



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

July 28, 2020 Government Records Council Meeting

Karen Brown (o/b/o Joyce W. Harley)
Complainant

Complaint No. 2017-227

v.
Essex County College
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council (“Council”) considered the July 21, 2020 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:

1. Because the parties failed to reach a fee agreement, and because Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 37.5 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant’s Counsel in the adjusted amount of \$11,250.00, representing 37.5 hours of service at \$300.00 per hour, or a decrease of 2.4 hours and \$3,712.50 from the originally filed fee application.**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

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 28th Day of July 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

**Karen Brown, Esq. (On Behalf of Joyce W. Harley)¹
Complainant**

GRC Complaint No. 2017-227

v.

**Essex County College²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. "Copies of the minutes for all meetings of the Essex County Board of Trustees [{"Board"}] from January 1, 2017 to the present."
2. "Copies of the Executive Session minutes and recordings of the [Board] from January 1, 2017 to the present."
3. "Copies of all text messages, e-mails and written correspondence from President Anthony Munroe [{"President Munroe"}] to the [Board] or any of its members from April 1, 2017 to the present."
4. "Copies of all text messages, e-mails and written correspondence from [President Munroe] to any employees of Essex County College [{"College"}] regarding Dr. Joyce W. Harley and/or the Office of Administration and Finance from May 1, 2017 to the present."
5. "Copies of all text messages, e-mails and written correspondence from [President Munroe] to any individuals or organizations regarding any and all affairs, matters or issues relating to [the College] from May 1, 2017 to the present."
6. "Copies of all text messages, e-mails and written correspondence from [President Munroe] to any individuals or organizations regarding Dr. Joyce W. Harley and the Office of Administration and Finance from May 1, 2017 to the present."
7. "Copies of any and all text messages, e-mails and written correspondence from April 2016 to the present relating to the removal of Marilyn Rutherford, Director of Purchasing and/or the Office of Purchasing from the supervisions of Dr. Joyce W. Harley and/or the Office of Administration and Finance."

Custodian of Record: Karen Bridgett³

Request Received by Custodian: October 23, 2017

Response Made by Custodian: November 1, 2017

GRC Complaint Received: November 29, 2017

¹ The Complainant represents Joyce W. Harley.

² Represented by Ramon E. Rivera, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, N.J.). Previously represented by Joy Tolliver, Esq., General Counsel (Newark, N.J.).

³ The current Custodian of Record is Maureen Behr.

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 2020 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, found that:

1. The current Custodian complied with the Council's November 12, 2019 Interim Order because she responded in the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to a portion of the Complainant's OPRA request, she lawfully denied access to the remainder. Further, the current Custodian cured the Custodian's unlawful denial of access by disclosing responsive records in accordance with the Council's November 12, 2019 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 12, 2019 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required the Custodian to search for and disclose responsive records to the valid portion of the Complainant's request, which the current Custodian complied with on December 13, 2019. 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 February 28, 2020, the Council distributed its Interim Order to all parties. On May 4, 2020, the Government Records Council ("GRC") advised the parties that the fee agreement time

frame expired. The GRC further advised that Complainant's Counsel had twenty (20) business days to submit a fee application.

On June 1, 2020 Counsel submitted a fee application. The fee application and Certification of Services ("Counsel Certification") set forth the following:

1. The complaint name and number: Brown, Esq. (O.B.O. Joyce W. Harley) v. Essex Cnty. College, GRC Complaint No. 2017-227.
2. Counsel's law firm affiliation: Counsel is a sole practitioner.
3. A statement of client representation: Counsel certified to her services, including consultation and communications with the Complainant, filing the OPRA request, review of the received records, correspondence and e-mail communications with the custodial agency, filing the Denial of Access Complaint, reviewing the relevant statutes, regulations and caselaw, participation in mediation and other work related to the GRC's adjudication of the complaint.
4. The hourly rate of all attorneys and support staff involved in the complaint: Counsel certified that she charged \$375.00 per hour and was the sole attorney who worked on the matter.
5. Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of her timesheets from October 16, 2017 through May 31, 2020 ("Schedule A"). During the fee period, Counsel billed a total of 39.9 hours for a total fee of \$14,962.50.
6. Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified to her twenty-two (22) years of experience, with twenty (20) years involved in municipal and county government. Counsel certified that that during her time advising the Passaic County Board of Chosen Freeholders, she assisted in the implementation of OPRA as well as provided advice to department custodians to ensure compliance with OPRA requests. Counsel certified that she provided similar advice to custodians during her time as Corporation Counsel with the City of Newark, and as Borough Attorney for the Borough of Roselle.

