



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

May 18, 2021 Government Records Council Meeting

Seth I. Davenport, Esq.
Complainant

Complaint No. 2020-33

v.

Township of Irvington (Essex)
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 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 dismiss this complaint based on the Complainant next-of-kin’s notification of his death and her request to withdraw the complaint. 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 18th Day of May 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: May 20, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting**

**Seth I. Davenport, Esq.¹
Complainant**

GRC Complaint No. 2020-33

v.

**Township of Irvington (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All invoices or bills (including detailed billing and billing summaries) submitted by or on behalf of O'Donnell, McCord, P.C. ("Firm") for work performed for the Township of Irvington ("Township").
2. If not included in response to item No. 1 above, all back-up or any detail of services rendered by date and individual for work performed for the Township.
3. All payment vouchers submitted by or on behalf of the Firm for work performed for the Township.
4. If the Township maintains a program for payment processing, a print-out of each payment made by the Township to the Firm.

Custodian of Record: Harold E. Wiener

Request Received by Custodian: January 13, 2020

Response Made by Custodian: February 7, 2020

GRC Complaint Received: February 10, 2020

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the April 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's January 13, 2020 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to properly respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension

¹ No legal representation listed on record.

² Represented by Evelyn Akushie-Onyeani, Esq. (Irvington, NJ).

of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. The Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to find a viable alternative to effectuate disclosure after failing to successfully send the responsive records to the Complainant via e-mail and Dropbox. N.J.S.A. 47:1A-5(g). Thus, the Custodian shall disclose the records to the Complainant through a viable electronic method (at cost in accordance with N.J.S.A. 47:1A-5(b) where applicable) and provide to the GRC documentation to support this disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On April 28, 2021, the Council distributed its Interim Order to all parties. On April 29, 2021, Clerk Shekenna Brown sent a Dropbox link to the Complainant containing the records responsive to the subject OPRA request.

Additional Submissions:

On May 11, 2021, the Complainant’s spouse e-mailed the GRC to advise of the Complainant’s death in March 2021 which was during the pendency of this complaint. The Complainant’s spouse further stated that as next-of-kin for the Complainant, she wished to withdraw the instant complaint.

³ 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.

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

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

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this complaint based on the Complainant next-of-kin's notification of his death and her request to withdraw the complaint. No further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

May 11, 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

April 27, 2021 Government Records Council Meeting

Seth I. Davenport, Esq.
Complainant

Complaint No. 2020-33

v.

Township of Irvington (Essex)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s January 13, 2020 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to properly respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to find a viable alternative to effectuate disclosure after failing to successfully send the responsive records to the Complainant via e-mail and Dropbox. N.J.S.A. 47:1A-5(g). Thus, the Custodian shall disclose the records to the Complainant through a viable electronic method (at cost in accordance with N.J.S.A. 47:1A-5(b) where applicable) and provide to the GRC documentation to support this disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹**

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.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

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

Interim Order Rendered by the
Government Records Council
On The 27th Day of April 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: April 28, 2021

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Seth I. Davenport, Esq.¹
Complainant**

GRC Complaint No. 2020-33

v.

**Township of Irvington (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All invoices or bills (including detailed billing and billing summaries) submitted by or on behalf of O'Donnell, McCord, P.C. ("Firm") for work performed for the Township of Irvington ("Township").
2. If not included in response to item No. 1 above, all back-up or any detail of services rendered by date and individual for work performed for the Township.
3. All payment vouchers submitted by or on behalf of the Firm for work performed for the Township.
4. If the Township maintains a program for payment processing, a print-out of each payment made by the Township to the Firm.

Custodian of Record: Harold E. Wiener

Request Received by Custodian: January 13, 2020

Response Made by Custodian: February 7, 2020

GRC Complaint Received: February 10, 2020

Background³

Request and Response:

On January 13, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 28, 2020, the Complainant e-mailed the Custodian seeking a status update on his OPRA request. On January 30, 2020, Clerk's Office employee Shawna Supel forwarded the Complainant's e-mail to Chief Financial Officer Faheem J. Ra'Oof seeking a status update. On January 31, 2020, Ms. Supel

¹ No legal representation listed on record.

² Represented by Evelyn Akushie-Onyeani, Esq. (Irvington, 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.

replied to the Complainant advising that Township attorney Ramon Rivera would respond to the subject OPRA request.

On February 3, 2020, Custodian's Counsel e-mailed the Complainant asking to speak with him verbally. On the same day, the Complainant advised that he was available to discuss the subject OPRA request. On February 4, 2020, the Complainant e-mailed Custodian's Counsel confirming their conversation on that day and noting that he sought records from January 2019 through December 2019. The Complainant also noted that he agreed to an extension of time through February 7, 2020 to allow Custodian's Counsel to review the request and determine if any further extensions were necessary. The Complainant stated that he also expected to receive at least unredacted copies of the detailed bills by that date.

