



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

February 23, 2021 Government Records Council Meeting

Richard Cielez
Complainant

Complaint No. 2017-218

v.

NJ State SPCA
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 Supplemental 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, finds that the Council should accept the Honorable Elia A. Pelios’s, Administrative Law Judge, Initial Decision “**CONCLUD[ING]** that [the Complainant] has abandoned his appeal.” *Id.* at 3. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED WITHOUT PREJUDICE.**” *Id.* Thus, 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 23rd Day of February 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 25, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Richard Cielez¹
Complainant**

GRC Complaint No. 2017-218

v.

**New Jersey State SPCA²
Custodial Agency**

Records Relevant to Complaint:

1. "A copy of the videotaped statement made by myself to Officer Donato, at Jamesburg Police Headquarters on November 21, 2014."
2. "A copy of the NJ SPCA release form that Officer Donato had me sign for that videotaped statement, that he never gave me a copy of."
3. "A copy of all reports, made by all the officers, who took part in the Helmetta Regional Animal Shelter investigation, of which I was charged along with Michal Cielez by Officer Donato."
4. "A copy of all Veterinarian reports submitted to you, by any Veterinarian, regarding the Helmetta Regional Animal Shelter investigation done by you, the [NJ SPCA]."
5. "A copy of all the reports you received from either the NJ State Health Department or the Middlesex County Health Department regarding the Helmetta Regional Animal Shelter investigation conducted by you the [NJ SPCA]."

Custodian of Record: Joseph F. Biermann

Request Received by Custodian: September 18, 2017

Response Made by Custodian: November 2, 2017

GRC Complaint Received: November 9, 2017

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 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 No legal representation listed on record.

² Represented by Harry Levin, Esq., of LevinCyphers Attorneys at Law (Toms River, NJ).

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 extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian's failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).
3. Since there are issues of contested facts, this complaint should be referred to the OAL for a review *de novo* to determine whether the Custodian unlawfully denied access to the requested records. Specifically, because the Custodian failed to provide the GRC with a completed SOI, and now alleges that responsive records were provided without charge, the GRC cannot determine whether the Custodian's initial imposition for a special service charge was valid under N.J.S.A. 47:1-5(e) or whether it remains an open issue. Furthermore, the Complainant challenged the Custodian's initial imposition of copying costs, as he requested the records delivered electronically. See N.J.S.A. 47:1A-5(b). Additionally, if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.

Procedural History:

On November 14, 2019, the Council distributed its Interim Order to all parties. On February 7, 2020, the complaint was transmitted to the Office of Administrative Law ("OAL").

On January 11, 2021, the Honorable Elia A. Pelios, Administrative Law Judge ("ALJ"), issued an Initial Decision "**CONCLUD[ING]** that [the Complainant] has abandoned his appeal." Id. at 3. The ALJ further "**ORDERED** that [the Complainant's] appeal is **DISMISSED WITHOUT PREJUDICE.**" Id.

Analysis

Administrative Law Judge's Initial Decision

The Administrative Procedures Act ("APA") provides that:

The head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the [Initial Decision] no later than 45 days after receipt of such recommendations . . . Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

[N.J.S.A. 52:14B-10(c).]

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

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the matter before the Council, the ALJ's Initial Decision determined that:

In considering the foregoing, it is noted that New Jersey is still in the midst of an unprecedented health emergency. It cannot be ignored that such may be to blame for many of the difficulties experienced in reaching [the Complainant] to move his appeal forward. However, it also cannot be ignored that in the nearly ten months since the rescheduling of the first conference call [the Complainant] has not contacted the OAL or the [Custodian] or its representative to provide updated information as to where he can be reached for communication regarding his appeal, to explain his failures to appear for multiple conference calls, or to even inquire as to its status, despite being afforded ample time to do so. Accordingly, in the absence of any other information or explanation, I am constrained to **CONCLUDE** that [the Complainant] has abandoned his appeal.

[Id. at 2-3.]