Counsel also certified that she served as Passaic County Clerk and responded to OPRA requests as its Custodian of Records. Counsel also certified to her time as Municipal Court Judge for the City of Passaic and City of Paterson. Counsel further certified that in private practice, she served as the designated counsel for Bergen County, Essex County, the City of Paterson, the City of East Orange, and the Paterson Board of Education, and provided advice and guidance regarding OPRA.

Counsel certified that her standard hourly rate was \$375.00 per hour and is what she charged in the current matter. Counsel certified that her hourly rate was comparable, if not

lower than other attorneys with similar backgrounds and experience, asserting that such attorneys charged \$450.00-\$500.00 per hour.

7. Detailed documentation of expenses: Counsel did not seek reimbursement of expenses.

The GRC received no further correspondence from the parties.

Analysis

Compliance

At its February 26, 2020 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On February 28, 2020, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by March 27, 2020.

On May 4, 2020, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On June 1, 2020, the nineteenth (19th) business day after receipt of the GRC’s notification, Counsel submitted her fee application.

Therefore, because the parties failed to reach a fee agreement, and because Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found 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. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney’s fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties’ ability to reach an agreement, the Council provided Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)).

Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a)).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$14,962.50, representing 39.9 hours at \$375.00 per hour. In support of this hourly rate, Counsel certified that her rate was reflected in the Complainant’s retainer agreement. Counsel Certif. at ¶ 27. Counsel further certified that her rate was “comparable, if not lower than the hourly rate charged by other attorneys in the area, possessing similar background, training and professional experience.” Counsel Certif. at ¶ 26. Counsel also certified to her years of experience advising local and county governments on OPRA matters as well as responding to OPRA matters directly while serving as a Records Custodian. Counsel Certif. at ¶ 13-18.

In reaching a determination on the reasonableness of the hourly rate, the GRC “should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area.” Walker, 415 N.J. Super. at 606. Further, the GRC must consider whether Counsel bore her burden of proof that the billed hourly rates were “fair, realistic, and accurate[.]” Walker v. Giuffre, 209 N.J. 124, 132 (2012). To this end, Counsel provides a certified description of her experience, as well as a generalized statement regarding commensurate charges in the relevant geographical area. Counsel Certif. at ¶ 26.

Upon reflection, the GRC is not persuaded that Counsel’s rates are reasonable for the following reasons. The GRC first notes that while Counsel described her experience in responding to and providing advice on OPRA matters, there was no evidence of experience in litigating OPRA matters in court or with the GRC. Additionally, OPRA litigation has resulted in fee awards with hourly rates notably less Counsel’s hourly rate of \$375.00, even when compared to attorneys with significant OPRA litigation experience. See *i.e.* Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014); Stern v. Lakewood Volunteer Fire Dep’t, Inc., 2016 N.J. Super. Unpub. LEXIS 2612 (App. Div. 2016); Parsons Infrastructure & Envtl. Grp., Inc. v. State, 2018 N.J. Super. Unpub LEXIS 432, 17-18 (App. Div. 2018)

For comparison, the GRC looks to Paff v. Cnty. of Salem, GRC Complaint No. 2015-342 (June 2017). There, the Council identified an hourly rate of \$300.00 as reasonable for Ted M. Rosenberg, Esq. based on his thirty-five (35) years of experience, which included serving as either prosecutor or solicitor for eleven (11) municipalities or boards. See also Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Nevin v. N.J. Dep’t of Health & Senior Servs., GRC complaint No. 2013-18 (February 2014). Counsel’s twenty (20) years of experience in municipal and county government should be similarly reflected with the hourly rate.

