Background

July 26, 2016 Council Meeting:

At its July 26, 2016 public meeting, the Council considered the June 21, 2016 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 as edited. The Council, therefore, found that:

1. Taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant’s OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no “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 Custodian’s initial failure to locate a record constitutes an insufficient search. Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).

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

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

3. The issue of whether the Custodian conducted a search for responsive OPRA requests on his computer 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.
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 July 27, 2016, the Council distributed its Interim Order to all parties.³ On January 27, 2017, the Appellate Division decided Scheeler, Jr. v. Office of the Governor, 2017 N.J. Super. LEXIS 9, 17-18 (App. Div. 2017) in a published opinion.

Analysis

Abeyance of Complaint

At its July 26, 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*

³ The GRC notes that Custodian's Counsel sent an e-mail on July 27, 2016 seeking an extension of time to allow the Custodian to address the Council's Interim Order. Notwithstanding the GRC's response seeking clarification as to the exact extension sought, the Custodian did not submit any correspondence thereafter.

N.J.S.A. 47:1A-6) Here, defendants did not deny access on the basis of any exemption in OPRA. Instead, as previously noted, defendants relied exclusively on the dicta in Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). Thus, defendants did not carry their burden to show that the denials were based on any exemptions in OPRA

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

Accordingly, the Council should lift the abeyance order and proceed with the adjudication of the complaint. The Council will address whether the Custodian properly conducted a search of his computer to locate additionally responsive OPRA requests (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.

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 knowingly withheld at least one (1) responsive OPRA request submitted by John Paff. The Complainant contended that he eventually received the request in response to an unrelated OPRA request but believed this subsequent disclosure was proof that the Custodian knowingly and willfully violated OPRA. The Complainant requested that the Council require the Custodian to disclose all responsive records. In the SOI, the Custodian asserted that his failure to provide Mr. Paff’s OPRA request was based on an oversight. Specifically, the Custodian certified that Mr. Paff’s request was on his computer and not printed out due to the holidays and other factors. The Custodian also argued that this

complaint was moot because he provided the outstanding OPRA request to the Complainant in response to the unrelated OPRA request.

In reviewing the evidence of record in its prior adjudication, the Council determined that the Custodian's search was insufficient. The Council reasoned that the Custodian's "failure to locate this easily identifiable record raises a question of whether he performed a search of his computer prior to disclosing records initially to the Complainant." Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016) at 5. However, the Council placed this complaint in abeyance prior to ordering the Custodian to take any further action. Now that the Court has decided in Scheeler, Jr., the Council can order the Custodian to perform a more adequate search to determine whether he provided to the Complainant the full universe of responsive records.

Therefore, the Custodian might have unlawfully denied access to the records responsive to the Complainant's January 15, 2014 OPRA request. N.J.S.A. 47:1A-6; Scheeler, Jr., 2017 N.J. Super. LEXIS 9. The Custodian must perform a second search for all responsive records, inclusive of those received electronically, and either: 1) disclose those OPRA requests not previously provided in his initial response via the requested method of delivery; or 2) certify that no additional responsive records exist. The Custodian must also certify to this search. Further, should any responsive third party OPRA requests not previously provided 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 the adjudication of the complaint. The Council will address whether the Custodian properly conducted a search of his computer to locate additionally responsive OPRA requests (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.
2. The Custodian might have unlawfully denied access to the records responsive to the Complainant's January 25, 2014 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 perform a second search for all responsive records, inclusive of those received electronically, and either: 1) disclose those OPRA requests not previously provided in his initial response via the requested method of delivery; or 2) certify that no additional responsive records exist. The Custodian must also certify to this search. Further, should any responsive third party OPRA requests not previously provided 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 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

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

April 18, 2017

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

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



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 26, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-147

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 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. Taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant’s OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no “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 Custodian’s initial failure to locate a record constitutes an insufficient search. Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).
3. The issue of whether the Custodian conducted a search for responsive OPRA requests on his computer 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.
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.



