

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**FINAL DECISION**

**John Paff,  
Complainant-Petitioner,**

**GRC Complaint No. 2006-158**

**v.**

**Borough of South Bound Brook  
Custodian of Record,**

**Record Closed: April 25, 2007  
Decided: May 30, 2007**

**Respondent,**

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John Paff, pro se, for Petitioner  
Richard Millet, Esq., for Respondent

**STATEMENT OF THE CASE**

In this matter, Complainant-Petitioner, John Paff ("Paff" or "Complainant"), seeks the imposition of a civil penalty upon the Custodian of the Borough of South Bound Brook, Donald Kazar ("the Custodian"), in accordance with the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq. Paff charges that the penalty is warranted because the Custodian committed a knowing and willful violation of OPRA in his handling of an OPRA request filed by Paff in May 2006. Specifically, the Denial of Access Complaint filed on September 12, 2006 alleges that the Custodian did not provide a response to his May 19, 2006 OPRA request within the requisite seven business day time period prescribed by OPRA. The Complainant asserts that he is seeking an order declaring that the Custodian violated the Complainant's rights under OPRA. The Complainant also asserts that he is seeking an order declaring that the Custodian provide him with access to the records within the scope of the request.

The Custodian acknowledges that he failed to respond to Paff's May 19, 2006 OPRA request within the statutorily-prescribed time frame. However, the Custodian denies that he knowingly and willfully violated OPRA and asserts that the pressure of other township business diverted his attention from Paff's OPRA request.

Having determined at its public meeting of December 14, 2006 that the Custodian did, in fact, fail to meet the statutory deadline for providing a response to the Complainant's May 19, 2006 OPRA request, the Government Records Council ("Council" or "GRC") must now determine whether this violation was knowing and willful under the totality of the circumstances, requiring the imposition of a civil penalty pursuant to OPRA, N.J.S.A. 47:1A-11.

## **PROCEDURAL HISTORY**

The Council first considered Paff's Denial of Access Complaint at its December 14, 2006 public meeting. The Custodian failed to file a Statement of Information when requested to do so by the Council on September 21, 2006, October 3, 2006 and October 25, 2006. Therefore, the Council considered the Denial of Access Complaint and the Findings and Recommendations of its Executive Director, Catherine Starghill, dated December 7, 2006. By a unanimous vote, the Council adopted the Executive Director's Findings and Recommendations with minor modifications and issued an Interim Order on December 14, 2006 finding, in pertinent part:

1. The Custodian has unlawfully denied access to the Complainant's request for resolutions and executive minutes for the months of April 2003, May 2004 and October 2005, due to the Custodian's failure to respond to the Complainant's request, thus resulting in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
2. The Custodian shall disclose the requested resolutions and minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.
3. The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.
4. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days and the Custodian's failure to respond to the GRC after several attempts, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

On January 24, 2007, the Custodian provided the Council with unredacted executive session meeting minutes dated April 8, 2003, as well as additional attachments not relevant to the Complainant's OPRA request

At the February 28, 2007 public meeting, the Council considered the February 21, 2007 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 as amended. The Council, therefore, issued an Interim Order which found:

1. Based on the Custodian's failure to provide the GRC with a legal certification indicating whether or not the meeting minutes had been approved by the governing body prior to the date of the Complainant's request and failure to provide the Complainant with the requested records as ordered in the Council's December 14, 2006 Interim Order, the GRC shall commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rules, R. 4:67-6 (2007).
2. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days, the Custodian's failure to respond to the GRC after several attempts, and the Custodian's failure to comply with the Council's December 14, 2006 Interim Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, the Council shall conduct a hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Such hearing shall be held on April 25, 2007 at the Council's regularly scheduled meeting.

On April 9, 2007, the Council sent a Notice of Hearing to the parties, scheduling the hearing for April 25, 2007. Also on April 9, 2007, the Council sent a Notice of Pre-Hearing Conference to the parties, scheduling the pre-hearing conference for April 23, 2007.

On April 23, 2007, the Executive Director conducted a telephonic pre-hearing conference with the parties.

The hearing proceeded as scheduled on April 25, 2007. At the hearing, the parties agreed to stipulate to the facts as presented in the Findings and Recommendations of the Executive Director dated December 7, 2006 and the Supplemental Findings and Recommendations of the Executive Director dated February 21, 2007.<sup>1</sup> Paff presented his case and testified on his own behalf. Richard Millet, Esq., attorney for the Custodian,

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<sup>1</sup> The Custodian did not stipulate to the third paragraph on page five of the December 14, 2006 Findings and Recommendations of the Executive Director.

presented the case on behalf of Donald Kazar, Custodian of the Borough of South Bound Brook, who testified on his own behalf. After closing remarks were presented by the parties, the Council closed the record and deliberated. After deliberations, the Council informed the parties that it would render a decision at its May 30, 2006, public meeting.