Based on the foregoing, the hourly rate of \$375.00 is not reasonable for a practitioner with Counsel’s experience and skill level in this geographical area. The Council should revise the hourly rate to \$300.00 to be in line with precedential caselaw.

b. Time Expended

In support of her request for fees, Counsel submitted a log of her time, identified as Schedule A. For the period from October 16, 2017 through May 31, 2020, Counsel billed a total of 39.9 hours for work on the file. This included drafting and filing the OPRA request, drafting the Denial of Access Complaint, e-mailing the parties, participating in mediation, reviewing submissions, and preparing a fee application.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s Schedule A provided detailed descriptions of the exact work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The bill itself is segregated by each month in which work was billed, which in turn is broken down by date, task performed, number of hours, and total amount for the month. The last page of Schedule A provides the cumulative number of hours performed and the total fee.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application mostly conforms to the requirements of

N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis.

The GRC finds that the accounting of charges is mostly acceptable with the exception of the May 29, 2020 and May 31, 2020 entries of a combined 4.8 hours charged to draft the application for attorney's fees. For these entries, the GRC believes that 4.8 hours represents an excessive time to draft the application given Counsel's experience. It should be noted that these entries do not include time spent researching administrative code and prior GRC decisions, nor time reviewing the file in preparation of drafting the application. Ultimately, it is more reasonable to allow for a charge of 2.4 hours, which is equivalent to the time Counsel assessed to file the Denial of Access Complaint.

Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 37.5 hours at \$300.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$11,250.00, representing 37.5 hours of service at \$300.00 per hour, or a decrease of 2.4 hours and \$3,712.50 from the originally filed fee application.**

2. Enhancement Analysis

Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 37.5 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$11,250.00, representing 37.5 hours of service at \$300.00 per hour, or a decrease of 2.4 hours and \$3,712.50 from the originally filed fee application.**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Prepared By: Samuel A. Rosado
Staff Attorney

July 21, 2020



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 26, 2020 Government Records Council Meeting

Karen Brown, Esq. (o/b/o Joyce W. Harley)
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Complaint No. 2017-227

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1. The current Custodian complied with the Council’s November 12, 2019 Interim Order because she responded in the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to a portion of the Complainant’s OPRA request, she lawfully denied access to the remainder. Further, the current Custodian cured the Custodian’s unlawful denial of access by disclosing responsive records in accordance with the Council’s November 12, 2019 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 12, 2019 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required the Custodian to search for and disclose responsive records to the valid portion of the Complainant’s request, which the current Custodian complied with on December 13, 2019. 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 26th Day of February 2020

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 28, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

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2. “Copies of the Executive Session minutes and recordings of the [Board] from January 1, 2017 to the present.”
3. “Copies of all text messages, e-mails and written correspondence from President Anthony Munroe [(“President Munroe”)] to the [Board] or any of its members from April 1, 2017 to the present.”
4. “Copies of all text messages, e-mails and written correspondence from [President Munroe] to any employees of Essex County College [(“College”)] regarding Dr. Joyce W. Harley and/or the Office of Administration and Finance from May 1, 2017 to the present.”
5. “Copies of all text messages, e-mails and written correspondence from [President Munroe] to any individuals or organizations regarding any and all affairs, matters or issues relating to [the College] from May 1, 2017 to the present.”
6. “Copies of all text messages, e-mails and written correspondence from [President Munroe] to any individuals or organizations regarding Dr. Joyce W. Harley and the Office of Administration and Finance from May 1, 2017 to the present.”
7. “Copies of any and all text messages, e-mails and written correspondence from April 2016 to the present relating to the removal of Marilyn Rutherford, Director of Purchasing and/or the Office of Purchasing from the supervisions of Dr. Joyce W. Harley and/or the Office of Administration and Finance.”

Custodian of Record: Karen Bridgett³

Request Received by Custodian: October 23, 2017

Response Made by Custodian: November 1, 2017

GRC Complaint Received: November 29, 2017

¹ No legal representation listed on record.

² Represented by Matthew J. Donohue, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ). Previously represented by Joy Tolliver, Esq., General Counsel (Newark, NJ).

³ The current Custodian of Record is Maureen Behr.