On February 5, 2020, Custodian's Counsel stated that she would review the OPRA request and determine if more time to respond was required. On the same day, the Complainant responded stating that twenty-five (25) calendar days had passed without a response and that the records sought were "immediate access" records. Thereafter, and the seventeenth (17th) business day after receipt of the subject OPRA request, Custodian's Counsel responded in writing on behalf of the Custodian stating that the City would require an extension of time through February 12, 2020. The Complainant responded denying the extension request but agreeing to delay the complaint process unless the Township met three (3) conditions. On February 6, 2021, Custodian's Counsel again sought an extension, noting that "there is no evidence of bad faith." On the same, the Complainant responded arguing that "bad faith" is not a basis for OPRA violations. The Complainant reiterated that he would not file a complaint if the Township met conditions set forth in his previous e-mail.

On February 7, 2020, Custodian's Counsel responded stating that well over 1,000 pages of records may be responsive to the OPRA request; thus, a copy cost of \$0.05 per page would apply. Counsel stated that she would apprise the Complainant of the total cost on either February 19, or 20, 2020. On the same day, the Complainant replied noting that he sought electronic copies of the responsive records and offered to bring in a personal scanner the following Monday. The Complainant noted that should this "reasonable solution" be rejected, he would file a complaint.

Denial of Access Complaint:

On February 10, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian violated OPRA by failing to immediately respond to those items seeking "immediate access" records. N.J.S.A. 47:1A-5(e). The Complainant noted that the GRC has multiple decisions and training materials available on its website that provide definitive guidance on how to address "immediate access" requests. See Kaplan v. Winslow Twp. Bd of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012); "2019 General OPRA Presentation." The Complainant also argued that to the extent the Township intended to review the records for redaction prior to disclosure, this fact was never communicated to him.

The Complainant further argued that Custodian Counsel's assertion that it would take nearly two (2) weeks to copy nearly 1,000 of records "exemplifies the willful actions of one eschewing the requirements of OPRA." The Complainant contended that the Township proceeded

as if the “immediate access” provision did not apply to it. The Complainant thus argued that the GRC must find in his favor in order to put “a stop to [the Township’s] lack of respect for OPRA and the public’s right to immediate access of certain documents.”

Supplemental Responses:

On February 10, 2020, Clerk’s Office employee Shonta D. Watson responded in writing on behalf of the Custodian disclosing a .zip file containing responsive records, which failed to deliver due to the attachment size. On February 11, 2020, Custodian’s Counsel e-mailed the Complainant advising that the Township disclosed the responsive records via e-mail on the previous day. The Complainant responded advising that he did not receive the e-mail, noting that it is possible that his e-mail account blocked the e-mail due to file size. The Complainant suggested as an alternative, he could provide the Township a Dropbox request. Ms. Watson replied confirming that the Complainant send the request, which the Complainant confirmed he sent.

On February 12, 2020, the Complainant e-mailed Ms. Watson seeking confirmation that she received the Dropbox request and included a link that she could also utilize to upload the records. Later that day, the Complainant e-mailed the Township expressing confusion that the responsive records had not been uploaded into his Dropbox account.

Statement of Information:⁴

On May 18, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 13, 2020. The Custodian certified that over 1,500 pages of records were located, scanned, and placed in a .zip file for disclosure. The Custodian certified that Ms. Watson responded in writing on his behalf on February 10, 2020 disclosing the .zip file via e-mail.

The Custodian contended that no unlawful denial of access occurred because the Township disclosed the responsive records on February 10, 2020, although without success due to the attachment size. The Custodian noted that the Township also had issues trying to load the records into the Complainant’s Dropbox account. The Custodian argued that the Township worked with the Complainant to accommodate him by seeking extensions of time and offering to provide the records in hard copy, which were rejected. The Custodian also argued that it would not permit the Complainant to use a personal scanner due to space limitations, the possible interruption of office operations, and the integrity of the responsive records. The Custodian thus argued that the Township’s attempts to accommodate the Complainant, which were “surprisingly rejected,” resulted in an unlawful denial of access similar to those contemplated in N.J.S.A. 47:1A-5(c) and N.J.S.A. 47:1A-5(g). See Vessio v. N.J. Dep’t of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009).

⁴ On February 26, 2020, this complaint was referred to mediation. On April 9, 2020, this complaint was referred back to the GRC for adjudication.

Analysis

Immediate Access

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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 October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of "immediate access" records).

Here, the Complainant's January 13, 2020 OPRA request sought invoices, detailed billing statements, and vouchers for O'Donnell, McCord, P.C., from January 1, through December 31, 2019. Such invoices, billing statements, and vouchers are categorically considered records subject to "immediate access." N.J.S.A. 47:1A-5(e). However, the first formal response to this OPRA request was not made until February 5, 2021, the seventeenth (17th) business day after receipt of the subject OPRA request.

The Custodian here had "an obligation to immediately" respond to a Complainant's clarified request granting access, denying access, seeking clarification, or requesting an extension of time. See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan, GRC 2011- 237. However, the evidence supports that the Custodian did not do so, and his failure is a violation of N.J.S.A. 47:1A-5(e).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's January 13, 2020 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to properly respond in writing to the Complainant's OPRA request, either granting access,

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.

