



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-370

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 Supplemental Findings and Recommendations of the 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 the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the GRC to address Complainant’s Counsel fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of June, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting

Robert A. Verry¹
Complainant

GRC Complaint No. 2015-370

v.

Borough of South Bound Brook (Somerset)²
Custodial Agency

Records Relevant to Complaint:

1. An exact copy of the last fifteen (15) e-mails sbbplanning@aol.com sent directly related to official Borough business.
2. An exact copy of the last fifteen (15) e-mails sbbplanning@aol.com received directly related to official Borough business.
3. Any and all e-mails, e-mail attachments, and/or correspondences sent to and received from sbbplanning@aol.com regarding the Family Dollar (or any variation thereof) from January 1, 2013, to August 15, 2015.
4. Any and all e-mails, e-mail attachments, and/or correspondences sent to and received from sbbplanning@aol.com regarding the Quick Chek (or any variation thereof) from January 1, 2013, to August 15, 2015.

Regarding Item Nos. 1 and 2, the Complainant sought courtesy (CC) and blind (BC) copied e-mails as well. The Complainant also clarified that he sought e-mails pertaining to official business and not personal e-mails.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: August 16, 2015
Response Made by Custodian: August 25, 2015
GRC Complaint Received: June 22, 2015

¹ Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).

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

Background

February 27, 2018 Council Meeting:

At its February 27, 2018 public meeting, the Council considered the Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's January 30, 2018 Interim Order because he timely provided the requested records to the Complainant, and provided a signed certification to the Council Staff.
2. Although the Custodian unlawfully denied access to the e-mail correspondence in accordance with the Council's findings, the Custodian complied in full with the Council's November 14, 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. Pursuant to the Council's November 14, 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, 432 (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 responsive records to the Complainant in accordance with the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On March 1, 2018 the Council distributed its Interim Order to all parties. On April 4, 2018, the Council notified the parties that the deadline to provide a fee agreement had passed, and therefore the Complainant's Counsel had to until May 2, 2018 to provide a fee application.

On May 2, 2018, the Complainant's Counsel provided a fee application to the GRC. The Custodian's Counsel in turn had ten (10) business days to provide a response. On May 11, 2018, the Custodian's Counsel requested and was granted an adjournment of five (5) business days to provide a response. On May 23, 2018, the Custodian's Counsel notified the GRC that settlement

letters were exchanged between himself and Complainant's Counsel, and sought two (2) additional days to respond.

On May 25, 2018, the Complainant's Counsel notified the GRC via e-mail that the parties had settled the fees, and that the instant complaint should be dismissed accordingly.

Analysis

Prevailing Party Attorney's Fees

At its February 27, 2018 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that 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 Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On March 1, 2018, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on March 29, 2018. Following multiple extensions and the submission of a fee application, the parties continued to work towards a fee agreement. Ultimately, on May 25, 2018, Complainant's Counsel e-mailed the GRC advising that the fee issue was settled and that this consolidated complaint could be withdrawn. Custodian's Counsel was copied on that e-mail.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the GRC to address Complainant's Counsel fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the GRC to address Complainant's Counsel fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

June 19, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 27, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-370

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 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 Custodian complied with the Council’s January 30, 2018 Interim Order because he timely provided the requested records to the Complainant, and provided a signed certification to the Council Staff.
2. Although the Custodian unlawfully denied access to the e-mail correspondence in accordance with the Council’s findings, the Custodian complied in full with the Council’s November 14, 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. Pursuant to the Council’s November 14, 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, 432 (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 responsive records to the Complainant in accordance with the Council’s 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.**



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

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry,¹
Complainant**

GRC Complaint No. 2015-370

v.

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

Records Relevant to Complaint:

1. An exact copy of the last fifteen (15) e-mails sbbplanning@aol.com sent directly related to official Borough business.
2. An exact copy of the last fifteen (15) e-mails sbbplanning@aol.com received directly related to official Borough business.
3. Any and all e-mails, e-mail attachments, and/or correspondences sent to and received from sbbplanning@aol.com regarding the Family Dollar (or any variation thereof) from January 1, 2013, to August 15, 2015.
4. Any and all e-mails, e-mail attachments, and/or correspondences sent to and received from sbbplanning@aol.com regarding the Quick Chek (or any variation thereof) from January 1, 2013, to August 15, 2015.