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. Although the Custodian properly sought an extension of time on November 1, 2017 to respond to the Complainant's OPRA request, the request is "deemed" denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. The Custodian's response was insufficient because she failed to respond in writing to each individual request item contained in the ORPA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's October 23, 2017 OPRA request Item Nos. 3 and 7 seeking multiple types of correspondence. N.J.S.A. 47:1A-6. Specifically, Item No. 3 is invalid because it failed to identify a subject matter/content, and Item No. 7 failed to identify senders and/or recipients. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016).
4. Notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's October 23, 2017 OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails "regarding any and all affairs, matters or issues relating to [the College]," where the sender of said e-mails is the President of the College. The sole use of the custodial agency's name does not sufficiently narrow the scope of the subject or content of the records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated March

22, 2016), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-59 (July 2016).

5. The Complainant's October 23, 2017 ORPA request Item Nos. 4 and 6 seeking correspondence are valid because they identified a sender/recipient, a specific date range, and content and/or subject matter. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See also Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.
6. **The Custodian shall comply with conclusion No. 5 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, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
7. 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.
8. 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 14, 2019, the Council distributed its Interim Order to all parties. On November 18, 2019, Custodian's Counsel sought an extension of time to respond. That same day, the GRC granted the request and extended the time to until the end of business on December 6, 2019. On December 4, 2019, Counsel requested an additional extension of time to respond to until the end of business on December 13, 2019. That same day, the GRC granted the additional extension request.

On December 13, 2019, Counsel responded to the Council's Interim Order. Counsel provided several hundred pages of responsive records via several e-mail attachments. Counsel also

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

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

provided a certification from the current Custodian, confirming that outside counsel reviewed the records and provided them to the Complainant in accordance with the Interim Order. Lastly, Counsel provided a document index for those records provided with redactions.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to conduct a search and disclose responsive records to the Complainant's OPRA request Item Nos. 4 and 6. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 2019, 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 21, 2019.

On November 18, 2019, the second (2nd) business day after receipt of the Council's Order, Counsel sought an extension of time to respond. That same day, the GRC granted the request and extended the time to until the end of business on December 6, 2019. On December 4, 2019, Counsel requested an additional extension of time to respond to until the end of business on December 13, 2019. That same day, the GRC granted the additional extension request.

On December 13, 2019, the last day of the extended deadline, Counsel responded in writing providing several hundred located and reviewed e-mails to the Complainant that same day. Counsel also included a document index for those records containing redactions, as well as a certification from the current Custodian.

Therefore, the current Custodian complied with the Council's November 12, 2019 Interim Order because she responded in the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City

of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to a portion of the Complainant's OPRA request, she lawfully denied access to the remainder. Further, the current Custodian cured the Custodian's unlawful denial of access by disclosing responsive records in accordance with the Council's November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's

Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied (1984).

[Id. at 76.]

Here, the Complainant filed the instant complaint after the Custodian denied access to the request. The Complainant asserted that each request item was sufficiently specific and valid requests for correspondence. Conversely, the Custodian asserted that most of the request items were overly broad and invalid.

The Council reviewed the arguments of both parties, concluded that OPRA request Nos. 4 and 6 were valid, and ordered the Custodian to search for and produce responsive records. As

determined above, the current Custodian complied with the Council's November 14, 2019 Interim Order on December 13, 2019. Thus, because this complaint resulted in a change in the Custodian conduct, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's November 12, 2019 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council required the Custodian to search for and disclose responsive records to the valid portion of the Complainant's request, which the current Custodian complied with on December 13, 2019. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's November 12, 2019 Interim Order because she responded in the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to a portion of the Complainant's OPRA request, she lawfully denied access to the remainder. Further, the current Custodian cured the Custodian's unlawful denial of access by disclosing responsive records in accordance with the Council's November 12, 2019 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 12, 2019 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required the Custodian to search for and disclose responsive records to the valid portion of the Complainant's request, which the current Custodian

complied with on December 13, 2019. 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

January 21, 2020⁷

⁷ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.



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

Karen Brown, Esq. (o/b/o Joyce W. Harley)

Complaint No. 2017-227

Complainant

v.

