



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**

**April 26, 2016 Government Records Council Meeting**

Susan Noto  
Complainant

Complaint No. 2015-95

v.

Essex County Register of Deeds & Mortgages  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 22, 2016 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 it dismisses the complaint because the Complainant withdrew the complaint (via Counsel) in an e-mail to the GRC on April 21, 2016. 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 26<sup>th</sup> Day of April, 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: May 2, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Susan Noto<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-95**

**v.**

**Essex County Register of Deeds & Mortgages<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies on compact disc (“CD”) or digital versatile disc (“DVD”) of recorded document images for the recording date range of March 1, 2013, through December 31, 2014.<sup>3</sup>

**Custodian of Record:** Maite Gaeta<sup>4</sup>  
**Request Received by Custodian:** September 30, 2014  
**Response Made by Custodian:** October 28, 2014  
**GRC Complaint Received:** April 7, 2015

**Background**

**December 15, 2015 Council Meeting:**

At its December 15, 2015 public meeting, the Council considered the November 10, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request. 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 October 31, 2007);

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<sup>1</sup> Represented by Sarah Gordon, Esq. (Seattle, WA).

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant originally sought records through September 30, 2014, but she amended her request on January 12, 2015, to extend the time frame through December 31, 2014.

<sup>4</sup> The Complainant named Dana Rone, Register of Deeds, as the Custodian of Record on the Denial of Access Complaint. Additionally, Michael Venezia was the original Custodian of Record.

DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007).

2. [Dana] Rone unlawfully denied access to the Complainant's OPRA request because the evidence of record supports that it contained sufficient information for both Mr. Narvaez and Ms. Rone to locate responsive records and even provide an estimated charge on two (2) occasions. N.J.S.A. 47:1A-6; Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011). Thus, the Custodian and/or Ms. Rone must provide electronic access to the responsive records in accordance with the provisions of N.J.S.A. 47:1A-5(b).
3. **The Custodian and/or Ms. Rone shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
4. The Council defers analysis of whether the Custodian and/or Ms. Rone knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending compliance with the Council's Interim Order.

Procedural History:

On December 16, 2015, the Council distributed its Interim Order to all parties.

On December 22, 2015, Ms. Rone advised the Complainant (via letter) that the Essex County Register's Office's ("Office") would provide 974,295 images at a cost of \$13,640.13, which is representative of the cost incurred to obtain and disclose the responsive records. On the same day, the Custodian responded to the Council's Interim Order. The Custodian provided certified confirmation of compliance to the Executive Director, in which she certified that the records were contained within 57 CDs. The Custodian also averred that the issue in this complaint appeared to stem from the cost to reproduce the responsive records. The Custodian certified that the cost of \$13,640.00 was derived from the \$0.014 cents per image that the County of Essex ("County") incurred to respond to the request. The Custodian noted that this cost was less than the actual cost expended by the County.

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

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

### Additional Submissions

On December 22, 2015, the Complainant's Counsel disputed the charge, arguing that the Custodian provided insufficient evidence to support the charge. Counsel further asserted that the Custodian never provided the Complainant with an opportunity to accept or reject the charge, even if there is an ordinance justifying same. Counsel asserted that OPRA only allowed for the charge of each blank CD; thus, she requested that the Custodian provide a cost for same. Counsel also contended that this complaint has always been about cost: the Denial of Access Complaint challenged the County's response that the request was invalid. Counsel noted that, given that the GRC did not address cost and other counties provide the same records at no charge, it is appropriate to conclude that the actual cost should fall within the statutory confines of OPRA.

On December 23, 2015, the Custodian responded via e-mail, advising that the County calculated its cost in accordance with N.J.S.A. 47:1A-5(c)(providing that a charge shall be reasonable and based on "actual direct cost"). Specifically, the Custodian stated that production of the images included contracting with an outside vendor, Alternative Micrographics, Inc. ("AM"), to retrieve the images from microfilms. The Custodian stated that the contract required the County to pay \$0.014 per image and \$30.00 per diazo copy of all microfilm rolls (of which the County retrieved 57). The Custodian averred that charging a commercial entity any less than the County or any member of the general public might pay would be contrary to OPRA. The Custodian noted that, as a final matter, the County had the ability to comply with the Council's order by advising the Complainant of the cost of production without disclosing records until the Complainant remitted payment. *See Noto v. Essex Cnty. Register of Deeds & Mortgages*, GRC Complaint No. 2015-95 (Interim Order dated December 15, 2015) at 7, FN 10. However, the Custodian noted that she provided the records and requested payment as a gesture of good faith.