Regarding Item Nos. 1 and 2, the Complainant sought courtesy (CC) and blind (BC) copied e-mails as well. The Complainant also clarified that he sought e-mails pertaining to official business and not personal e-mails.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: August 16, 2015
Response Made by Custodian: August 25, 2015
GRC Complaint Received: June 22, 2015

Background

November 14, 2017 Council Meeting:

At its November 14, 2017 public meeting, the Council considered the November 8, 2017

¹ Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).

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

Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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, and his failure to respond within the extended deadline 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Item Nos. 1 & 2 of the Complainant's OPRA request are invalid as they did not include a range of dates for the requested e-mails pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Moreover, requests seeking e-mails related to "official Borough business" are overly broad and invalid pursuant to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Alt v. City of Vineland (Cumberland), GRC Complaint No. 2013-205 (June 2014). Therefore, notwithstanding the Custodian's "deemed" denial, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
3. Item Nos. 3 & 4 of the Complainant's OPRA request are valid under OPRA as they identify a sender or recipient, provide a specific range of dates, and contain the subject of the e-mails. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Complainant has identified with sufficient particularity the subject matter of the requested e-mails pursuant to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). Accordingly, the Custodian has failed to bear his burden of proving that his denial of access to Item Nos. 3 and 4 of the Complainant's OPRA request was lawful. Thus, the Custodian must grant the Complainant access to records responsive to this portion of the request. If responsive records do not exist, the Custodian shall certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions (if needed), 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

5. 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.
6. 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 November 16, 2017, the Council distributed its Interim Order to all parties. On November 22, 2017, the Custodian requested an extension time to respond to until December 1, 2017. The Custodian responded to the Council's Interim Order on November 30, 2017, certifying his compliance with the Council's Interim Order and providing the Complainant with the requested records.

Analysis

Compliance

At its November 14, 2017 meeting, the Council ordered the Custodian to provide responsive records to the Complainant and to submit certified confirmation of compliance to the Executive Director. November 16, 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 November 24, 2017, accounting for the holiday break.

On November 22, 2017, the Custodian sought an extension of time to respond to the Council's Interim Order. The GRC granted the extension to until December 1, 2017. On November 30, 2017, the Custodian provided the Council Staff with evidence demonstrating he provided the Complainant with the requested records, as well as a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's January 30, 2018 Interim Order because he timely provided the requested records to the Complainant, and provided a signed certification to the Council Staff.

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.

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 unlawfully denied access to the e-mail correspondence in accordance with the Council’s findings, the Custodian complied in full with the Council’s November 14, 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.]

The Complainant filed the instant complaint to request that the GRC order disclosure of the requested e-mail correspondence. The Custodian argued in the Statement of Information that the requests were overly broad and therefore invalid OPRA requests. In its November 14, 2017 Interim Order, the Council disagreed in part and ordered the Custodian to disclose responsive records pertaining to Item nos. 3 and 4 of the Complainant's OPRA request, if any existed. Thereafter, between November 22, 2017 and November 30, 2017, the Custodian disclosed responsive records to the Complainant, with an accompanying certification. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, pursuant to the Council's November 14, 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. at 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 responsive records to the Complainant in accordance with the Council's 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. at 432, and Mason, 196 N.J. at 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 Custodian complied with the Council's January 30, 2018 Interim Order because he timely provided the requested records to the Complainant, and provided a signed certification to the Council Staff.
2. Although the Custodian unlawfully denied access to the e-mail correspondence in accordance with the Council's findings, the Custodian complied in full with the Council's November 14, 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. Pursuant to the Council's November 14, 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, 432 (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 responsive records to the Complainant in accordance with the Council's 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: Samuel A. Rosado
Staff Attorney

February 20, 2018



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

November 14, 2017 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-370

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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, and his failure to respond within the extended deadline 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Item Nos. 1 & 2 of the Complainant’s OPRA request are invalid as they did not include a range of dates for the requested e-mails pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Moreover, requests seeking e-mails related to “official Borough business” are overly broad and invalid pursuant to MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Alt v. City of Vineland (Cumberland), GRC Complaint No. 2013-205 (June 2014). Therefore, notwithstanding the Custodian’s “deemed” denial, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
3. Item Nos. 3 & 4 of the Complainant’s OPRA request are valid under OPRA as they identify a sender or recipient, provide a specific range of dates, and contain the subject of the e-mails. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No.