Essex County College

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. Although the Custodian properly sought an extension of time on November 1, 2017 to respond to the Complainant’s OPRA request, the request is “deemed” denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. The Custodian’s response was insufficient because she failed to respond in writing to each individual request item contained in the ORPA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s October 23, 2017 OPRA request Item Nos. 3 and 7 seeking multiple types of correspondence. N.J.S.A. 47:1A-6. Specifically, Item No. 3 is invalid because it failed to identify a subject matter/content, and Item No. 7 failed to identify senders and/or recipients. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016).
4. Notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s October 23, 2017 OPRA request Item No. 5. N.J.S.A. 47:1A-6.

Specifically, the Complainant sought all e-mails “regarding any and all affairs, matters or issues relating to [the College],” where the sender of said e-mails is the President of the College. The sole use of the custodial agency’s name does not sufficiently narrow the scope of the subject or content of the records sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated March 22, 2016), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-59 (July 2016).

5. The Complainant’s October 23, 2017 ORPA request Item Nos. 4 and 6 seeking correspondence are valid because they identified a sender/recipient, a specific date range, and content and/or subject matter. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See also Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.
6. **The Custodian shall comply with conclusion No. 5 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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order 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**

**Karen Brown, Esq. (o/b/o Joyce W. Harley)¹
Complainant**

GRC Complaint No. 2017-227

v.

**Essex County College²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

- 1) “Copies of the minutes for all meetings of the Essex County Board of Trustees [(“Board”)] from January 1, 2017 to the present.”
- 2) “Copies of the Executive Session minutes and recordings of the [Board] from January 1, 2017 to the present.”
- 3) “Copies of all text messages, e-mails and written correspondence from President Anthony Munroe [(“President Munroe”)] to the [Board] or any of its members from April 1, 2017 to the present.”
- 4) “Copies of all text messages, e-mails and written correspondence from [President Munroe] to any employees of Essex County College [(“College”)] regarding Dr. Joyce W. Harley and/or the Office of Administration and Finance from May 1, 2017 to the present.”
- 5) “Copies of all text messages, e-mails and written correspondence from [President Munroe] to any individuals or organizations regarding any and all affairs, matters or issues relating to [the College] from May 1, 2017 to the present.”
- 6) “Copies of all text messages, e-mails and written correspondence from [President Munroe] to any individuals or organizations regarding Dr. Joyce W. Harley and the Office of Administration and Finance from May 1, 2017 to the present.”
- 7) “Copies of any and all text messages, e-mails and written correspondence from April 2016 to the present relating to the removal of Marilyn Rutherford, Director of Purchasing and/or the Office of Purchasing from the supervisions of Dr. Joyce W. Harley and/or the Office of Administration and Finance.”

Custodian of Record: Karen Bridgett

Request Received by Custodian: October 23, 2017

Response Made by Custodian: November 1, 2017

GRC Complaint Received: November 29, 2017

¹ No legal representation listed on record.

² Represented by Joy Tolliver, Esq., General Counsel (Newark, NJ).

Background³

Request and Response:

On October 23, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 1, 2017, the Custodian responded in writing stating that for Item Nos. 1, 2, and 7, an extension of time to until the end of business on November 10, 2017 was needed to respond. The Custodian also stated that the remainder of the request was denied as overly broad and vague.

On November 2, 2017, the Complainant responded to the Custodian, objecting to the characterization that Item Nos. 3-6 were overly broad and invalid. The Complainant stated that the request identified specific types of records, the dates requested, the parties involved, and the subject matter.

On November 21, 2017, the Complainant e-mailed the Custodian, stating that she has yet to receive a response from the Custodian, and the extended deadline of November 10 has since passed. The Complainant added that she would deem her request denied as a result. The Complainant also stated that the Custodian should notify her if she had in fact provided the records but in a different medium than requested.

Denial of Access Complaint:

On November 29, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of the date of filing, she has not received a response from the Custodian. The Complainant asserted that as a result her request has been deemed denied.

The Complainant argued that the Custodian had no legal basis to deny her request and contended that the claim that Item Nos. 3-6 were overly broad were without merit. The Complainant maintained that the items outlined specific types of records, a date range, the parties to the correspondence, and the subject matter.