### **FACTS AND REVIEW OF TESTIMONY**

The operative facts, as adduced at the April 25, 2007 hearing and as stipulated to by the parties, are as follows:

Paff testified that on May 8, 2006, he faxed a letter to the Borough of South Bound Brook clerk asking for Executive Session resolutions and minutes from April 2003, May 2004 and October 2005. Transcript page (“Tr.”) 13, line (“l.”) 7-14. Paff received an e-mail from the Custodian on May 16, 2006 requesting that Paff complete the Township’s OPRA request form. Paff completed the Township’s official OPRA request form and e-mailed it to the Custodian on May 19, 2006. Tr. 13, l. 15-18.

Paff testified that he did not receive a response to his May 19, 2006 OPRA request. Tr. 13, l. 18. On July 22, 2006, Paff faxed a letter to the Custodian, asking whether the Custodian responded to Paff’s May 19, 2006 OPRA request. Tr. 13, l. 20-25. Paff received no response from the Custodian to his July 22, 2006 fax. Tr. 14, l. 1. However, Paff received a fax transmittal receipt showing that his July 22, 2006 fax was received by the Custodian. Tr. 14, l. 3.

Paff testified that on September 12, 2006, he filed a Denial of Access Complaint with the GRC. Tr. 14, l. 7. On September 21, 2006, the GRC sent a notice to the Custodian requesting that he complete a Statement of Information and return it to the GRC within five business days. Tr. 14, l. 20. On October 3, 2006, the GRC sent a No Defense letter to the Custodian stating that if the Statement of Information was not received within three business days, the case would be adjudicated with the documents already on file. Tr. 14, l. 21-25. On October 15, 2006, the GRC sent a second No Defense letter to the Custodian by certified mail. Tr. 15, l. 4-6.

On December 14, 2006, the Council considered the Denial of Access Complaint and the Findings and Recommendations of its Executive Director, Catherine Starghill, dated December 7, 2006. By a unanimous vote, the Council adopted the Executive Director's Findings and Recommendations with minor modifications and issued an Interim Order on December 14, 2006. Findings and Recommendations of the Executive Director dated December 7, 2006, Revised Interim Order dated December 14, 2006.

The Custodian failed to provide the requested documents to Paff as required by the Council’s December 14, 2006 Interim Order. Tr. 15, l. 1-4.

Paff testified, however, that on January 24, 2007, the Custodian sent 96 pages of documents to the GRC. The Custodian did not provide a copy of the documents to Paff.

Tr. 16, l. 20-24. On February 20, 2007, the GRC case manager sent via e-mail the 96 pages of documents which the Custodian provided to the GRC. Tr. 17, l. 12-15. Paff reviewed the 96 pages of documents and concluded that he was not sure if the documents were those he had requested. Tr. 18, l. 7-9. Paff, however, noticed that the Executive Session minutes for April 8, 2003 included additional records which were not requested, including exhibits, correspondence, claims, vouchers and a resolution. Tr. 18, l. 9-18. Also, Paff noticed that on page 7 of the minutes of the April 8, 2003 meeting there was a motion to go into Executive Session at 10:15 pm and a motion to return to regular session at 10:50 pm. Tr. 24, l. 5-13.

On cross examination, Paff testified that he has served similar requests on numerous other municipalities in New Jersey at various times. Tr. 23, l. 19. Paff further testified that when he receives responses concerning minutes from other municipalities, he reviews those minutes. Tr. 23, l. 24.

On cross examination, Paff testified that his review of minutes for meetings held on May 4 and May 11, 2004 which were provided by the Custodian to the GRC disclosed no mention of any Executive Session in those minutes. Tr. 24, l. 25–Tr. 25, l. 12. Paff testified that his review of minutes for a meeting held October 11, 2005 which was provided by the Custodian to the GRC disclosed a motion to go into Executive Session to discuss a personnel problem. Tr. 25, l. 13- Tr. 26, l. 1. However, the Executive Session minutes from October, 2005 requested by Paff were not included in the 96 pages of records the Custodian sent to the GRC. Tr. 18, l. 3-7.

The Custodian testified that he started working for the Borough of South Bound Brook in October, 1989. Tr. 28, l. 1-2. The Custodian also serves as the Borough Administrator of South Bound Brook as well as the payroll clerk, the registrar, and the assessment clerk of South Bound Brook. Tr. 27, l. 2-13. The Custodian is a part time employee of South Bound Brook. Tr. 27, l. 16. His full time job is owner of a family-run catering business in South Bound Brook. Tr. 27, l. 19-21.

The Custodian testified that he has taken several courses for the various township positions he holds, including a Resident Municipal Clerk course and other conferences and courses. Tr. 28, l. 3-8. Upon questioning by the Council, the Custodian testified that he attended an OPRA training seminar in November, 2006 given by the League of Municipalities. Tr. 35, l. 7-19.

