



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**February 28, 2023 Government Records Council Meeting**

Daniel Z. Rivlin, Esq.  
(o/b/o American Airlines, Inc.)  
Complainant

Complaint No. 2020-72

v.

Port Authority of NY and NJ  
Custodian of Record

At the February 28, 2023 public meeting, the Government Records Council (“Council”) considered the February 21, 2023 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 Complainant and Complainant’s Counsel failed to comply with the Council’s Interim Order because they failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b); (d). Accordingly, the matter shall be closed, as no further analysis is necessary.

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 28<sup>th</sup> Day of February 2023

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 6, 2023**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
February 28, 2023 Council Meeting**

**Daniel Z. Rivlin, Esq. o/b/o American Airlines, Inc.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-72**

**v.**

**The Port Authority of New York and New Jersey<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Aubrey Wynne Lane allegations regarding Rene Malave Santiago and/or American Airlines relating to American Airlines Flight 1280 from Phoenix Sky Harbor airport to JFK airport on June 15, 2017 and June 16, 2017 . . . [y]ou are requested to provide copies of all of the following [records] for any and all investigations conducted by The Port Authority of New York and New Jersey regarding Aubrey Lane:

1. All notes, emails, reports, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Officer Jeremy Khan;
2. All notes, emails, voicemails, reports, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Officer Parvin-Alcock;
3. All notes, emails, voicemails, reports, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Officer Coady;

All notes, emails, reports, voicemails, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Captain Richard Bellucci[.]”<sup>3</sup>

**Custodian of Record:** William Shalewitz

**Requests Received by Custodian:** November 15, 2019 and November 20, 2019 (amended)

**Responses Made by Custodian:** November 20, 2019, November 27, 2019, January 16, 2020, February 20, 2020 and March 20, 2020

**GRC Complaint Received:** April 6, 2020

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<sup>1</sup> Daniel Z. Rivlin, Esq. (Newark, NJ) filed the complaint on behalf of, and represents, American Airlines, Inc.

<sup>2</sup> Represented by Caitlin Sullivan, Esq. (New York, NY).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

Daniel Z. Rivlin, Esq. o/b/o American Airlines, Inc. v. The Port Authority of New York and New Jersey, 2020-72 – Supplemental Findings and Recommendations of the Executive Director

## Background

### December 13, 2022 Council Meeting:

At its December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 2022 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 Custodian complied with the Council’s November 9, 2022 Interim Order because he responded in the prescribed time frame certifying that he disclosed to the Complainant on June 22, 2020, during the pendency of this complaint, the records responsive to the subject OPRA request with appropriate redactions and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the request, in redacted form, during the pendency of this complaint. 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. 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, after the Denial of Access Complaint was filed on April 6, 2020, the Custodian disclosed on June 22, 2020, the records responsive to the Complainant’s OPRA request. 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 December 14, 2022, the Council distributed its December 13, 2022 Interim Order to all parties. On January 13, 2023, the Government Records Council (“GRC”) advised the parties that the fee agreement time frame expired. The GRC further advised the parties that the Complainant’s Counsel had twenty (20) business days from January 12, 2023 to submit a fee application, which

was the end of business on February 10, 2023. The Complainant's Counsel did not submit a fee application within the appropriate time frame to do so.

### **Analysis**

#### **Compliance**

At its December 13, 2022 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 December 14, 2022, 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 January 12, 2023.

On January 13, 2023, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. As of the end of business on February 10, 2023, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from the Complainant or Complainant’s Counsel.

Therefore, the Complainant and Complainant’s Counsel failed to comply with the Council’s Interim Order because they failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b); (d). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant and Complainant’s Counsel failed to comply with the Council’s Interim Order because they failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b); (d). Accordingly, the matter shall be closed, as no further analysis is necessary.

Prepared By: John E. Stewart

February 21, 2023



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

December 13, 2022 Government Records Council Meeting

Daniel Z. Rivlin, Esq. (o/b/o American Airlines, Inc.)  
Complainant

Complaint No. 2020-72

v.