2009-07 (April 2010). The Complainant has identified with sufficient particularity the subject matter of the requested e-mails pursuant to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). Accordingly, the Custodian has failed to bear his burden of proving that his denial of access to Item Nos. 3 and 4 of the Complainant's OPRA request was lawful. Thus, the Custodian must grant the Complainant access to records responsive to this portion of the request. If responsive records do not exist, the Custodian shall certify to this fact.

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions (if needed), 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**
5. 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.
6. 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 14th Day of November, 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 16, 2017

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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-370

v.

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

Records Relevant to Complaint:

1. An exact copy of the last fifteen (15) e-mails sbbplanning@aol.com sent directly related to official Borough business.
2. An exact copy of the last fifteen (15) e-mails sbbplanning@aol.com received directly related to official Borough business.
3. Any and all e-mails, e-mail attachments, and/or correspondences sent to and received from sbbplanning@aol.com regarding the Family Dollar (or any variation thereof) from January 1, 2013, to August 15, 2015.
4. Any and all e-mails, e-mail attachments, and/or correspondences sent to and received from sbbplanning@aol.com regarding the Quick Chek (or any variation thereof) from January 1, 2013, to August 15, 2015.

Regarding Item Nos. 1 and 2, the Complainant sought courtesy (CC) and blind (BC) copied e-mails as well. The Complainant also clarified that he sought e-mails pertaining to official business and not personal e-mails.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: August 16, 2015
Response Made by Custodian: August 25, 2015
GRC Complaint Received: June 22, 2015

¹ Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).

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

Background³

Request and Response:

On August 16, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 25, 2015, the Custodian responded via e-mail, seeking an extension of time to until September 1, 2015. No additional response was made by the Custodian prior to the filing of this complaint.

Denial of Access Complaint:

On November 20, 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 OPRA request within the extended deadline.

The Complainant asserted that Item Nos. 1 & 2 are valid requests for e-mails coming from a private address because the request explicitly sought correspondence “directly related to official Borough business,” and that such e-mails are public records because they would have been “made” or “received” in the course of South Bound Brook’s official business, citing Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). Moreover, the records are identifiable since the Custodian can readily ascertain the last fifteen (15) e-mails sent or received from that address prior to August 15, 2015, the date of submission.

The Complainant further noted that Item Nos. 3 & 4 are similarly valid requests for e-mails and other correspondence pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The requests identify an e-mail address as the sender and recipient, a date range, and a subject matter for each, according to the Complainant.

Therefore, the Complainant requested that, should the GRC order the Custodian to produce the requested records; 1) the GRC should determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees, and 2) investigate whether the Custodian should be penalized pursuant to N.J.S.A. 47:1A-11.

Statement of Information:

On December 29, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on or about August 25, 2015. The Custodian argued that the matter should be dismissed, as the requested items are overbroad and undefined, referencing MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Elcavage, GRC No. 2009-07. The Custodian contended that a general term without additional context over a broad period of time is not a proper request under OPRA.

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.

In addition to dismissing the matter, the Custodian requested that the GRC review the possibility of seeking costs from the Complainant for “misleading information and/or omissions and vexatious and frivolous complaints.”

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).⁴ 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 dated October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s OPRA request by seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated . . . the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

In the present case, the Custodian certified that his office received the OPRA request on or around August 25, 2015, responded that day, and sought an extension of time to September 1, 2015. However, the Custodian failed to respond within the extended period.

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

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.

days, and his failure to respond within the extended deadline 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), Kelley, GRC 2007-11, and Kohn, GRC 2007-124. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).

Validity of the Request

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 New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). *See also Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

The Council has established criteria deemed necessary under OPRA to request an e-mail communication. Elcavage, GRC 2009-07. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also Sandoval v. N.J. State Parole Bd.*, GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). Thus, the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2009-124 (April 2010).