The Custodian testified that the Complainant's May 19, 2006 request was the first OPRA request which the Custodian had ever received. Tr. 28, l. 12. The Custodian received the Complainant's May 8, 2006 request by fax. Tr. 28, l. 13-16. Upon receiving the Complainant's May 8, 2006 request, the Custodian sent an e-mail to the Complainant requesting that the Complainant fill out an official OPRA request form. The Custodian forwarded a copy of the form to the Complainant. Tr. 28, l. 19-24.

The Custodian testified that he had a telephone conversation with the Complainant to the effect that the Complainant needed to fill the official OPRA request

form out and return it to the Custodian; the Custodian told the Complainant it would take some time to get the requested records since they were “buried in [his] office.” Tr. 29, l. 2-8.

The Custodian testified that in April 2006, the long time Mayor of the Borough of South Bound Brook resigned suddenly and a councilman became Mayor. Tr. 30, l. 6-13. The resignation of the Mayor and the appointment of the new interim Mayor placed additional time constraints upon the Custodian because he was required to help the new Council move forward with the new interim Mayor. Tr. 30, l. 17-22. Beginning in April, 2006 with the resignation of the Mayor, it took most of the Custodian’s time doing new paperwork and filling in new Council people and the new interim Mayor on procedures and policies and attending meetings. Tr. 31, l. 1-6. In November, 2006, a new Mayor was elected and new council members were elected. Tr. 31, l. 9-11. The newly elected Mayor had never served as a Mayor before. Tr. 31, l. 16-18. The Custodian then had new time constraints helping the new Mayor and taking care of financial year-end reports. Tr. 31, l. 21-25.

The Custodian testified that his office is very small and the minutes are kept in closets or in boxes. Tr. 32, l. 7-10. The Custodian had to search for some of the requested minutes from 2003 and 2004. Tr. 32, l. 11-13. The Custodian started to search for the April minutes requested by the Complainant but got involved in other things and had to stop the search. Tr. 32, l. 13-16.

The Custodian testified that when he finally put together the minutes of the April 2003, May 2004, and October 2005 Borough Council meetings and submitted them to the GRC, his submission included all of the Council meetings that had been requested for those months. South Bound Brook had no other Council meetings in any of those months other than those memorialized by the minutes submitted. Tr. 32, l. 23-25.

On cross examination, the Custodian testified that the Complainant’s May 19, 2006 OPRA request disrupted the operations of his office “a little bit.” Tr. 33, l. 17-18. At the time that Complainant submitted his OPRA request in May, 2006, the Custodian was not familiar with the provisions of OPRA concerning substantial disruption. Tr. 34, l. 2-5. The Complainant’s May 19, 2006 OPRA request was the first OPRA request the Custodian had received. Because he had never responded to an OPRA request before, the Custodian was not familiar with the provision of OPRA concerning substantial disruption. Tr. 34, l. 2. The Custodian never reached out to the Complainant to say that the OPRA request was a substantial disruption of his office. Tr. 34, l. 10-11.

On cross examination, the Custodian testified that he did receive the Complainant’s May, 2006 OPRA request. Tr. 34, l. 24. The Custodian testified that the first time he responded to the Complainant’s May, 2006 OPRA request was on January 24, 2007 when he sent the records to the GRC. Tr. 34, l. 12-18.

Upon questioning by the Council, the Custodian testified that he attended an OPRA training seminar in November, 2006 given by the League of Municipalities. Tr. 35, l. 7-19.

Upon questioning by the Council, the Custodian testified that he has a clerical assistant at the Borough of South Bound Brook who also does dog licenses and acts as secretary for the Board of Health, Board of Public Works, Mayor and Council. Tr. 35, l. 22 – Tr. 36, l. 8.

Upon questioning by the Council, the Custodian testified that he did not respond to the GRC's Interim Orders because he forwarded them to the former Borough attorney. Tr. 36, l. 16-24. The Custodian testified that the former Borough attorney told the Custodian to submit the requested records as soon as possible. Tr. 40, l. 8-10. The Custodian testified that he simply moved the GRC's Interim Orders from one pile of documents to another on his desk because he was preoccupied with other Borough business. Tr. 40, l. 10-15.

Upon questioning by the Council, the Custodian testified that he works a minimum of 20 hours per week at the Borough Hall in the evening hours. Tr. 37, l. 5 – 15. The Custodian is not in the Borough office every day. Tr. 37, l. 16-18. The Custodian could work as many as 28 to 30 hours per week and he tries to put in as many hours as he can to complete the work. Tr. 37, l. 21 – Tr. 38, l. 6. If the Custodian is ill or on vacation, there is no one to complete the work in his absence. Tr. 38, l. 7-12.

Upon questioning by the Council, the Custodian testified that the Borough of South Bound Brook is a very small borough with very limited staff space. Tr. 38, l. 13-14. With a tax rate of \$5.15 per hundred, the Mayor and Borough Council do not want to hire extra help. Tr. 38, l. 15-17.