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-147

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all Open Public Records Act (“OPRA”) requests filed (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: January 15, 2014
Response Made by Custodian: January 27, 2014
GRC Complaint Received: May 27, 2015

Background³

Request and Response:

On January 15, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 27, 2014, the seventh (7th) business day after receipt of the OPRA request,⁴ the Custodian responded in writing, disclosing multiple records.

Denial of Access Complaint:

On May 27, 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 by January 24, 2014, 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 request.

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.

⁴ All public agencies were closed on January 20, 2014, for a federal holiday.

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

In addition, the Complainant contended that the Custodian knowingly and willfully withheld one (1) OPRA request submitted by John Paff, which was responsive to the subject OPRA request. The Complainant asserted that, at the time of the Custodian's response, he possessed no evidence that the Custodian failed to provide the record.⁵ The Complainant stated that he subsequently submitted an OPRA request to the Custodian on April 25, 2015, seeking all e-mails between the Custodian and Mr. Paff regarding OPRA from the time period January 1, 2013 and the date of the request. The Complainant averred that the Custodian provided, among other records, a copy of the withheld OPRA request.

The Complainant contended that this disclosure proves that the Custodian never intended to disclose Mr. Paff's request to the Complainant in response to the subject OPRA request. The Complainant contended that Mr. Paff's OPRA request was integral to arguments presented in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-57, *et seq.* (Interim Order dated May 24, 2016). The Complainant surmised that the Custodian deliberately and intentionally withheld Mr. Paff's request with no intention of ever disclosing it to the Complainant. Further, the Complainant asserted that the Custodian apparently intended to hide the record "*forever*" (emphasis in original). The Complainant asserted that the record would have remained hidden had he not submitted the second OPRA request.

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 failure to respond in a timely manner resulted in a "deemed" denial; 2) order disclosure of all responsive records (and not those the Custodian "finds acceptable for the public to receive"); 3) determine that the Custodian knowingly and willfully violated OPRA, thereby 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. He complained.

⁵ The Complainant criticized that the GRC "unduly places the burden on [a requestor] to prove" that a custodian failed to disclose all responsive records. However, the GRC's long-standing case law supports that "credible evidence" must exist in the record to refute a custodian's certification that all records were provided. See Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2010-279 (Final Decision dated February 28, 2012); Ehmann v. Borough of Belmar (Monmouth), GRC Complaint No. 2014-281 (March 2015).

Statement of Information:

On June 23, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request “in January 2014.” The Custodian certified that his search included reviewing OPRA requests that had been received and locating responsive records. The Custodian certified that he responded in writing on January 27, 2014, disclosing responsive records.

The Custodian contended that the instant complaint was frivolous because the Complainant was in receipt of all responsive records. The Custodian asserted that nondisclosure of Mr. Paff’s request was the result of an oversight. The Custodian asserted that he inadvertently did not disclose Mr. Paff’s request to the Complainant because it was on his computer and not printed out “due to holidays and [the] nature of the request.” The Custodian argued that the Complainant’s arguments have no merit here because he ultimately disclosed Mr. Paff’s request to the Complainant. The Custodian asserted that the Complainant cannot argue that he never intended to disclose the record if he did just that in response to a subsequent OPRA request. The Custodian noted that this disclosure is the sole reason the Complainant filed the instant complaint. The Custodian requested that the GRC dismiss this complaint.

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).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant contended that the Custodian failed to respond in a timely manner. In the SOI, the Custodian certified that he received the Complainant’s OPRA request “in January 2014.” Thus, absent the Custodian certifying that he received the request on a specific date, the GRC is satisfied that the evidence of record supports that the Custodian received the Complainant’s OPRA request on January 15, 2014. Based on the foregoing, the response time frame began on January 16, 2014, which represents the first (1st) business day after receipt of the request. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011). In the Denial of Access Complaint, the Complainant contended that the last business day to respond was January 24, 2014, but that the Custodian did not respond until January 27, 2014. However, the Complainant’s time calculation ignores Martin Luther King, Jr., Day, a Federal holiday that

⁶ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

all State, County, and municipal agencies observed on January 20, 2014. Thus, by the GRC's calculation, the seventh (7th) business day was January 27, 2014, the day the Custodian responded by granting access to responsive records.