On the same day, the Complainant's Counsel, noting that she did not concede that a charge was warranted, agreed that OPRA permits an agency to impose a special service charge, but that same must be reasonable and based on the actual direct cost incurred to make copies of records. N.J.S.A. 47:1A-5(c). Counsel averred that this charge would be in addition to any cost incurred by an outside vendor. Counsel asserted that the \$0.014 per image charge did not apply here because the County originally paid it to store the responsive records and would have incurred that cost regardless of the subject OPRA request. Counsel argued that the following cost should apply if fulfilling the request were to entail: 1) obtaining diazo copies from AM, 2) converting those copies to digital format, and 3) providing the images on CDs:

- \$30.00 x 57 diazo copies = \$1,710.
- The cost of 57 blank CDs.
- The cost to convert to digital format based on the hourly rate of the lowest level employee capable of fulfilling the request.

Counsel contended that, based on the foregoing, \$13,640.13 is unlawful, especially considering that the Custodian failed to provide any documentation proving that it represented the actual incurred cost. Further, Counsel contended that the County's process of converting digital records into an antiquated medium, only to have to convert them back, is unfortunate; however, the

Complainant was not responsible to pay this cost. Counsel requested that the Custodian produce an itemized bill accounting for the actual costs incurred to fulfill the responsive OPRA request.

Later that same day, the Complainant's Counsel again e-mailed the Custodian, amending her analysis of the proposed special service charge. Counsel asserted that the diazo cost did not apply here because the Complainant was not seeking same. Counsel noted that, even if the Complainant were seeking diazo copies, the cost per roll is \$50.00, of which the vendor credits the County \$30.00: the actual cost per diazo copy would be only \$20.00. Counsel also reiterated her request for an itemized bill.

On December 24, 2015, the Custodian stated that Ms. Rone certified to the actual cost in a letter attached to the County's December 22, 2015 e-mail. Further, the Custodian disputed that the County incurred a one-time cost to store images with AM, noting that the contract required the County to pay every time they retrieve an image. The Custodian asserted that she failed to see how the County did not support the imposed charge when they already provided a copy of the AM contract to the Complainant. Additionally, the Custodian averred that it was her understanding that a diazo referred to the process of copying but indicated that she would seek clarification from AM. Finally, the Custodian stated that she had requested an itemized bill and would send same to the Complainant's Counsel immediately upon receipt. However, the Custodian sought five (5) business days to procure the bill based on the holidays. On the same day, the Complainant's Counsel acknowledged that the Custodian had endeavored to provide an itemized bill.<sup>7</sup>

On January 5, 2016, the Complainant's Counsel requested an update on the itemized bill, as six (6) business days had passed. Counsel noted that it was brought to her attention that the Office maintained its records as electronic images, which she expected to be reflected in the bill.

On January 21, 2016, the Complainant e-mailed the Custodian, stating that, although the Custodian provided 57 CDs, one of them was a duplicate. The Complainant asserted that the Custodian still had not produced a CD containing images for the time frame March 1, to March 8, 2013. The Complainant thus requested an update as to when the Complainant would receive the outstanding images to include those images from August 4, through December 31, 2014. Additionally, the Complainant noted that during a telephone conversation on January 11, 2016, she agreed to pay \$20.00 per CD. The Complainant thus requested that the Custodian provide a forwarding address and advise to whom she should make a \$1,120.00 check payable.

On January 26, 2015, the Custodian e-mailed the Complainant, admitting that she did not review the records provided based on the limited time frame within which she was required to comply with the Council's Order. The Custodian stated that, notwithstanding the forgoing, she had hoped to receive an explanation from AM on the error and has since requested the missing March 1, through March 8, 2013 images for disclosure. The Custodian also provided the Complainant with payable information.