Upon questioning by the Council, the Custodian testified that he would have responded in a more timely fashion to an Order of the Superior Court of New Jersey for him to produce documentation to the Complainant. Tr. 39, l. 6-22.

Upon questioning by the Council, the Custodian testified that he believed he was required by OPRA to provide the documents requested by the Complainant within seven days. Tr. 40, l. 16-Tr. 41, l. 2.

### **LEGAL ANALYSIS**

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq. ("OPRA" or "the Act") declares that it is the public policy of the State of New Jersey to make available all government records to the public with certain exceptions. The Act requires custodians of records, the persons charged with enforcing its provisions, to grant or deny access to a government record no later than seven business days after the request is filed, provided the record is currently available and not in storage or archived. N.J.S.A. 47:1A-5.i. If the

record is in storage or archived, the custodian must so advise the requestor within seven business days after the receipt of the OPRA request, and must advise the requestor when the record can be made available. *Id.* If a requested government record is temporarily unavailable because it is in use or in storage, a custodian must so advise the requestor and make arrangements to promptly make available a copy of the record. N.J.S.A. 47:1A-5.g.

As a matter of practice, the seven-day period is at times extended by mutual agreement of the Custodian and the Requestor. If a Custodian requires additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's request, he may obtain a written agreement from the Complainant in order to do so. The failure to provide a written response within seven business days after receiving a request results in a "deemed" denial of the request. N.J.S.A. 47:1A-5.i. In Baldwin v. Readington Township, GRC Complaint No. 2006-165 (April 2007), the Council determined that the Custodian violated N.J.S.A. 47:1A-5.i. by failing to grant or deny the Complainant access to the records responsive within the statutorily mandated seven business days, or to obtain a written agreement from the Complainant extending the time in which the Custodian had to fulfill the Complainant's OPRA request. See also DeLuca v. Town of Guttenburg, GRC Complaint No. 2006-25 (May 2006)(finding that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response within the statutorily mandated seven (7) business days, therefore creating a "deemed" denial); Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006)(finding that the Custodian's failure to obtain a written agreement extending the seven business day time period resulted in a "deemed" denial of the request).

OPRA requires that the Custodian prove that a denial of access is authorized by law. Specifically, OPRA states that "[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

Pursuant to N.J.S.A. 47:1A-11, a custodian, public official, officer or employee who knowingly and willfully violates OPRA, and is found to have unreasonably denied access under the totality of the circumstances, is subject to a civil penalty. The law provides for issuance of a \$1,000 civil penalty for an initial violation, \$2,500 for a second violation that occurs within ten years of an initial violation, and \$5,000 for a third violation occurring within ten years of an initial violation. The Council enforces the penalty in the Superior Court of New Jersey in accordance with the "Penalty Enforcement Law of 1999," N.J.S.A. 2A:58-10.

OPRA does not contain a definition of what constitutes a "knowing and willful" violation. New Jersey courts have noted that "knowingly" is defined in Black's Law Dictionary (4<sup>th</sup> ed. 1968) at 1012, as: "[w]ith knowledge; consciously; intelligently, willfully; intentionally." Woodcock v. Calabrese, 148 N.J. Super. 526, 537 (Cty. Ct. 1977), citations omitted.

However, the concept of "willful" misconduct is a familiar one in New Jersey law. The Supreme Court has observed:

Like many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use. While its general contours, given its language, are similar in all contexts, it may differ depending on the common-law rule or the statute to which it is relevant, and perhaps even within such rule or statute different depending on the facts. Fielder v. Stonack, 141 N.J. 101, 124 (1995).

Although the contours of what constitutes willful misconduct may differ depending on the situation, the case law concerning willful misconduct establishes certain basic principles. It is clear that the phrase involves “much more” than negligent conduct. Alston v. City of Camden, 168 N.J. 170, 185 (2001), citing Fielder, *supra*. It is also settled that “there must be some knowledge that the act is wrongful.” Fielder, *supra*, 141 N.J. at 124. While there need not be the actual intent to cause harm, the action must exhibit a “positive element of conscious wrongdoing.” *Id.*, quoting Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962). The Supreme Court in Fielder summarized the definition of willful misconduct as “the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.” *Id.*, citation omitted.

The Supreme Court reaffirmed this definition in Alston, *supra*. Alston involved a police officer who was entitled to immunity from a tort claim unless his actions constituted willful misconduct. During its deliberations, the jury asked the trial court to clarify the definition of “willful misconduct.” The trial court instructed the jury that:

[t]o satisfy the requirement of willfulness, there must be a positive element of conscious wrongdoing and another way of looking at it is willful misconduct is the commission of a forbidden act with actual knowledge that the act is forbidden.... *Id.* at 184.

The Supreme Court upheld these instructions. *Id.* at 188.