Requested Item Nos. 1 & 2

The Complainant requested the “last fifteen (15) e-mails” sent or received via a specified address that related directly to “official Borough business.” The Complainant argued that the requests seek identifiable records since the Custodian can easily ascertain the last fifteen (15) e-mails sent or received prior to August 15, 2015, the date of submission. However, a request for government records from an alleged private e-mail account must still conform to the requirements set forth in Elcavage, GRC 2009-07.

Here, the requests do not specify a date or range of dates but instead ask for a specific number of e-mails beginning from the date of submission and up to the total number requested, notwithstanding the actual date of receipt or delivery. Although the Complainant identifies a starting point, the end point is inherently variable depending on whether each e-mail is responsive. Regardless, even if this criterion satisfied the date range element under Elcavage, GRC 2009-07, the requests fail to identify a specific subject or content matter. In Alt v. City of Vineland (Cumberland), GRC Complaint No. 2013-205 (June 2014), the Council held that because the complainant’s request for e-mails pertaining to “city business” could encompass a multitude of subjects, the request was invalid for failing to identify a specific subject or content matter. Similarly, the Complainant’s request for e-mails pertaining to “official Borough business” could include a host of subjects, requiring the Custodian to read every e-mail sent or received to determine whether it relates to official business. OPRA does not require a Custodian to conduct an open-ended search of an agency’s files. MAG, 375 N.J. Super. at 549.

Accordingly, Item Nos. 1 & 2 of the Complainant’s OPRA request are invalid as they did not include a range of dates for the requested e-mails pursuant to Elcavage, GRC 2009-07. *See also Verry*, GRC 2009-124. Moreover, requests seeking e-mails related to “official Borough business” are overly broad and invalid pursuant to MAG, 375 N.J. Super. at 546, and Alt, GRC 2013-205. Therefore, notwithstanding the Custodian’s “deemed” denial, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Requested Item Nos. 3 & 4

In contrast to the above, Item Nos. 3 & 4 identify a timeframe (January 1, 2013, to August 15, 2015) and subject matter (Family Dollar or Quick Chek), in addition to the sender and recipient. The request is facially valid under the requirements set forth in Elcavage, GRC 2007-07. In particular, the described identifiers are sufficiently narrow for the Custodian to conduct a targeted search for responsive e-mails in accordance with MAG, 375 N.J. Super. at 549.

Therefore, Item Nos. 3 & 4 of the Complainant's OPRA request are valid under OPRA as they identify a sender or recipient, provide a specific range of dates, and contain the subject of the e-mails. Elcavage, GRC 2009-07. The Complainant has identified with sufficient particularity the subject matter of the requested e-mails pursuant to MAG, 375 N.J. Super. at 549. Accordingly, the Custodian has failed to bear his burden of proving that his denial of access to Item Nos. 3 and 4 of the Complainant's OPRA request was lawful. Thus, the Custodian must grant the Complainant access to records responsive to this portion of the request. If responsive records do not exist, the Custodian shall certify to this fact.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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, and his failure to respond within the extended deadline 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), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Item Nos. 1 & 2 of the Complainant's OPRA request are invalid as they did not include a range of dates for the requested e-mails pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Moreover, requests seeking e-mails related to "official Borough business" are overly broad and invalid pursuant to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Alt v. City of Vineland (Cumberland), GRC Complaint No. 2013-205 (June 2014). Therefore, notwithstanding

the Custodian's "deemed" denial, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

3. Item Nos. 3 & 4 of the Complainant's OPRA request are valid under OPRA as they identify a sender or recipient, provide a specific range of dates, and contain the subject of the e-mails. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Complainant has identified with sufficient particularity the subject matter of the requested e-mails pursuant to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). Accordingly, the Custodian has failed to bear his burden of proving that his denial of access to Item Nos. 3 and 4 of the Complainant's OPRA request was lawful. Thus, the Custodian must grant the Complainant access to records responsive to this portion of the request. If responsive records do not exist, the Custodian shall certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions (if needed), 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 1:4-4,⁶ to the Executive Director.⁷**
5. 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.
6. 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: Samuel A. Rosado
Staff Attorney

November 8, 2017

⁶ "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."

⁷ 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.