Port Authority of NY and NJ  
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 2022 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. The Custodian complied with the Council’s November 9, 2022 Interim Order because he responded in the prescribed time frame certifying that he disclosed to the Complainant on June 22, 2020, during the pendency of this complaint, the records responsive to the subject OPRA request with appropriate redactions and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the request, in redacted form, during the pendency of this complaint. 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. 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, after the Denial of Access Complaint was filed on April 6, 2020, the Custodian disclosed on June 22, 2020, the records responsive to the Complainant’s OPRA request. 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 13<sup>th</sup> Day of December 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 14, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 13, 2022 Council Meeting**

**Daniel Z. Rivlin, Esq. o/b/o American Airlines, Inc.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-72**

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**The Port Authority of New York and New Jersey<sup>2</sup>  
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All notes, emails, reports, voicemails, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Captain Richard Bellucci[.]”<sup>3</sup>

**Custodian of Record:** William Shalewitz

**Requests Received by Custodian:** November 15, 2019 and November 20, 2019 (amended)

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**GRC Complaint Received:** April 6, 2020

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<sup>1</sup> Daniel Z. Rivlin, Esq. (Newark, NJ) filed the complaint on behalf of, and represents, American Airlines, Inc.

<sup>2</sup> Represented by Caitlin Sullivan, Esq. (New York, NY)

<sup>3</sup> There were other records requested that are not relevant to this complaint.

## Background

### November 9, 2022 Council Meeting:

At its November 9, 2022 public meeting, the Council considered the August 23, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties.<sup>4</sup> The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). Thus, because the complaint was filed amid an unwarranted and unsubstantiated extension of time, the complaint is ripe for adjudication and shall not be dismissed.
2. Because the Custodian has unlawfully denied access to the Complainant's November 15, 2019 OPRA request, as amended on November 20, 2019, the Custodian must disclose the records requested by the Complainant. N.J.S.A. 47:1A-6; Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3<sup>rd</sup> Cir. 2019). If the Custodian already disclosed the responsive records during the pendency of this complaint, he must certify to that fact.
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 deliver certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
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.
5. 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 10, 2022, the Council distributed its Interim Order to all parties. On November 17, 2022, the Custodian responded to the Council's Interim Order. The Custodian

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<sup>4</sup> This complaint was scheduled for adjudication at the Council's August 30, 2022 meeting but was tabled for additional legal review.



certified that he disclosed the requested records during the pendency of the complaint via e-mail on June 22, 2020 with redactions for personal information.

## **Analysis**

### **Compliance**

At its November 9, 2022 meeting, the Council ordered the Custodian to disclose the records responsive to the Complainant's OPRA request, or if the records were disclosed during the pendency of this complaint, to certify to that fact, and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On November 10, 2022, 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 18, 2022.<sup>5</sup>

On November 17, 2022, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance averring that on June 22, 2020, during the pendency of the complaint, he transmitted via e-mail all records responsive to the request. The Custodian further certified that he redacted the responsive records to remove the following content: Port Authority of New York and New Jersey employee identification numbers, personal addresses, personal telephone numbers, dates of births, social security numbers and the names of a witness and a suspect.

Therefore, the Custodian complied with the Council's November 9, 2022 Interim Order because he responded in the prescribed time frame certifying that he disclosed to the Complainant on June 22, 2020, during the pendency of this complaint, the records responsive to the subject OPRA request with appropriate redactions 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 and 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

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<sup>5</sup> November 11, 2022 was a State holiday.

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. 1983)); 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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the request, in redacted form, during the pendency of this complaint. 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 Appellate Division 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, 71 (2008), the 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." (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 (7<sup>th</sup> 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.]

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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant filed his OPRA request on November 15, 2019, as amended on November 20, 2019. The Custodian failed to respond in a timely manner to the request and the Complainant filed the within complaint on April 6, 2020, alleging he was unlawfully denied access to the requested records. On November 9, 2022, the Council ordered the Custodian to disclose to the Complainant the records responsive to the request or certify the records were disclosed during the pendency of the complaint. On November 17, 2022, the Custodian responded to the Council's Order, certifying that he disclosed the requested records with appropriate redactions on June 22, 2020, during the pendency of the complaint. Therefore, there is a factual causal nexus between the

complaint and the relief ultimately achieved, and the relief ultimately achieved by the Complainant had a basis in law.

Therefore, 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, after the Denial of Access Complaint was filed on April 6, 2020, the Custodian disclosed on June 22, 2020, the records responsive to the Complainant’s OPRA request. 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 Custodian complied with the Council’s November 9, 2022 Interim Order because he responded in the prescribed time frame certifying that he disclosed to the Complainant on June 22, 2020, during the pendency of this complaint, the records responsive to the subject OPRA request with appropriate redactions and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the request, in redacted form, during the pendency of this complaint. 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. 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, after the Denial of Access Complaint was filed on April 6, 2020, the Custodian disclosed on June 22, 2020, the records responsive to the Complainant’s OPRA request. 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: John E. Stewart

December 6, 2022



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DEPARTMENT OF COMMUNITY AFFAIRS  
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PO Box 819  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**November 9, 2022 Government Records Council Meeting**

Daniel Z. Rivlin, Esq. (o/b/o American  
Airlines, Inc.)