The Appellate Division also has spoken as to the definition of willful misconduct. In ECES v. Salmon, 295 N.J. Super. 86 (App. Div. 1996), the Appellate Division reviewed the question of what constituted a willful violation of the New Jersey Conflicts of Interest Law. It found the Fielder definition of willfulness to be particularly apt. Fielder concerned the potential tort liability resulting from the failure of a police officer to follow orders in a chase situation. The Appellate Division noted that this scenario, similar to the Conflicts of Interest Law, involved “the possible malfeasance of a personal charged with the protection of the public.” *Id.* at 106. Accordingly, the court relied upon the language in Fielder, discussed above, and determined that willful misconduct under the Conflicts Law’s penalty provision “must be intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless or unintentional.” *Id.* at 107.

Nothing suggests that the Legislature, in enacting OPRA, intended to establish a definition of willfulness that is different from that set forth in the foregoing cases. As in

Alston, Fielder, and ECES v. Salmon, the OPRA penalty provision is directed at misconduct committed by public employees.

Applying the law to the facts adduced from the testimony, arguments and evidence offered in this matter by the parties, the Council **FINDS** that the Custodian knowingly and willfully violated OPRA when he failed to grant or deny access to the requested records, or to request an extension of time within which to produce the records, within seven business days of receiving Paff's request.

For the Council to find that the Custodian committed a knowing and willful violation of OPRA, there must be evidence in the record to prove that the Custodian consciously violated the law. The Council **FINDS** the respective testimonies of Paff and the Custodian to be credible in convincing the Council that the Custodian knew that he should have responded to Paff's OPRA request within seven business days and willfully failed to do so and that he consciously violated OPRA in so doing.

The Custodian testified that on May 8, 2006, in response to an e-mail from Complainant, the Custodian forwarded the Borough's official OPRA request form to the Complainant and requested that the Complainant complete the form. The Complainant testified that he e-mailed the completed OPRA request form to the Custodian on May 19, 2006. The Custodian testified that he did receive the Complainant's May 19, 2006 OPRA request.

The Custodian also testified that he believed he was required to forward the requested records to the Complainant within seven days, yet failed to do so due to the pressure of other Borough business. The Custodian testified that he started to search for the minutes requested by the Complainant but stopped because he "got involved in other things." The Custodian testified that the first time he responded to the Complainant's May 19, 2006 OPRA request was on January 24, 2007 when he sent the records to the GRC, more than eight months after the Complainant's OPRA request.

The Council further **FINDS** that, under the totality of the circumstances in this matter, the Custodian unreasonably denied access to the records requested by the Complainant in his May 19, 2006 OPRA request.

The Custodian testified that he failed to respond to the Complainant's May 19, 2006 OPRA request because he was busy with other Borough work and because the sudden resignation of the longtime Mayor required him to work more closely with the new interim Mayor. The Custodian failed to provide any evidence as to why he failed to file a Statement of Information when requested to do so by the Council on September 21, 2006, October 3, 2006 and October 25, 2006. The Custodian's preoccupation with other Borough business endured for eight months, until he provided the requested records to the Council on January 24, 2007. However, the Custodian's testimony regarding the impact of Complainant's OPRA request on the business of his office was equivocal at best. When asked on cross examination if Complainant's request "substantially disrupted

the operations” of the Custodian’s office, the Custodian replied, “Basically a little bit. It was just one more thing that I had to deal with.”

N.J.S.A. 47:1A-5.g. permits consideration of demands on agency operations imposed by a document request. However, Complainant requested Executive Session resolutions and minutes from April 2003, May 2004 and October 2005. The Council **FINDS** that the evidence of record does not indicate that Complainant’s request was so voluminous or complex as to create an exceptional circumstance excusing the Custodian’s failure to respond to the Complainant’s OPRA request in a timely fashion. See, e.g., New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166, 181 (App. Div. 2007).

The Custodian also testified that the minutes are kept in closets or in boxes in the Borough offices and he had to search for some of the requested minutes. Based on the decision in MAG Entertainment LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 574 (App. Div. 2005), the Custodian was obligated to fulfill the records request which required that he search his files to find the requested identifiable government records. Therefore, the Council **FINDS** that Custodian unlawfully denied access to the requested records. See also Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

The Custodian further testified that he failed to respond to the Council’s December 14, 2006 Interim Order, which required that he provide the requested records within five business days of the receipt of the Order, because he had forwarded the Order to the Borough attorney. Yet the Custodian also testified that the Borough attorney advised him to provide the documents as soon as possible, advice which the Custodian apparently ignored. Moreover, Complainant testified that he attended an OPRA training seminar in November, 2006; he was therefore aware of the requirements of OPRA when the Council’s Interim Order was issued. The Custodian, however, testified that he simply moved the Council’s Interim Order from one pile of documents to another on his desk because he was preoccupied with other Borough business. The Custodian also testified that he would have responded in a more timely fashion to an Order of the Superior Court of New Jersey.