Supplemental Responses:

On December 1, 2017, the Custodian responded to the Complainant via e-mail. For Item No. 1, the Custodian stated that ninety-one (91) pages of records were attached to the e-mail. Regarding Item No. 2, the Custodian stated that an additional extension was needed to respond and provided a new return date of December 8, 2017. The Custodian also stated that an extension was needed for Item No. 7 to until December 20, 2017.

Regarding Item Nos. 3-6, the Custodian maintained that the requests were overly broad and vague.

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 December 20, 2017, the Custodian responded to the Complainant via e-mail. The Custodian stated that there were no recordings of the Executive Sessions of the Board. However, the Custodian stated that thirty-three (33) pages of written records were attached to the e-mail. The Custodian added that redactions were made pursuant to OPRA's exemption for advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.

Statement of Information:⁴

On February 18, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 23, 2017. The Custodian certified that she forwarded the request to internal counsel and senior management. The Custodian the certified that once records were retrieved, they were forwarded to counsel for review and redaction as necessary. The Custodian certified that she responded in writing on November 1, 2017, stating that additional time was needed to respond to Item Nos. 1, 2, and 7, and denied Item Nos. 3-6 as overly broad and vague.

The Custodian then certified that additional responses were provided on December 1, 2017, and December 20, 2017, providing responsive records to Item Nos. 1 and 2, respectively. The Custodian also certified that, regarding Item No. 7, she collaborated with the College's IT department to develop search terms used to locate responsive records. The Custodian certified that the search resulted in a return of thousands of e-mails requiring review.

The Custodian asserted that Item Nos. 3-7 were impermissibly overbroad and vague. The Custodian asserted that OPRA does not "authorize a party to make a blanket request for every document a public agency has on file . . . Rather, a party requesting access to a public record under ORPA must specifically describe the document sought." Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005) (quoting Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005)). The Custodian added that a request is invalid if it required the custodian to manually search through all the agency's files, analyze, compile, and collated the information contained therein. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Custodian also argued that the Council previously invalidated similar requests. The Custodian cited Fleming v. Town of Phillipsburg (Warren), GRC Complaint No. 2012-222 (June 2013), where the complainant sought inspection of "any and all correspondence and documents between the Town of Phillipsburg, its officials, employees, or agents sent to or received from Ingersoll-Rand, its officials, employees or agents with regard to the Ingersoll property for the past five (5) years." The Custodian noted that the request specified the type of documents sought, the individuals involved, a subject matter, and a date range. The Custodian asserted that notwithstanding the request containing those elements, the Council held that the request was invalid pursuant to MAG and Bent. The Custodian noted that the Council's ruling emphasized on the requests' language for records "relating to" the subject matter, thereby requiring the custodian to determine whether a record could be related to some other entity.

⁴ The matter was referred to mediation on December 20, 2017. The matter was then referred back from mediation on January 25, 2018.

The Custodian also cited Dusenberry v. N.J. City Univ. Found., GRC Complaint No. 2012-82 (May 2013), where the complainant sought e-mails, telephone records, memoranda, facsimiles, and letters between the University President and various individuals regarding the university's "80th Anniversary Gala in October 2010." The Custodian asserted that although the request identified specific individuals, and a subject matter, the Council held that the request was overly broad because it would require the custodian to conduct research to determine if responsive records were responsive to the subject matter.

The Custodian argued that in the current matter, the Complainant's request would impose the same burdens as those in previous cases. The Custodian asserted that for Item No. 3, the request sought any and all correspondence between President Munroe and the Board from April 1, 2017 to the present, a request that was rejected as invalid under Dusenberry, GRC 2012-82.

The Custodian then contended that Item No. 4 would require the her to search the records of President Munroe and every College employee, and then subjectively determine which of those records could "regard Joyce Harley." The Custodian asserted that Item No. 6 was virtually identical to Item No. 4 but expanded the potential recipients from every employee at the College to "any individual or organization."

The Custodian next argued that Item No. 5 was an even broader request, requiring the Custodian to locate any correspondence sent by President Munroe to any individual organization relating to the College. The Custodian argued that since President Munroe was hired in May 2017, the request amounted to a request for all correspondence sent by President Munroe during his tenure at the College.

Lastly, the Custodian contended that Item No. 7 would require the Custodian to search the text messages, e-mails, and written correspondence of every College employee and then subjectively determine whether a record "relates" to the subject matter identified.