Therefore, taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant's OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "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.

Insufficient Search

A custodian is obligated to search for and find identifiable government records listed in an OPRA request. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); May v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007); Schneble v. NJ Dep't of Env'tl. Prot., GRC Complaint 2007-220 (April 2008). Further, "it is among a custodian's duties to perform a complete search for the requested records before responding to an OPRA request as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law." Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014) at 3.

In Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), the Council held that the custodian denied access as a result of an initially inadequate search pursuant to complainant's OPRA request and failed to bear the burden of proving due diligence in searching for the records. Specifically, the complainant submitted two (2) OPRA requests, one year apart, for the same records. The custodian conducted a search one year after the initial search and located the records in the same area, within an office that she admitted having searched a year earlier.

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013), the custodian initially responded to the complainant's request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. In accordance with Schnebel, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Id.

Here, the Complainant sought and the Custodian disclosed a number of responsive records within seven (7) business days. However, the Complainant submitted an unrelated OPRA request on April 25, 2015: the Custodian's response included an OPRA request (sent via e-mail) that was responsive to the OPRA request at issue here that he did not initially disclose. In the Denial of Access Complaint, the Complainant contended that the Custodian purposely withheld the record and never intended to disclose it because of its relevance to Verry, GRC 2015-57 *et seq.* Conversely, the Custodian certified in the SOI that his failure to disclose the record initially "was a mere oversight." The Custodian certified that he did not locate the record because he did not print it out "due to holidays and [the] nature of the request."

The Council's decision in Lebbing is applicable here. Specifically, the Custodian provided records on January 27, 2014; however, he somehow failed to locate on his computer Mr. Paff's clearly identified OPRA request. The Custodian subsequently located and disclosed to the Complainant Mr. Paff's OPRA request in response to another OPRA request that sought e-mails between Mr. Paff and the Custodian. The Custodian's failure to locate this easily identifiable record raises a question of whether he performed a search of his computer prior to disclosing records initially to the Complainant. However, the Custodian did not provide a detailed explanation of his search other than "reviewed OPRA requests." Thus, the evidence clearly supports that the Custodian conducted an insufficient response prior to disclosing responsive records to the Complainant.

Accordingly, the Custodian's initial failure to locate a record constitutes an insufficient search. Lebbing, GRC 2009-251. Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner, GRC 2013-52.

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 Custodian's insufficient search raises the question of whether he performed a search on his computer for responsive records. However, should the GRC require the Custodian to perform a search of his computer and confirm whether any additional records exist, the issue of disclosability of OPRA requests would certainly come into play. The GRC has already held in abeyance other complaints regarding the disclosability of OPRA requests due to the pending Appellate Division action. *See* Scheeler, Jr. v. NJ Office of the Governor, GRC Complaint No. 2014-67 (Interim Order dated February 23, 2016).

Considering the prevailing question of disclosure currently being reviewed by the Appellate Division, the instant complaint should be held in abeyance pending a decision in Scheeler. 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 (September 2015).

Accordingly, the issue of whether the Custodian conducted a search for responsive OPRA requests on his computer 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 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. Taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant's OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "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 Custodian's initial failure to locate a record constitutes an insufficient search. Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).
3. The issue of whether the Custodian conducted a search for responsive OPRA requests on his computer 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.
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

June 21, 2016⁷

⁷ This complaint was prepared for adjudication at the Council's June 28, 2016 meeting, but could not be adjudicated due to lack of quorum.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 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: July 27, 2016