There is nothing in OPRA which excuses non-compliance with an Order of the Council based on a preoccupation with other business. Finally, in Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006), the Council determined that awaiting legal advice is not a lawful reason for denial of access. Therefore, the Council found that the Custodian in Cottrell did not bear the burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Moreover, the Custodian testified that he sometimes works as many as 28 to 30 hours per week and he tries to put in as many hours as he can to complete the work. This testimony, coupled with the Custodian’s testimony that he simply moved the Council’s Interim Order from one pile of documents to another on his desk because he was preoccupied with other Borough business, and the Custodian’s testimony that he would

have responded in a more timely fashion to an Order of the Superior Court of New Jersey, leads to the conclusion that the Custodian knowingly and willfully failed to perform his responsibilities under OPRA and ignored the Council's December 14, 2006 Interim Order and the Council so **FINDS**.

Therefore, under the totality of the circumstances in this matter, the Council **FINDS** that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records.

### **CONCLUSION AND ORDER**

Based upon the foregoing, the Council **CONCLUDES** that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances regarding John Paff's May 19, 2006 OPRA request. Therefore, the assessment of a civil penalty in the amount of \$1,000.00 against the Custodian personally is warranted pursuant to N.J.S.A. 47:1A-11.

It is so **ORDERED**.

In accordance with the Rules Governing the Superior Court of New Jersey, there is a period of 45 days from the date of this final decision to file an appeal with the Superior Court, Appellate Division.

**Final Decision Rendered by the  
Government Records Council  
On the 30th Day of May, 2007**

Vincent P. Maltese, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

Decision Distribution Date: May 30, 2007



**State of New Jersey**  
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**INTERIM ORDER**

**February 28, 2007 Government Records Council Meeting**

John Paff  
Complainant

Complaint No. 2006-158

v.

Borough of South Bound Brook  
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council ("Council") considered the February 21, 2007 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 as amended. The Council, therefore, finds:

1. Based on the Custodian's failure to provide the GRC with a legal certification indicating whether or not the meeting minutes had been approved by the governing body prior to the date of the Complainant's request and failure to provide the Complainant with the requested records as ordered in the Council's December 14, 2006 Interim Order, the GRC shall commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rules, 1969 R. 4:67-6 (2007).
2. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days, the Custodian's failure to respond to the GRC after several attempts, and the Custodian's failure to comply with the Council's December 14, 2006 Interim Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, the Council shall conduct a hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Such hearing shall be held on April 25, 2007 at the Council's regularly scheduled meeting.



Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of February 2007

Vincent Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary  
Government Records Council

**Decision Re-Distribution Date: March 15, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 28, 2007 Council Meeting**

**John Paff<sup>1</sup>  
Complainant**

*GRC Complaint No. 2006-158*

v.

**Borough of South Bound Brook<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All resolutions passed by the Borough Council in accordance with N.J.S.A. 10:4-13 that authorized any and all Borough Council executive (closed) sessions held during the months of April 2003, May 2004 and October 2005.
2. Minutes of all Borough Council executive (closed) sessions held during the months of April 2003, May 2004 and October 2005.

*Request Made: May 19, 2006*

*Response Made: None*

*Custodian: Donald E. Kazan*

**GRC Complaint Filed:** September 12, 2006

**Background**

December 14, 2006

At the December 14, 2006 public meeting, the Government Records Council (“Council”) considered the December 7, 2006 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 has unlawfully denied access to the Complainant’s request for resolutions and executive minutes for the months of April 2003, May 2004 and October 2005, due to the Custodian’s failure to respond to the Complainant’s request, thus resulting in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Richard Millet, Esq. (Somerville, NJ).

2. **The Custodian shall disclose the requested resolutions and minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
3. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**
4. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days and the Custodian's failure to respond to the GRC after several attempts, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

**January 3, 2007**

Council's Revised Interim Order distributed to the parties.

**January 17, 2007**

Facsimile from the GRC to the Custodian's Counsel. The GRC sent the Council's Revised Interim Order to the Custodian's Counsel via facsimile with a request for compliance by January 24, 2007.

**January 24, 2007**

Letter from the Custodian to the GRC with attachments that are not relevant to the Complainant's request, except the unredacted executive session meeting minutes dated April 8, 2003.

The Custodian asserts that the documents requested in the Council's Interim Order have been provided. The Custodian also asserts that the only document missing is the executive session meeting minutes for October 2005, due to the fact that the matters discussed within the minutes involve personnel matter and have not been resolved.

**February 3, 2007**

Letter from the Complainant to the GRC. The Complainant advised the GRC that he did not receive the records that the Custodian sent to the GRC in response to the Council's Interim Order.

## **Analysis**

### **Whether the Custodian complied with the Council's December 14, 2006 Interim Order?**

In the Custodian's January 24, 2007 submission, he asserts that the documents requested in the Council's Interim Order have been provided. The Custodian also asserts that the only document missing is the executive session meeting minutes for October 2005, due to the fact that the matters discussed within the minutes involve personnel matter and have not been resolved.