Complaint No. 2020-72

Complainant

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Port Authority of NY and NJ  
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). Thus, because the complaint was filed amid an unwarranted and unsubstantiated extension of time, the complaint is ripe for adjudication and shall not be dismissed.
2. Because the Custodian has unlawfully denied access to the Complainant’s November 15, 2019 OPRA request, as amended on November 20, 2019, the Custodian must disclose the records requested by the Complainant. N.J.S.A. 47:1A-6; Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3<sup>rd</sup> Cir. 2019). If the Custodian already disclosed the responsive records during the pendency of this complaint, he must certify to that fact.
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 deliver<sup>1</sup>**

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<sup>1</sup> 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,<sup>2</sup> to the Executive Director.<sup>3</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 9<sup>th</sup> Day of November 2022

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 10, 2022**

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<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 9, 2022 Council Meeting**

**Daniel Z. Rivlin, Esq. o/b/o American Airlines, Inc.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-72**

v.

**The Port Authority of New York and New Jersey<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Aubrey Wynne Lane allegations regarding Rene Malave Santiago and/or American Airlines relating to American Airlines Flight 1280 from Phoenix Sky Harbor airport to JFK airport on June 15, 2017 and June 16, 2017 . . . [y]ou are requested to provide copies of all of the following [records] for any and all investigations conducted by The Port Authority of New York and New Jersey regarding Aubrey Lane:

1. All notes, emails, reports, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Officer Jeremy Khan;
2. All notes, emails, voicemails, reports, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Officer Parvin-Alcock;
3. All notes, emails, voicemails, reports, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Officer Coady;
4. All notes, emails, reports, voicemails, radio logs, event logs, opinions, evaluations, consultations, correspondence, memoranda, or telephone messages, regarding Aubrey Lane’s criminal complaint(s), created, received or sent by Captain Richard Bellucci[.]”<sup>3</sup>

**Custodian of Record:** William Shalewitz

**Requests Received by Custodian:** November 15, 2019 and November 20, 2019 (amended)

**Responses Made by Custodian:** November 20, 2019, November 27, 2019, January 16, 2020, February 20, 2020 and March 20, 2020

**GRC Complaint Received:** April 6, 2020

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<sup>1</sup> Daniel Z. Rivlin, Esq. (Newark, NJ) filed the complaint on behalf of, and represents, American Airlines, Inc.

<sup>2</sup> Represented by Caitlin Sullivan, Esq. (New York, NY)

<sup>3</sup> There were other records requested that are not relevant to this complaint.



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

### **Requests and Responses:**

On November 15, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.<sup>5</sup> On November 20, 2019, the third (3<sup>rd</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that “[The Port Authority of New York and New Jersey] (“agency”) would be very happy to respond to your request.” The Custodian further informed the Complainant that request item number 5 was broad and unclear, and he therefore asked the Complainant to clarify request item number 5.<sup>6</sup> On November 20, 2019, the Complainant amended the request by resubmitting it with request item number 5 crossed out and the statement, “[s]ee attached. Item #5 has been crossed out-please process or advise accordingly.”

On November 27, 2019, the fifth (5<sup>th</sup>) business day following receipt of the Complainant’s amended request, Freedom of Information Administrator Bin Bin Chen, on behalf of the Custodian, responded by informing the Complainant that any responsive records are in storage or archived and the agency will respond by January 16, 2020.

On January 16, 2020, the Custodian notified the Complainant via the agency’s Public Record Access Form “that additional time is needed to process the request.” The Custodian informed the Complainant that a response would be sent by February 20, 2020. On February 20, 2020, an identical form was sent to the Complainant, informing him that additional time was needed to process the request until March 20, 2020. Thereafter, on March 20, 2020, another identical form was sent to the Complainant, informing him that additional time was needed until April 22, 2020.

### **Denial of Access Complaint:**

On April 6, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted an OPRA request to the Custodian on November 15, 2019, and the Custodian responded on November 20, 2019, informing him that request item number 5 was broad and unclear. The Complainant stated that the Custodian asked him to clarify the request item, and the Complainant said he did so on November 20, 2019 by deleting request item number 5 so that it would no longer be at issue.