Based on the foregoing, the ALJ “**ORDERED** that [the Complainant’s] appeal is **DISMISSED WITHOUT PREJUDICE.**” Id. at 3.

Here, the ALJ fairly summarized the procedural and factual background in the Initial Decision and explained why he determined that the Complainant abandoned his complaint. The ALJ found that the Complainant had ample time to contact the OAL or the Custodian to provide updated contact information or inquire as to the status of his complaint notwithstanding the difficulties arising from the State’s ongoing health emergency. The ALJ’s conclusions are aligned and consistent with those determinations. As such, the GRC is satisfied it can ascertain which facts the ALJ accepted as true, and further, finds that those facts provide a reasonable basis for the ALJ’s conclusions.

Therefore, the Council should accept the ALJ’s Initial Decision “**CONCLUD[ING]** that [the Complainant] has abandoned his appeal.” Id. at 3. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED WITHOUT PREJUDICE.**” Id. Thus, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council should accept the Honorable Elia A. Pelios’s, Administrative Law Judge, Initial Decision “**CONCLUD[ING]** that [the Complainant] has abandoned his appeal.” Id. at 3. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED WITHOUT PREJUDICE.**” Id. Thus, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

February 16, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Richard Cielez
Complainant

Complaint No. 2017-218

v.

NJ State SPCA
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt 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 extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian’s failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian’s failure to respond obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b). Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).
3. Since there are issues of contested facts, this complaint should be referred to the OAL for a review *de novo* to determine whether the Custodian unlawfully denied access to the requested records. Specifically, because the Custodian failed to provide the GRC with a completed SOI, and now alleges that responsive records were provided without charge, the GRC cannot determine whether the Custodian’s initial imposition for a special service charge was valid under N.J.S.A. 47:1-5(e) or whether it remains an open issue. Furthermore, the Complainant challenged the Custodian’s initial imposition of copying costs, as he requested the records delivered electronically. See N.J.S.A. 47:1A-



5(b). Additionally, if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 2019

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 14, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Richard Cielez¹
Complainant**

GRC Complaint No. 2017-218

v.

**N.J. State SPCA²
Custodial Agency**

Records Relevant to Complaint:

1. “A copy of the videotaped statement made by myself to Officer Donato, at Jamesburg Police Headquarters on November 21, 2014.”
2. “A copy of the NJ SPCA release form that Officer Donato had me sign for that videotaped statement, that he never gave me a copy of.”
3. “A copy of all reports, made by all the officers, who took part in the Helmetta Regional Animal Shelter investigation, of which I was charged along with Michal Cielez by Officer Donato.”
4. “A copy of all Veterinarian reports submitted to you, by any Veterinarian, regarding the Helmetta Regional Animal Shelter investigation done by you, the [NJ SPCA].”
5. “A copy of all the reports you received from either the NJ State Health Department or the Middlesex County Health Department regarding the Helmetta Regional Animal Shelter investigation conducted by you the [NJ SPCA].”

Custodian of Record: Joseph F. Biermann

Request Received by Custodian: September 18, 2017

Response Made by Custodian: November 2, 2017

GRC Complaint Received: November 9, 2017

Background³

Request and Response:

On September 18, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded in writing stating that the request requires additional time to respond and set a new return date of October 27, 2017.

¹ No legal representation listed on record.

² Represented by Harry Levin, Esq., of LevinCyphers Attorneys at Law (Toms River, NJ).

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

On September 19, 2017, the Complainant replied to the Custodian, disputing the length of the extension, stating that he would consent to an extension through October 9, 2017. The Custodian replied that same day, stating that the agency was small and had limited manpower dedicated to administrative matters.

On September 21, 2017, the Complainant e-mailed the Custodian, acknowledging the new return date of October 23, 2017. The Complainant added that in addition to the records sought in his OPRA request, he requested the names of NJ SPCA's Custodian of Records, Custodian of Property, and Custodian of Evidence, or any other title provided to them by the organization.