In the Complainant's February 3, 2007 submission, he advised the GRC that he did not receive the records that the Custodian sent to the GRC in response to the Council's Interim Order.

The Custodian provided the GRC with various documents that were not relevant to the Complainant's request, except the unredacted executive session meeting minutes dated April 8, 2003. The Custodian failed to provide the GRC with a legal certification indicating whether or not the meeting minutes had been approved by the governing body prior to the date of the Complainant's request. The Custodian also failed to provide the Complainant with the requested records as ordered in the Council's December 14, 2006 Interim Order. Therefore, the Custodian has not complied with the Council's December 14, 2006 Interim Order.

Based on the Custodian's failure to provide the GRC with a legal certification indicating whether or not the meeting minutes had been approved by the governing body prior to the date of the Complainant's request and failure to provide the Complainant with the requested records as ordered in the Council's December 14, 2006 Interim Order, the GRC shall commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rules, 1969 R. 4:67-6 (2007).

### **Whether the Custodian's actions rise to the level of a knowing and willful violation of the OPRA and unreasonable denial of access under the totality of the circumstances?**

The OPRA states that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, 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.

In this case, the Custodian failed to comply with the Council’s December 14, 2006 Interim Order. Also, previously in the December 14, 2006 Council Meeting, the Council decided based on the Custodian’s failure to respond to the Complainant after one hundred and thirty-six (136) business days and the Custodian’s failure to respond to the GRC after several attempts, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 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 (Berg); 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 (App. Div. 1996) at 107).

Thus, based on the Custodian’s failure to respond to the Complainant after one hundred and thirty-six (136) business days, the Custodian’s failure to respond to the GRC after several attempts, and the Custodian’s failure to comply with the Council’s December 14, 2006 Interim Order, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, the Council shall conduct a hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the Custodian's failure to provide the GRC with a legal certification indicating whether or not the meeting minutes had been approved by the governing body prior to the date of the Complainant's request and failure to provide the Complainant with the requested records as ordered in the Council's December 14, 2006 Interim Order, the GRC shall commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rules, 1969 R. 4:67-6 (2007).
2. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days, the Custodian's failure to respond to the GRC after several attempts, and the Custodian's failure to comply with the Council's December 14, 2006 Interim Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, the Council shall conduct a hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Such hearing shall be held on April 21, 2007 at the Council's regularly scheduled meeting.

Prepared By:

Tiffany L. Mayers  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

February 21, 2007

**Revised Interim Order  
December 14, 2006 Government Records Council Meeting**

John Paff  
Complainant

Complaint No. 2006-158

v.

Borough of South Bound Brook  
Custodian of Record

At the December 14, 2006 public meeting, the Government Records Council ("Council") considered the December 7, 2006 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 has unlawfully denied access to the Complainant's request for resolutions and executive minutes for the months of April 2003, May 2004 and October 2005, due to the Custodian's failure to respond to the Complainant's request, thus resulting in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
2. **The Custodian shall disclose the requested resolutions and minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
3. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**
4. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days and the Custodian's failure to respond to the GRC after several attempts, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 14<sup>th</sup> Day of December, 2006

Vincent P. Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: January 3, 2007**

**Findings and Recommendations of the Executive Director  
December 14, 2006 Council Meeting**

John Paff<sup>3</sup>

GRC Complaint No. 2006-158

**Complainant**

v.

**Borough of South Bound Brook<sup>4</sup>**  
*Custodian of Records*

**Records Relevant to Complaint:**

3. All resolutions passed by the Borough Council in accordance with N.J.S.A. 10:4-13 that authorized any and all Borough Council executive (closed) sessions held during the months of April 2003, May 2004 and October 2005.
4. Minutes of all Borough Council executive (closed) sessions held during the months of April 2003, May 2004 and October 2005.

*Request Made: May 19, 2006*

*Response Made: None*

*Custodian: Donald E. Kazan*

**GRC Complaint Filed: September 12, 2006**

**Background**

May 19, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests to purchase the records listed above.

July 22, 2006

**Letter from the Complainant to the Custodian. The Complainant asserts that his records show that the request form was sent to the Custodian on May 19, 2006, but a response has not been provided.**

September 12, 2006

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<sup>3</sup> No legal representation listed.

<sup>4</sup> No legal representation listed.

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachment:

- Complainant’s OPRA Request dated May 19, 2006.
- Fax receipt

The Complainant asserts that on May 19, 2006, he submitted a records request form via PDF e-mail attachment to the Custodian. The Complainant also asserts that after not receiving a response, he faxed a follow-up letter dated July 22, 2006, along with another copy of the completed request form to the Custodian. The Complainant further asserts receiving a fax receipt indicating that the Custodian had received the Complainant’s faxed request form on July 23, 2006.