The Complainant stated that thereafter he received the following responses from the Custodian:

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

<sup>5</sup> The Complainant attached to the request Port Authority Report NCIR No. 17K7532 and an executed authorization for release of information from Aubrey Lane, together with a certification of identity.

<sup>6</sup> The Custodian determined that only one (1) of the request items was overly broad such that it could not be fulfilled. Request item number 5 sought “[a]ll other documents relating to Aubrey Lane in your possession, custody or control not already being produced in response to request nos. 1-4 above.”

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- On November 27, 2019, the Custodian stated the agency would respond by January 16, 2020.
- On January 16, 2020, the Custodian stated the agency would respond by February 20, 2020.
- On February 20, 2020, the Custodian stated the agency would respond by March 20, 2020.
- On March 20, 2020, the Custodian stated the agency would respond by April 22, 2020.

The Complainant stated that the Custodian never asked for his consent to any of the extensions, which totaled over 130 days of delay. Moreover, the Complainant stated that the Custodian gave him no reason why so many rolling extensions were necessary. The Complainant stated that he waited over four (4) months from his original request before filing the Denial of Access Complaint. The Complainant argued that repeated and excessive extensions of time such as this have been found by the GRC to be unreasonable and result in a “deemed” denial of access. The Complainant cited Rodriguez v. Kean University, GRC Complaint No. 2015-114 (April 2016) and Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014) in support of his argument.

Statement of Information:

On April 22, 2020, the GRC sent the Custodian a request for the Statement of Information (“SOI”). The Custodian failed to return the completed SOI to the GRC.

On May 1, 2020, the GRC sent the Custodian a letter advising him that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint.

On May 6, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 15, 2019, and responded in writing on November 20, 2019 and November 27, 2019.<sup>7</sup> The Custodian certified that he forwarded the request to the Port Authority of New York and New Jersey Police Department (“PAPD”) for retrieval of responsive records. The Custodian certified that the following records are responsive to the Complainant’s request:

- PAPD officer memo books
- Police criminal complaint report
- PAPD event report

The Custodian certified that the PAPD informed him that the Federal Bureau of Investigation (“FBI”) was handling the matter and the FBI informed the PAPD that responsive records should not be released until after the investigation was complete. The Custodian certified that he informed the Complainant that additional time was needed to respond further to the request. The Custodian certified that the legal explanation and statutory citation for the denial of access to the records is “N/A.”<sup>8</sup>

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<sup>7</sup> The evidence of record reveals the Custodian responded on November 27, 2019.

<sup>8</sup> The Custodian stated “N/A” for SOI Item 9 (C) through (F).

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## Analysis

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>9</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of 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).

Here, the Custodian requested four (4) extensions of time from November 27, 2019 until April 22, 2020. This is a period encompassing ninety-nine (99) business days to respond to the Complainant's request. On April 6, 2020, eleven (11) business days into the final extension, the Complainant filed a Denial of Access Complaint claiming he was denied access to the requested records due to excessive and unreasonable extensions of time. The issue of timeliness is central to the analysis in the instant complaint because the Council has repeatedly held that if a complaint is filed during the period of a valid extension of time, the complaint is unripe and must be dismissed.<sup>10</sup> See Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013). See also Percella v. City of Bayonne (Hudson), GRC Complaint No. 2013-109 (April 2013) and White v. N.J. Dep't of Treasury, GRC Complaint No. 2013-120 (April 2013).

Although OPRA allows up to (7) business days for a custodian to grant or deny access, the Council will not find that a custodian has violated OPRA if the statutory time period is enlarged by agreement of the parties. See Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), holding that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. In support of its decision, the Council relied upon several of its previous decisions (citations omitted). Moreover, even where a complainant has refused to agree to the custodian's request for an extension of time, the Council has found that the custodian may still properly secure such an extension. See Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010). However, even though it is well-settled that a custodian may properly obtain an extension of time to grant or deny access despite objection from the complainant, the custodian cannot exploit same to continuously deny access by repeatedly rolling over an extension once it is obtained.

In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council decided when a series of extensions of time to respond to the request

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<sup>9</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

<sup>10</sup> The Complainant here did not request immediate access records.