On September 22, 2017, the Custodian replied to the Complainant, stating that he should submit a new OPRA request if he requires additional information. The Custodian also stated that the Complainant needed to be specific and better define his request.

On September 22, 2017, the Complainant resubmitted his OPRA request in response to the Custodian's request for clarity, seeking the following:

1. "A copy of the videotaped statement made by Officer Donato of me, at Jamesburg Police Headquarters on November 21, 2014."
2. "A copy of the NJ SPCA release form Officer Donato had me sign, for the videotaped statement, which I never received a copy of."
3. "A copy of all investigative reports made by all the officers, who took part in the Helmetta Regional Animal Shelter investigation conducted by the [NJ SPCA] resulting in myself and Micheal Cielez being charged by Officer Donato."
4. "A copy of all the Veterinarian reports submitted to the NJ SPCA, by any Veterinarian, regarding the Helmetta Regional Animal Shelter investigation conducted by the NJ SPCA which resulted in myself and Michael Cielez being charged by Officer Donato."
5. "A copy of all the reports you received from either the NJ State Health Department or the Middlesex County Health Department regarding the Helmetta Regional Animal Shelter investigation conducted by the NJ SPCA which resulted in myself and Michael Cielez being charged by Officer Donato."
6. "I am requesting either the Organizational chart, your duty roster [sic] and or other records(s) which indicates the names of the NJ SPCA Custodian of Records, Custodian of Evidence and Custodian of Property from October 31, 2014 to September 1, 2017. This request includes any other names or titles these Custodians go by who perform these tasks."

On November 1, 2017, the Complainant e-mailed the Custodian, stating that he has not received a response to his OPRA request that was due on October 27, 2017. The Complainant requested that the Custodian provide a response by the end business that day.

On November 2, 2017, the Custodian responded to the Complainant, stating that for Item No. 1, efforts were still being made to duplicate the video; for Item No. 2, the record was believed to be in copied matter and remains pending. For Item No. 6, the Custodian provided a copy of the NJ SPCA organizational chart.

Regarding Item Nos. 3-5, the Custodian stated that a special service charge would be imposed prior to fulfillment. The Custodian stated that fulfilling these request items would require five (5) hours of labor at \$20 per hour, with copying costs of \$60, mailing costs of \$10, and video duplication costs of \$42. The Custodian stated that he would not process the request until the Complainant submits a check for the full amount.

On November 2, 2017, the Complainant responded to the Custodian. The Complainant noted that special service charges are for requests seeking voluminous amounts of records and requiring extraordinary amounts of time to process. The Complainant stated that his request involved a single matter from a short period of time. Additionally, the Complainant stated that he requested electronic delivery of responsive records, which is free of charge. The Complainant also requested that the copy of the video delivered via e-mail. Lastly, the Complainant stated that the organizational chart he received did not provide the information requested in Item No. 6.

On November 6, 2017, the Custodian replied to the Complainant, stating that the OPRA request sought files from various NJ SPCA officers, veterinary records, and all state and county health department records regarding the identified investigation. The Custodian added that an initial count of 500 pages of documents have been located and would be too large to send via e-mail. The Custodian also stated that the video recording had been located but would also be too large to send via e-mail. Regarding the organizational chart, the Custodian stated that the record was the only one available according to the NJ SPCA President. Lastly, the Custodian stated that the Complainant could view the records at the agency headquarters, but there would be a \$20 per hour labor fee to assign someone to assist the Complainant.

Denial of Access Complaint:

On November 9, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the assessed special service charge was absurd, as well as the hourly fee to inspect the records as an alternative. The Complainant maintained that the Custodian refused to provide the records via the requested method, which would have been free of copying costs. The Complainant added that the Custodian has a contract with the NJ SPCA to pay \$20 per hour for processing OPRA requests. The Complainant argued that the labor fee assessed by the Custodian should not be his responsibility as the requestor.