The Complainant states that OPRA requires a Custodian to either grant or deny access to a requested record within seven (7) business days of receipt. The Complainant also states that if the Custodian denies access, he or she must provide a written response to the requestor setting forth the specific basis for the denial. The Complainant further states because the Custodian has done neither, he is in violation of OPRA.

The Complainant asserts that he is seeking an order declaring that the Custodian violated the Complainant’s rights under OPRA. The Complainant also asserts that he is seeking an order declaring that the Custodian provide him with access to the records within the scope of the request.

September 13, 2006

Offer of Mediation sent to both parties. The Custodian did not respond to mediation.

**September 18, 2006**

The Complainant agreed to mediate this complaint.

**September 21, 2006**

Request for Statement of Information sent to the Custodian.

**October 3, 2006**

No Defense Letter from the GRC to the Custodian. The letter states that the GRC provided the Custodian with a request for a Statement of Information on September 21, 2006 and to date has not received a response. It also states that if no submission is made within three (3) business days of receipt of this letter, this case may proceed to adjudication before the GRC with the documents already on file.

**October 25, 2006**

No Defense Letter from the GRC to the Custodian sent to the Custodian via certified mail because the GRC had not received the Custodian’s Statement of Information.

## Analysis

### Whether the Custodian unlawfully denied access to resolutions and executive minutes for the months of April 2003, May 2004 and October 2005?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a Custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...* In the event a Custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant asserts that on May 19, 2006 he submitted a records request form via PDF e-mail attachment to the Custodian. The Complainant also asserts that after not receiving a response he faxed a follow-up letter dated July 22, 2006, along with another copy of the completed request form to the Custodian. The Complainant further asserts receiving a fax receipt indicating that the Custodian had received the Complainant's faxed request form on July 23, 2006.

The Complainant states that OPRA requires a Custodian to either grant or deny access to a requested record within seven (7) business days of receipt. The Complainant also states that if the Custodian denies access, he or she must provide a written response

to the requestor setting forth the specific basis for the denial. The Complainant further states because the Custodian has done neither, he is in violation of OPRA.

The Complainant asserts that he is seeking an order declaring that the Custodian violated the Complainant's rights under OPRA. The Complainant also asserts that he is seeking an order declaring that the Custodian provides him with access to the records within the scope of the request.

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. 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 prior GRC decision, Pincus v. Newark Police Department, GRC Complaint No. 2005-219 (April 2006), the Council found that the Custodian unlawfully denied access to the requested records by not appropriately responding within the statutorily mandated seven (7) business day timeframe pursuant to N.J.S.A. 47:1A-5.i. Also, in prior GRC decision, Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-63 (July 2006), the Council found that the Custodian's failure to provide the Complainant with a written response to her request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

In this case, the Custodian's failure to respond to the Complainant's request for all resolutions passed by the Borough Council in accordance with N.J.S.A. 10:4-13 that authorized any and all Borough Council executive (closed) sessions held during the months of April 2003, May 2004 and October 2005, and minutes of all Borough Council executive (closed) sessions held during the months of April 2003, May 2004 and October 2005, constitutes as a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.

**In prior GRC decision, Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005), the Council found that the Custodian should redact the exempt information contained in the requested executive session minutes, providing a detailed and lawful basis for each redacted part thereof and provide access to those redacted minutes that have not already been released.**

**Therefore, in this case, the Custodian shall redact the exempt information contained within the requested executive session minutes, including a detailed and**

lawful basis for each redaction, and provide the redacted minutes to the Complainant if the requested minutes were approved by the governing body prior to the date of this OPRA request. The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

**Whether the Custodian's actions rise to the level of a knowing and willful violation of the OPRA and unreasonable denial of access under the totality of the circumstances?**

The OPRA states that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, 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.

In this case, the Custodian has yet to respond to the Complainant after one hundred and thirty-six (136) business days. The Custodian has also failed to respond to the GRC's SOI requests, which were sent via regular mail and certified mail. The GRC also attempted to contact the Custodian via telephone and e-mail. On the Custodian's voice mail, he identifies his e-mail address, of that which the GRC had been using when attempting to contact the Custodian. Both an e-mail read receipt and a postal service confirmation indicate that the documents sent by the GRC had been delivered and received.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 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 (Berg); 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 (App. Div. 1996) at 107).

Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days and the Custodian's failure to respond to the GRC after several attempts, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

5. The Custodian has unlawfully denied access to the Complainant's request for resolutions and executive minutes for the months of April 2003, May 2004 and October 2005, due to the Custodian's failure to respond to the Complainant's request, thus resulting in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
6. **The Custodian shall disclose the requested resolutions and minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
7. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not**

**approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**

8. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days and the Custodian's failure to respond to the GRC after several attempts, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

Prepared By:

Tiffany L. Mayers  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

December 7, 2006