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crosses the threshold of reasonableness and constitutes a denial of access. In Ciccarone, the custodian sought a total of seven (7) extensions of time, totaling fifty-two (52) business days. The complainant agreed to the first four extensions, then stated that he would grant no further extensions. The Council found that an additional twenty-seven (27) business days “following expiration of the last agreed-upon extension of time in order to address the balance of the complainant’s request is clearly an excessive amount of time and flies in the face of OPRA’s mandate to ‘promptly comply . . .’ with a records request . . .” Id. at 9. The Council concluded that the custodian’s excessive extensions resulted in a “deemed” denial of the request, and in reaching that conclusion the Council looked to what is “reasonably necessary.”

Here, as in Ciccarone, the Custodian sought numerous extensions of time to address the Complainant’s request. A breakdown of the extensions of time is set forth in the following table:

<b>Date of Request for Extension</b>	<b>New Deadline for Response</b>	<b>Total Number of Business Days</b>	<b>Reason for Extension</b>
November 27, 2019 (the fifth business day following receipt of the Complainant’s clarified request)	January 16, 2020	Thirty-three (33)	Any responsive records are “in storage or archived”
January 16, 2020	February 20, 2020	Twenty-three (23)	“. . . additional time is needed to process the request.”
February 20, 2020	March 20, 2020	Twenty-one (21)	“. . . additional time is needed to process the request.”
March 20, 2020	April 22, 2020	Twenty-two (22)	“. . . additional time is needed to process the request.”

In the instant complaint, the Complainant’s OPRA request sought various types of records relating to an investigation. The GRC need not analyze the validity of the request because the Custodian indicated that he had sufficient information to conduct a search for responsive records by informing the Complainant that responsive records, if any, were “in storage or archived[.]” See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), holding that the custodian “performed a search and was able to locate records responsive . . .” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177.

The Custodian informed the Complainant he would need thirty-three (33) business days to retrieve the archived records. Thereafter, the Custodian unilaterally took three (3) additional extensions of time totaling sixty-six (66) more business days without providing any specific reason or reasons for the need of such additional extensions. Although there is nothing in the evidence of record to indicate the Complainant disputed the extensions, there is likewise nothing in the evidence of record to indicate the Complainant agreed to the extensions. However, in the complaint

the Complainant did express his intense opposition to the many extensions by arguing that such repeated and excessive extensions of time were unreasonable and that they resulted in a “deemed” denial of his request.<sup>11</sup>

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to effectively respond to the request.<sup>12</sup>

Here, the Complainant’s request is of low to moderate complexity. At the outset, the Custodian found one (1) of the request items to be overly broad and the Complainant promptly removed the item from the request, which immediately reduced the content of the request by twenty (20) percent. Further, although the Complainant did request several various types of records, all of the records related to a single incident and the Complainant attached to the request Port Authority Report NCIR No. 17K7532 to clearly identify the incident and aid the Custodian in his search for responsive records. Moreover, each of the request items sought essentially the same type of records.

The GRC does not know the level of ease or difficulty experienced by the agency in identifying and retrieving the requested records because the SOI merely states that the request was forwarded to the PAPD. The PAPD was successful, however, in locating three (3) categories of responsive records. Because the Custodian stated “N/A” for SOI Item 9(F), the GRC does not know if any redactions would have been necessary. However, the GRC does know that the records were in storage or archived; therefore, it is reasonable that the Custodian may have needed the initial thirty-three (33) business day extension of time to retrieve and prepare the records. But with respect to the additional extensions of time; however, the Custodian failed to explain why they were necessary. The Custodian merely stated that the time was needed to “process the request.”

Thirty-three (33) business days is a significant period of time to process a request, especially given the fact that the request was made to a sizable agency with at least one full-time employee available to assist the Custodian. As such, the GRC cannot conclude from the record that the Custodian was extraordinarily hindered such that a time period in excess of the initial thirty-three (33) business days was necessary to respond to the request. Moreover, the evidence of record does not reflect extenuating circumstances that would have warranted a ninety-nine (99) business day delay.

Based on the evidence of record, extending the response time for the OPRA request beyond the initial thirty-three (33) business day extension of time in order to address the Complainant’s

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<sup>11</sup> Although the complainant’s acquiescence to extensions was a mitigating factor in Ciccarone, it was not the only factor on which the GRC relied to determine whether the requests for extensions were reasonable.

<sup>12</sup> As noted in Ciccarone, “[e]xtenuating circumstances” could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency’s need to reallocate resources to a higher priority due to *force majeure*.