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<sup>7</sup> The Complainant's Counsel also requested that the Custodian provide a price for producing similar records going forward. This conversation continued through several e-mails; however, the GRC need not address same because its adjudication authority is limited solely to subject OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(b).

On January 27, 2016, the Complainant e-mailed the Custodian, confirming that the Custodian would disclose the outstanding March images. The Complainant also sought an update on disclosure of the August 4, through December 31, 2014 images. Finally, the Complainant advised that she would be mailing a check in the next few days. On February 22, 2016, the Complainant sought an update on the questions posed in her January 27, 2016 e-mail.

On February 22, 2016, the Complainant's Counsel sought an update on the disclosure of the outstanding responsive records for the time frame from August 4, through December 31, 2014. On March 3, 2016, the Complainant's Counsel sought a status update, noting that the Complainant had previously attempted to resolve any outstanding compliance issues to no avail. Counsel stated that she would consider the Custodian's failure to respond by March 4, 2016, a violation of the Council's Order.

On March 4, 2016, the Custodian e-mailed the Complainant's Counsel to apologize for the delay and asserting that the outstanding records were not part of the Council's Interim Order. The Custodian advised Counsel that she would be in a position to provide a formal response on March 9, 2016. The Complainant noted that Ms. Rone was not in the office. However, her assistant informed the Custodian that they are still awaiting a firm date for disclosure from AM.

On March 9, 2016, the Custodian e-mailed the Complainant's Counsel, advising that AM promised to deliver the outstanding records for disclosure in the next few days. The Custodian anticipated that she would disclose the outstanding records by March 18, 2016, although she anticipated earlier disclosure.<sup>8</sup>

On April 21, 2016, the Complainant's Counsel e-mailed the GRC, advising that the Complainant wished to withdraw the complaint.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant withdrew the complaint (via Counsel) in an e-mail to the GRC on April 21, 2016. Therefore, no further adjudication is required.

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

April 22, 2016

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<sup>8</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.



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

December 15, 2015 Government Records Council Meeting

Susan Noto  
Complainant

Complaint No. 2015-95

v.

Essex County Register of Deeds and Mortgages  
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request. 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 October 31, 2007); DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007).
2. Ms. Rone unlawfully denied access to the Complainant’s OPRA request because the evidence of record supports that it contained sufficient information for both Mr. Narvaez and Ms. Rone to locate responsive records and even provide an estimated charge on two (2) occasions. N.J.S.A. 47:1A-6; Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011). Thus, the Custodian and/or Ms. Rone must provide electronic access to the responsive records in accordance with the provisions of N.J.S.A. 47:1A-5(b).
3. **The Custodian and/or Ms. Rone shall comply with item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of**



**compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 15<sup>th</sup> Day of December, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 16, 2015**

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

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



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 15, 2015 Council Meeting**

**Susan Noto<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-95**

**v.**

**Essex County Register of Deeds & Mortgages<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies on compact disc (“CD”) or digital versatile disc (“DVD”) of recorded document images for the recording date range of March 1, 2013, through September 30, 2014.

**Custodian of Record:** Michael Venezia<sup>3</sup>  
**Request Received by Custodian:** September 30, 2014  
**Response Made by Custodian:** October 28, 2014  
**GRC Complaint Received:** April 7, 2015

**Background<sup>4</sup>**

**Request and Response:**

On September 30, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On October 8, 2014, six days following the Custodian’s receipt of the request, the Complainant purportedly spoke with the Custodian, who advised her to contact the Register of Deeds directly. On the same day, the Complainant purportedly spoke with William Narvaez, Acting Register of Deeds, and subsequently faxed the subject OPRA request to him. On October 10, 2014, the Complainant e-mailed her OPRA request to Mr. Narvaez.

On October 28, 2014, the Complainant e-mailed Mr. Narvaez seeking a status on her request. The Complainant noted that Mr. Narvaez had advised her one (1) week prior that the Essex County Register’s Office’s (“Office”) was working on the request. Further, the Complainant noted that a custodian’s failure to respond within seven (7) business days resulted

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<sup>1</sup> Represented by Sarah Gordon, Esq. (Seattle, WA).