The Custodian asserted that Item Nos. 3-7 of the Complainant's request failed to specifically identify government records. The Custodian argued that she undertook good faith efforts to respond and provide responsive records to the remaining items of the request. Thus, the Custodian requested that the Council find that the Custodian did not unlawfully deny access to the requested records.

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).⁵ 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).

Further, OPRA provides that a custodian may request an extension of time to respond to the Complainant's OPRA request but that a specific date by which the Custodian will further respond must be provided. N.J.S.A. 47:1A-5(i). OPRA also provides that, should the custodian fail to provide a response by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i). In Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013), the custodian timely responded in writing on the fifth (5th) business day after receiving the complainant's OPRA request, seeking five (5) additional days to respond. However, the custodian failed to respond within the additional time requested. Therefore, the Council held that there was a "deemed" denial of access under N.J.S.A. 47:1A-5(i).

In the instant matter, the Complainant stated that she submitted the OPRA request on October 23, 2017. On November 1, 2017, Custodian responded in writing, denying access to a portion of the records, but sought an extension of time to respond to Item Nos. 1, 2, and 7 to until November 10, 2017. The Complainant then claimed that after not receiving a response from the Custodian before the end of the extended deadline, she e-mailed the Custodian on November 21, 2017, stating that she had yet to receive a response would therefore treat her request as "deemed" denied.

Therefore, although the Custodian properly sought an extension of time on November 1, 2017 to respond to the Complainant's OPRA request, the request is "deemed" denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn, GRC 2011-326.

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that ". . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually." Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

On December 1, 2017, the Custodian responded to the Complainant's request in part, providing responsive records to Item No. 1, but sought additional time for Item Nos. 2 and 7. On December 20, 2017, the Custodian responded to the Complainant, providing records responsive to Item No. 2, but failed to provide a response pertaining to Item No. 7.

⁵ 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.

Therefore, the Custodian's response was insufficient because she failed to respond in writing to each individual request item contained in the ORPA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

Validity of Request

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, 381 N.J. Super. at 37;⁶ 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).

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request such records in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). The Council has also applied the criteria set forth in

⁶ Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).

Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. See e.g. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) (invalid request omitting the “subject and/or content”); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016) (invalid request omitting “date or range of dates”).

Item Nos. 3 and 7

With respect to the Complainant’s OPRA request Item Nos. 3 and 7, the Custodian asserted in her initial response that Item No. 3 was overly broad and vague. Regarding Item No. 7, the Custodian sought an extension of time to respond, but did not respond before the complaint filing. It was not until she submitted her SOI that the Custodian argued that Item No. 7 was also invalid as overly broad and vague.

A plain reading of both items supports the Custodian’s position that the requests are invalid. Specifically, in Item No. 3 the Complainant failed to include a subject matter and/or content contained within the forms of communication requested. As for Item No. 7, the Complainant did not include any senders and/or recipients; thus, the Custodian’s search for any forms of communication would necessarily be open-ended. Therefore, the GRC is satisfied that Item Nos. 3 and 7 are invalid, as they lacked an element required to be a valid request for communications.

Thus, notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s October 23, 2017 OPRA request Item Nos. 3 and 7 seeking multiple types of correspondence. N.J.S.A. 47:1A-6. Specifically, Item No. 3 is invalid because it failed to identify a subject matter/content, and Item No. 7 failed to identify senders and/or recipients. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37, N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Armenti, GRC 2009-154. See also Verry, GRC 2009-124; Inzelbuch, GRC 2015-68.

Item No. 5

Regarding Item No. 5, the Custodian asserted that the request was overly broad and vague as it requested various forms of correspondence “regarding any and all affairs, matters or issues relating to [the College].” The Custodian contended that this request essentially seeks all correspondence from President Munroe during his time with the College, without any attempt to narrow the subject to a specific issue.

The Appellate Division has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated March 22, 2016), the Council held that while terms such as “sheet,” “vacation,” and “sick” were too broad to satisfy the subject matter or content of requested e-mails, proper names such as “Carlton” and “Verry” were indeed valid. The Council noted that because proper names cannot be construed interchangeably, a custodian could easily identify them in a search for responsive documents. Id.

However, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-59 (July 2016), the complainant sought all e-mails to and from the custodian containing a “disclaimer” informing the recipient that “[e]mail received by or sent to [Borough of South Bound Brook (“Borough”)] officials is subject to the Open Public Records Act” and similar language. The Council held that the disclaimer does not satisfy the Elcavage subject/content matter requirement because the disclaimer appears in every e-mail sent to the identified recipients. The Council, relying on Verry, GRC 2015-97 *et al.* found that because a disclaimer is typically generic in nature, the resulting search would comprise a wide range of e-mails encompassing various unrelated topics. Therefore, the Council held that the request was invalid.

The Council’s decisions in Verry, 2015-59 and Verry, 2015-97 *et al.* are instructive for the current matter. While “Essex County College” is a proper name similar to those deemed valid under Verry, 2015-97 *et al.*, it is important to note that the agency in this matter is Essex County College. Like the generic disclaimer in Verry, 2015-59, a search for e-mails from the President of said College would result in a multitude of e-mails containing a wide range of topics unrelated to each other. Thus, the sole use of the custodial agency’s name does not satisfy the Elcavage element requiring a subject and/or content matter.

Accordingly, notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s October 23, 2017 OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails “regarding any and all affairs, matters or issues relating to [the College],” where the sender of said e-mails is the President of the College. The sole use of the custodial agency’s name does not sufficiently narrow the scope of the subject or content of the records sought. MAG, 375 N.J. Super. at 546; N.J. Builder’s Ass’n, 390 N.J. Super. at 180; Burke, 429 N.J. Super. at 176. See also Verry, GRC 2015-97, *et seq.*, and Verry, GRC 2015-59.

Item Nos. 4 and 6

Regarding requests requiring research, the distinction between search and research is fact-sensitive. That is, there are instances where the very specificity of a request requires only a search, as would be with OPRA requests for communications properly containing all three (3) criteria set forth in Elcavage, GRC 2009-7. To that end, the Council has provided guidance on how requests containing the Elcavage criteria do not require research:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer,

a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

[Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Upon review, the GRC is satisfied that the Complainant’s OPRA request Item Nos. 4 and 6 conform to the requirements under Elcavage as valid requests for correspondence. The Complainant identified the requested e-mails’ sender/recipients, a date range, and contained the subject matter or content of “Dr. Joyce W. Harley” and/or the “Office of Administration and Finance.” See Verry, GRC 2015-97, *et seq.*

Accordingly, the Complainant’s October 23, 2017 ORPA request Item Nos. 4 and 6 seeking correspondence are valid because they identified a sender/recipient, a specific date range, and content and/or subject matter. See Burke, 429 N.J. Super. at 176; Elcavage, GRC 2009-07. See also Armenti, GRC 2009-154. Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prevailing Party Attorney’s Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian properly sought an extension of time on November 1, 2017 to respond to the Complainant’s OPRA request, the request is “deemed” denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).

2. The Custodian's response was insufficient because she failed to respond in writing to each individual request item contained in the ORPA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's October 23, 2017 OPRA request Item Nos. 3 and 7 seeking multiple types of correspondence. N.J.S.A. 47:1A-6. Specifically, Item No. 3 is invalid because it failed to identify a subject matter/content, and Item No. 7 failed to identify senders and/or recipients. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016).
4. Notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's October 23, 2017 OPRA request Item No. 5. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails "regarding any and all affairs, matters or issues relating to [the College]," where the sender of said e-mails is the President of the College. The sole use of the custodial agency's name does not sufficiently narrow the scope of the subject or content of the records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated March 22, 2016), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-59 (July 2016).
5. The Complainant's October 23, 2017 ORPA request Item Nos. 4 and 6 seeking correspondence are valid because they identified a sender/recipient, a specific date range, and content and/or subject matter. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See also Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Therefore, the Custodian may have unlawfully denied access to responsive records. The Custodian shall conduct a search and disclose to the Complainant responsive records. If no responsive records are located, the Custodian must certify to same.
6. **The Custodian shall comply with conclusion No. 5 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, if applicable. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹

7. 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.
8. 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

October 30, 2019

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁸ "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."

⁹ 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.