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request is clearly excessive and flies in the face of OPRA's mandate to ". . . promptly comply . . ." with a records request and to grant or deny access ". . . as soon as possible . . ." N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Accordingly, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Ciccarone, GRC 2013-280. Thus, because the complaint was filed amid an unwarranted and unsubstantiated extension of time, the complaint is ripe for adjudication and shall not be dismissed.

### **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 Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3<sup>rd</sup> Cir. 2019), the United State Court of Appeals for the Third Circuit reviewed a matter on appeal from the United States District Court of New Jersey ("USDCNJ") that involved the denial of three separate OPRA requests filed by appellants with the New Jersey Institute of Technology ("NJIT"). Id. at 304. The custodian denied the requests in deference to a directive that the FBI had issued to NJIT to withhold the responsive records. Id. During the pendency of the lawsuit (which had been removed to USDNJ by third-party defendant FBI), NJIT produced the records that it previously withheld at the FBI's behest. Ibid. As a result of that disclosure, the sole issue before the court was whether appellants were prevailing parties under OPRA entitled to a fee award. Id. at 311. The USDCNJ determined that appellants were not prevailing parties; however, the Third Circuit reversed that decision upon concluding that a third party's interest does not supersede a records custodian's obligation to produce non-exempt documents and any obligation to pay attorneys' fees. Id. at 313. The Third Circuit determined that:

[I]t is of no moment that the FBI directed NJIT to withhold the disputed records. NJIT, as the records custodian, bore the duty under OPRA to decide whether to release or withhold the records Golden and Locke sought, as well as the burden to pay attorneys' fees if it made the wrong decision. NJIT was free to consult with the FBI to determine whether disclosure would impinge upon any of the FBI's interests. NJIT did not err by advising the FBI that its interests may be affected by production of the documents or by seeking the FBI's position as to whether disclosure would be proper. Where NJIT went astray was in failing to exercise independent judgment and, instead, unquestioningly obeying the FBI's orders to withhold the records. NJIT is responsible for that choice and must bear the consequences, *i.e.*, paying attorneys' fees.

[Id. at 313-314 (internal citations omitted).]

Here, the Complainant requested various types of records relating to an investigation. Although the Custodian informed the Complainant that request item number 5 was overly broad, the Custodian did not assert that the remainder of the request items were invalid or that any records responsive to the request were exempt from access. To the contrary, after the Complainant removed request item number 5 from the request, the Custodian informed the Complainant that any responsive records were in storage or archived, and that he would need thirty-three (33) business days to retrieve the records. The Custodian certified in the SOI that three (3) categories of records were determined to be responsive to the Complainant's amended request; however, the Custodian refused to disclose the responsive records to the Complainant. The Custodian certified that the only reason he denied access to the records was because the FBI informed the agency that the records should not be released until after an investigation was complete.

However, like in Golden, 934 F.3d 302, the Custodian failed to cite any statutory provision as a reason for denial. In fact, the Custodian certified that no legal explanation and/or statutory citation for the denial of access was applicable. Moreover, the Custodian did not assert that disclosure of the responsive records would be inimical to the public interest.<sup>13</sup> As such, the GRC finds Golden persuasive in holding that the Custodian has unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6.

Therefore, because the Custodian has unlawfully denied access to the Complainant's November 15, 2019 OPRA request, as amended on November 20, 2019, the Custodian must disclose the records requested by the Complainant. N.J.S.A. 47:1A-6; Golden, 934 F.3d 302. If the Custodian already disclosed the responsive records during the pendency of this complaint, he must certify to that fact.

### **Knowing & Willful**

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

### **Prevailing Party 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request based on unwarranted and unsubstantiated extensions.

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<sup>13</sup> See N.J.S.A. 47:1A-3 regarding access to records of investigation in progress.

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N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). Thus, because the complaint was filed amid an unwarranted and unsubstantiated extension of time, the complaint is ripe for adjudication and shall not be dismissed.

2. Because the Custodian has unlawfully denied access to the Complainant's November 15, 2019 OPRA request, as amended on November 20, 2019, the Custodian must disclose the records requested by the Complainant. N.J.S.A. 47:1A-6; Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3<sup>rd</sup> Cir. 2019). If the Custodian already disclosed the responsive records during the pendency of this complaint, he must certify to that fact.
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 deliver<sup>14</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>15</sup> to the Executive Director.<sup>16</sup>**
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.
5. 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: John E. Stewart

August 23, 2022<sup>17</sup>

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<sup>14</sup> 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.

<sup>15</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>16</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>17</sup> This complaint was scheduled for adjudication at the Council's August 30, 2022 meeting but was tabled for additional legal review.

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