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant named Dana Rone, Register of Deeds, as the Custodian of Record on the Denial of Access Complaint.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

in a “deemed” denial. The Complainant asked if Mr. Narvaez was essentially denying her request.

On October 29, 2014, Mr. Narvaez responded via e-mail, advising the Complainant that the Office was not denying her request. Mr. Narvaez advised that the Office was preparing their response and would provide a cost shortly; however, the process took longer than expected due to a change in vendors and because redactions were required. On November 25, 2014, the Complainant e-mailed Mr. Narvaez again to seek a status update for her request.

On January 12, 2015, the Complainant e-mailed Dana Rone, Register of Deeds, amending her request to extend the time frame to December 31, 2014. Additionally, the Custodian noted that she was following up her original OPRA request prior to filing a Denial of Access Complaint because Ms. Rone had just recently taken office.

On January 16, 2015, Ms. Rone responded in writing on behalf of the Custodian, advising that the Office’s policy requires payment of an administrative fee of \$61.00 to process the Complainant’s OPRA request. Ms. Rone advised that she would provide a total cost after the Complainant remitted the administrative fee.

On January 21, 2015, the Complainant requested clarification on whether the Office was requiring her to pay a fee to obtain a detailed price quote. The Complainant noted that she would be contacting the Government Records Council (“GRC”) for guidance.

On January 28, 2015, the Complainant e-mailed Ms. Rone, stating that, pursuant to a recent telephone conversation, the Office quoted the Complainant a charge of \$.05 per image for a total of \$48,700.00. The Complainant noted that she wished to receive the responsive records electronically and that lawful fees for electronic delivery are contained within N.J.S.A. 47:1A-5(b). The Complainant also noted that three (3) other counties either charged for the cost of materials only or did not charge for electronic delivery. The Complainant reiterated her request to receive the responsive records electronically.

On February 9, 2015, the Complainant requested that Ms. Rone acknowledge receipt of her January 28, 2015, e-mail. On February 10, 2015, Ms. Rone advised the Complainant that she forwarded the e-mail to the Custodian and that they were waiting to receive guidance from the GRC. On February 17, 2015, the Complainant sought a status update for her OPRA request. On February 19, 2015, the Complainant sought another update on the status of her OPRA request.<sup>5</sup> On March 3, 2015, the Complainant’s Counsel e-mailed the Custodian and Ms. Rone to seek a status update on the Complainant’s OPRA request, noting that the Complainant needed to consider her options should her request be denied.

On March 4, 2015, Ms. Fernanda Campelo forwarded Ms. Rone’s letter, dated February 27, 2015, which denied the Complainant’s OPRA request as overly broad. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). On March 9, 2015, the Complainant’s Counsel e-mailed the Custodian and Ms. Rone to take issue with the denial of access, given that

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<sup>5</sup> On February 17, 2015, the Complainant contacted the GRC to see if the Custodian/Ms. Rone submitted an inquiry. On February 19, 2015, the GRC responded, advising that it was unable to locate a pending inquiry.

the Office previously noted that it had to redact the records and proposed a fee of \$48,700.00 to disclose same.

#### Denial of Access Complaint:

On April 7, 2015, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant disputed that her OPRA request was overly broad. The Complainant argued that it seems impossible that Ms. Rone could have quoted her a price of \$48,700.00 for responsive records only to then deny the request as invalid. The Complainant noted that Mr. Narvaez previously advised that the Office was working on providing records but was delayed by a change in vendors and the need to redact records.

#### Statement of Information:

On July 2, 2015, the GRC requested a completed Statement of Information (“SOI”) from the Custodian.<sup>6</sup> After failing to respond within the provided five (5) business days, the GRC sent a “No Defense” letter to the Custodian on July 13, 2014, requesting a completed SOI within three (3) business days of receipt.