⁶ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98; Herron, GRC 2006-178; Harris, GRC 2011-65.

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.

In the matter before the Council, the Complainant sought access to the requested records electronically via e-mail. Upon determining that a voluminous amount of responsive records existed, Custodian’s Counsel offered to provide the records in hardcopy at a cost. The Complainant rejected that offer, instead suggesting that he come to the Township office and copy the records using a personal scanning device. After receiving no response from the Township, the Complainant filed the instant complaint on February 10, 2020. Approximately an hour after the Complainant filed the instant complaint, the Township attempted to disclose the responsive records via e-mail. However, that attempt failed because of the size of the attachment. Over the next few days, the Township and Complainant discussed disclosing the records via Dropbox.

In the SOI, the Custodian argued that the Township encountered technical difficulties trying to send the record via e-mail and Dropbox. The Custodian also argued that the Complainant rejected an offer to receive paper copies and that the Township would not allow the Complainant to use a personal scanner for several reasons. The Custodian thus argued that because all attempts to accommodate the Complainant failed or were rejected, no unlawful denial of access occurred. In arguing this position, the Custodian cited to N.J.S.A. 47:1A-5(g) and multiple cases addressing the “substantial disruption of agency operations” exemption. However, absent from the SOI is confirmation that the Township successfully disclosed the responsive records to the Complainant and that he received them.

At first blush, this complaint appears to center on a method of delivery and medium conversion issue. See O’Shea v. Twp. of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008); N.J.S.A. 47:1A-5(d). However, both issues were appropriately addressed by the Township in offering paper copies due to the voluminous amount of responsive records and their ultimate conversion into the electronic file Ms. Watson attempted to e-mail the Complainant on February 10, 2020.

Instead, the threshold issue comes down to a basic question of whether successful disclosure occurred or that nondisclosure, as appears to be the result here, was lawful. The Council’s consideration is thus focused on whether it was lawful for the Custodian and/or staff members of the Township to cease attempting disclosure under the guise of a “substantial disruption of agency operations” argument once both e-mailing and uploading the records to Dropbox failed.

When applying the fact of this complaint to a plain reading of OPRA, the GRC finds that it was not lawful for the Custodian to discontinue attempts to disclose the responsive records. OPRA requires disclosure of those records that are not otherwise exempt from access and does not allow for a custodian to deny access on the basis that they could not be sent to the requestor. N.J.S.A. 47:1A-5(g). It should be noted that the Custodian, through Counsel and Clerk's Office staff, offered paper copies of the records and did not respond to the Complainant's request to use a personal scanner.⁷ However, the Custodian and his staff should have explored multiple alternatives for disclosure beyond the forgoing in order to effectuate disclosure. Those could include saving the records to a flash drive, writing them to a compact disc, or splitting/reducing the size of the files to fit within one or multiple e-mails. Notwithstanding, there is no evidence in the record that any of these alternatives were explored.

Further, the GRC does not agree that seeking additional solutions to disclosing those records would amount to a substantial disruption of agency operations. While the GRC understands that the Township attempted to accommodate the requestor in suggesting multiple avenues for disclosing the records, there is no evidence that exploring other options contemplated above would result in a substantial disruption of agency operations in a manner similar to those discussed in Vessio, GRC 2007-63 and Dittrich, GRC 2008-13. In fact, while 1,500 pages of records could be considered voluminous, the Township already located the specifically identified records, converted them into an electronic format, and made multiple attempts to disclose them. Thus, the GRC does not agree that the Custodian could reply on the "substantial disruption" exemption simply because disclosure through e-mail and Dropbox failed.

Accordingly, the Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to find a viable alternative to effectuate disclosure after failing to successfully send the responsive records to the Complainant via e-mail and Dropbox. N.J.S.A. 47:1A-5(g). Thus, the Custodian shall disclose the records to the Complainant through a viable electronic method (at cost in accordance with N.J.S.A. 47:1A-5(b) where applicable) and provide to the GRC documentation to support this disclosure.

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.

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 January 13, 2020 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to properly respond in writing to the Complainant's OPRA request,

⁷ The GRC notes that it has previously held that a "public agency" lawfully rejected a requestor's ability to use a personal device to copy "government records" based on concerns over the integrity of those records. See Hascup v. Waldwick Bd. of Educ., GRC Complaint No. 2005-192 (April 2007).

either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. The Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to find a viable alternative to effectuate disclosure after failing to successfully send the responsive records to the Complainant via e-mail and Dropbox. N.J.S.A. 47:1A-5(g). Thus, the Custodian shall disclose the records to the Complainant through a viable electronic method (at cost in accordance with N.J.S.A. 47:1A-5(b) where applicable) and provide to the GRC documentation to support this disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso
Executive Director

April 20, 2021

⁸ 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.

⁹ "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."

¹⁰ 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.