Statement of Information:⁴

On March 9, 2018, the GRC sent the Custodian a request for the Statement of Information (“SOI”). On March 14, 2018, Counsel for the Custodian e-mailed the GRC, requesting a forty-five (45) day extension of time to respond. On March 15, 2018, the GRC responded in writing, granting an initial extension of fifteen (15) business days to respond, and stated that if additional time was needed, a second request could be made in writing. On April 17, 2018, the GRC sent the Custodian a “No Defense” letter, stating that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained

⁴ On November 27, 2017, this complaint was referred to mediation. On February 26, 2018, the matter was referred back to the GRC for adjudication.

within the complaint. The Custodian failed to submit the SOI or otherwise respond to the GRC's notice.

Additional Submissions:

On September 18, 2019, the GRC wrote to the Complainant via e-mail, inquiring as to whether the Complainant wished to pursue the matter considering the circumstances surrounding the NJ SPCA⁵ since the complaint filing. On September 19, 2019, the Complainant responded in writing, stating that he still wished to move forward with adjudication.

On October 10, 2019, the GRC submitted a request for a 14-point analysis on the Custodian's imposition of a special service charge. On October 11, 2019, the Custodian responded via e-mail. The Custodian stated that the NJ SPCA's police functions were dissolved in August 2018 by the New Jersey State Legislature. The Custodian also stated that he believed that all responsive records were provided to the Complainant without charge. The Custodian stated that as a result special service charge issue was irrelevant. The Custodian also provided the following responses:

1. What records are requested?

Response: Asked and answered. Documents were supplied in 2017. If for some reason you need a duplicate copy please let me know. We stand by that response.

2. Give a general nature description and number of the government records requested.

Response: Asked and answered. Documents were supplied in 2017. If for some reason you need a duplicate copy please let me know. We stand by that response.

3. What is the period of time over which the records extend?

Response: Asked and answered. Documents were supplied in 2017. If for some reason you need a duplicate copy please let me know. We stand by that response.

4. Are some or all of the records sought archived or in storage?

Response: Asked and answered. Documents were supplied in 2017. If for some reason you need a duplicate copy please let me know. We stand by that response.

5. What is the size of the agency (total number of employees)?

Response: Unknown – please inquire directly with the NJ SPCA as I left the Board in 2011.

6. What is the number of employees available to accommodate the records request?

⁵ As of August 1, 2018, the NJ SPCA was stripped of law enforcement duties, and effectively disbanded. See L 2017, c. 331.

Response: 1 or 2.

7. To what extent do the requested records have to be redacted?

Response: Redaction was very limited only redacting confidential personal data.

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?

Response: No governmental employees were used.

9. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?

Response: No governmental employees were used.

10. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to return records to their original storage place?

Response: No governmental employees were used.

11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?

Response: Unknown – please inquire directly with the NJ SPCA as I left the Board in 2011.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

Response: The Agency ceased per legislation in August 2018.

13. What is the availability of information technology and copying capabilities?

Response: Limited technology and zero copying equipment.

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce, and return the requested documents.

Response: Unknown at this time and I believe the documents were provided at no charge.

On October 15, 2019, the GRC responded to the Custodian, first noting that his reply to the GRC's request for submission did not include a certification. Notwithstanding, the GRC sought additional information from the Custodian based on the information provided. Specifically, the GRC asked for the date the records were provided to the Complainant and to provide evidence of same.

On October 15, 2019, the Custodian responded to the GRC's additional information request via two (2) separate e-mails.⁶

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).⁷ 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 March 19, 2007 OPRA request 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 by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

Here, the Custodian initially responded to the OPRA request on September 18, 2017, the date of receipt, seeking an extension of time to until the end of business on October 27, 2017. The Custodian did not respond within that time frame. The Custodian did not provide a definitive response to the Complainant until November 2, 2017 where he provided a partial response and

⁶ The Custodian's e-mails contained statements and attachments referring to events that occurred during mediation proceedings. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23-C-4.

⁷ 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.

imposed a special service charge for the remainder of the request. Thus, in keeping with Kohn, GRC 2007-124, the Custodian's failure to respond prior to the extension expiration resulted in a "deemed" denial.