On July 17, 2014, the Custodian filed an SOI. On July 23, 2015, the GRC returned the SOI to the Custodian, advising that the GRC’s regulations prohibit parties in mediation from divulging the content of or sharing documents and statements with anyone not a party to same. N.J.A.C. 5:105-2.5(f). The GRC thus requested that the Custodian submit an amended SOI to exclude any discussions and documents made during mediation. On August 3, 2015, the Custodian e-mailed the GRC, advising that he was out of the office and recently returned to receive the GRC’s returned SOI notification. On the same day, the GRC granted an extension until August 6, 2015, to submit the revised SOI. To date, the GRC has not received an amended SOI from the Custodian.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>7</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of

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<sup>6</sup> On April 22, 2015, the instant complaint was referred to mediation. On July 1, 2015, the complaint was referred back to the GRC for adjudication.

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

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).

Additionally, in DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007), the custodian orally advised the complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

While the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i) and the Council's decision in Paff v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006).

Id. at 10.

Here, the evidence suggests that the Custodian orally responded to the Complainant advising her to contact Mr. Narvaez. However, an oral response does not equate to a valid response under OPRA. *See also* Rivera v. Rutgers, The State Univ. of NJ, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11; Deluca, GRC 2006-126.

### **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 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 Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(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). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>8</sup> NJ Builders Assoc. v. NJ 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).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant “performed a search and was able to locate records responsive . . .” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. *See also Gannett v. Cnty. of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213).

Moreover, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. *See Bond v. Borough of Washington (Warren)*, GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).

Here, the Complainant’s OPRA request sought “recorded document images” for a specific time frame (March 1, 2013, through September 30, 2014). After the Custodian directed the Complainant to the Office, she corresponded with Mr. Narvaez and then Ms. Rone over the span of six (6) months prior to filing this complaint. On October 29, 2014, Mr. Narvaez advised the Complainant that the Office was preparing the request and would provide a cost. On January 16, 2015, Ms. Rone advised the Complainant that a \$61.00 administrative fee would apply to her

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<sup>8</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

request. Thereafter, Ms. Rone verbally advised the Complainant that she would apply a copy cost of \$0.05 per image for a total of \$48,700.00. However, in a rather abrupt change of position, on March 4, 2015, the Office forwarded to the Complainant Ms. Rone's letter, denying the request on the basis that same was overly broad. Notwithstanding that the term "recorded document images" may be unfamiliar to the GRC, the evidence of record clearly supports that both Mr. Narvaez and Ms. Rone were fully aware of the records sought and likely located same. Thus, the GRC is not satisfied that the Complainant's OPRA request was invalid.

Accordingly, Ms. Rone unlawfully denied access to the Complainant's OPRA request because the evidence of record supports that it contained sufficient information for both Mr. Narvaez and Ms. Rone to locate responsive records and even provide an estimated charge on two (2) occasions. N.J.S.A. 47:1A-6; Burke, 429 N.J. Super. at 177; Bond, GRC 2009-324. Thus, the Custodian and/or Ms. Rone must provide electronic access to the responsive records in accordance with the provisions of N.J.S.A. 47:1A-5(b).

### **Knowing & Willful**

The Council defers analysis of whether the Custodian and/or Ms. Rone knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their 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 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, results in a "deemed" denial of the Complainant's OPRA request. 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 October 31, 2007); DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007).
2. Ms. Rone unlawfully denied access to the Complainant's OPRA request because the evidence of record supports that it contained sufficient information for both Mr. Narvaez and Ms. Rone to locate responsive records and even provide an estimated charge on two (2) occasions. N.J.S.A. 47:1A-6; Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011). Thus, the Custodian and/or Ms.

Rone must provide electronic access to the responsive records in accordance with the provisions of N.J.S.A. 47:1A-5(b).

3. **The Custodian and/or Ms. Rone shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
4. The Council defers analysis of whether the Custodian and/or Ms. Rone knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending their compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending compliance with the Council's Interim Order.

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

Reviewed By: Joseph D. Glover  
Executive Director

November 10, 2015<sup>11</sup>

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<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>11</sup> This complaint was prepared for adjudication at the Council's November 17, 2015, meeting, but could not be adjudicated due to lack of quorum.