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 extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

Failure to Submit SOI

OPRA also provides that "Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]" N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that "[a] custodian's failure to submit a completed and signed SOI . . . may result in the Council's issuing a decision in favor of the complainant." N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC's initial request for an SOI. After the expiration of the initial fifteen (15) business day extension, the GRC again attempted to obtain a completed SOI from the Custodian by sending a "No Defense" letter and requesting a completed SOI within three (3) business days of receipt. The Custodian failed to submit an SOI within the three (3) business days or otherwise response to the GRC's letter.

Accordingly, the Custodian's failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records

custodian . . .” N.J.S.A. 47:1A-7(b). Alterman, Esq., GRC 2013-353. See also Kovacs, GRC 2014-196; Howell, GRC 2015-249.

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 Appellate Division of the New Jersey Superior Court has proffered ways in which the GRC may determine whether a Custodian’s claimed exemption applies to a record. In Hyman v. City of Jersey City, 2012 N.J. Super. Unpub. LEXIS 2032 (App. Div. 2012), the court held that:

The GRC functions in an adjudicative capacity and is statutorily charged, if it is able to do so, to “make a determination as to a record's accessibility based upon the complaint and the custodian’s response thereto[.]” N.J.S.A. 47:1A-7(e) (emphasis added). If the custodian’s response to the complaint does not justify the denial of access based upon the claimed privilege or exception, the GRC has a number of options available to it . . . It may conclude the proffered privilege does not apply and order the release of the document. Ibid. It may, through its Executive Director, require the custodian to submit, within prescribed time limits, additional information deemed necessary for the GRC to adjudicate the complaint. N.J.S.A. 47:1A-7(c) . . . Additionally, it may “conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the ‘Administrative Procedure Act,’ . . . insofar as they may be applicable and practicable.” N.J.S.A. 47:1A-7(e).

[(Slip op. at 20-21).]

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a).

As noted above, the Custodian failed to provide a completed SOI to the GRC. Thereafter, the GRC requested a completed 14-point analysis from the Custodian regarding his imposition of a special service charge. The Custodian responded without providing a certification, stating that the records were provided without charge. When the GRC requested additional information and evidence supporting production, the Custodian responded again without certification and provided evidence in the course of mediation proceedings.

At this juncture, the GRC must defer to the court’s analysis in Hyman. There, the court determined that Jersey City’s document index, submitted as part of the *in camera* review, “prevented meaningful adjudication by the GRC.” (Slip op. at 17). Here, the Custodian failed to provide an SOI to the GRC. Thereafter, the Custodian provided conflicting information without

certification as to whether he produced responsive records without imposing a special service charge or copying costs. Notwithstanding, the Complainant has stated he wished to continue to pursue the matter. For that reason, contested facts exist that warrant a hearing to develop the record.

Therefore, since there are issues of contested facts, this complaint should be referred to the OAL for a review *de novo* to determine whether the Custodian unlawfully denied access to the requested records. Specifically, because the Custodian failed to provide the GRC with a completed SOI, and now alleges that responsive records were provided without charge, the GRC cannot determine whether the Custodian's initial imposition for a special service charge was valid under N.J.S.A. 47:1-5(e) or whether it remains an open issue. Furthermore, the Complainant challenged the Custodian's initial imposition of copying costs, as he requested the records delivered electronically. See N.J.S.A. 47:1A-5(b). Additionally, if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.

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 extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian's failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).
3. Since there are issues of contested facts, this complaint should be referred to the OAL for a review *de novo* to determine whether the Custodian unlawfully denied access to the requested records. Specifically, because the Custodian failed to provide the GRC with a completed SOI, and now alleges that responsive records were provided without charge, the GRC cannot determine whether the Custodian's initial imposition for a special service charge was valid under N.J.S.A. 47:1-5(e) or whether it remains an open issue. Furthermore, the Complainant challenged the Custodian's initial imposition of copying costs, as he requested the records delivered electronically. See N.J.S.A. 47:1A-

5(b). Additionally, if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.

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