State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant
v.
County of Atlantic
Custodian of Record

Complaint No. 2012-197

At the June 25, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 2013 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 lawfully denied access to the requested 1,300 e-mail addresses because the Custodian has borne her burden of proving that the disclosure of approximately 1,300 County e-mail addresses at once, in one document, constitutes administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1.

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant did not achieve any relief because the Custodian lawfully denied access to the requested e-mail addresses. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting

Mary Steinhauer-Kula[1] **GRC Complaint No. 2010-197**
Complainant

v.

Township of Downe (Cumberland)[2]
Custodian of Records

Records Relevant to Complaint: On-site inspection of the following:

1. Entire contents of all bid proposals submitted for the re-evaluation project
2. Code of Ethics adopted by Township and all signed copies by the elected and appointed Township officials agreeing to said Code of Ethics.

Request Made: July 9, 2010
Response Made: Unknown
GRC Complaint Filed: August 3, 2010[3]

Background

June 26, 2012 Council Meeting:

At its June 26, 2012 public meeting, the Council considered the June 19, 2012 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 failed to comply with the Council's March 27, 2012 Interim Order because the Custodian failed to provide to the Complainant the two (2) bid proposals responsive to request Item No. 1 within the mandated five (5) business days from receipt of Council's Interim Order. The Custodian also failed to provide a detailed list of all bid proposals responsive to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request. Further, when the Custodian responded to the Council's Interim Order, he only provided a legal certification certifying that he provided the two (2) bid proposals responsive to the Complainant's request Item No. 1, however he failed to

[1] No legal representation listed on record.
[2] Richard DeVillasanta, Custodian of Records. Represented by John G. Carr, Esq., of Cresse & Carr (Woodbury, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

certify when he provided copies of these bid proposals or whether he provided these bid proposals to the Complainant. In addition, when Custodian's Counsel eventually provided the two (2) bid proposals responsive to request Item No. 1, he only provided such bid proposals to the GRC and not to the Complainant.

2. The GRC is unable to determine whether the Custodian provided copies of all the bid proposals and the contents thereof responsive to request Item No. 1. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Procedural History:

On June 27, 2012, the Council distributed its Interim Order to all parties. On October 25, 2012, this complaint was transmitted to the Office of Administrative Law ("OAL"). On May 29, 2013, OAL transmitted this complaint back to the GRC marked as withdrawn pursuant to a stipulation of settlement signed by the Custodian's Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed as part of a stipulation of settlement signed by the Custodian's Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant
v.
Township of Downe (Cumberland)
Custodian of Record

Complaint No. 2010-197

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 2012 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 failed to comply with the Council's March 27, 2012 Interim Order because the Custodian failed to provide to the Complainant the two (2) bid proposals responsive to request Item No. 1 within the mandated five (5) business days from receipt of Council's Interim Order. The Custodian also failed to provide a detailed list of all bid proposals responsive to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request. Further, when the Custodian responded to the Council's Interim Order, he only provided a legal certification certifying that he provided the two (2) bid proposals responsive to the Complainant's request Item No. 1, however he failed to certify when he provided copies of these bid proposals or whether he provided these bid proposals to the Complainant. In addition, when Custodian's Counsel eventually provided the two (2) bid proposals responsive to request Item No. 1, he only provided such bid proposals to the GRC and not to the Complainant.

2. The GRC is unable to determine whether the Custodian provided copies of all the bid proposals and the contents thereof responsive to request Item No. 1. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting

Mary Steinhauer-Kula[1] **GRC Complaint No. 2010-197**
Complainant

v.

Township of Downe (Cumberland)[2]
Custodian of Records

Records Relevant to Complaint: On-site inspection of the following:
1. Entire contents of all bid proposals submitted for the re-evaluation project
2. Code of Ethics adopted by Township and all signed copies by the elected and appointed Township officials agreeing to said Code of Ethics.

Request Made: July 9, 2010
Response Made: Unknown
Custodian: Richard DeVillasanta
GRC Complaint Filed: August 3, 2010[3]

Background

March 27, 2012

Government Records Council's ("Council") Interim Order. At its March 27, 2012 public meeting, the Council considered the March 20, 2012 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's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has failed to bear his burden of proof that he lawfully denied the Complainant access to the requested bid proposal contents. N.J.S.A. 47:1A-6. Because the Custodian identified two (2) bid proposals

[1] No legal representation listed on record.
[2] Represented by John Carr, Esq., of Cresse & Carr (Woodbury, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

responsive to the Complainant's request for Item No. 1, the Custodian must provide these two (2) bid proposals and their contents to the Complainant.

3. **The Custodian shall comply with Item 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. The Custodian must also provide to the Council a detailed list of all bid proposals provided to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[4] to the Executive Director.[5]**

4. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request for the Code of Ethics adopted by the Township exists and therefore, no signed copies by the elected and appointed Township officials exist, and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

5. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.

6. 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.

March 29, 2012

Council's Interim Order distributed to the parties.

May 10, 2012

Telephone call from the GRC to Ms. Nadine Lockley, Deputy Clerk ("Ms. Lockley). The GRC states that it has not received a response to the Council's Interim Order. Ms. Lockley states that the Custodian is out on extended sick leave and has not

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

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

been in the office. Ms. Lockley also states that she is acting as Custodian for the Township. The GRC informs Ms. Lockley that that it will resend the Council's March 27, 2012 Interim Order to Ms. Lockley for her completion. Ms. Lockley states that she is willing to help the GRC in fulfilling the Council's Interim Order.

May 11, 2012

E-mail from the GRC to Ms. Lockley attaching the Council's March 27, 2012 Interim Order and Findings and Recommendations. The GRC states that Ms. Lockley must respond to the Council's Interim Order within five (5) business days.

May 18, 2012

E-mail from Custodian's Counsel to the GRC. Counsel states that he is in receipt of the GRC's e-mail dated May 11, 2012. Counsel states that the Township only has one Municipal Clerk who has been out on sick leave since April 5, 2012. Counsel also states that the Custodian has been in the office only once since April 5, 2012 for approximately one (1) hour. Counsel further states that the Custodian began collecting the records responsive to comply with Council's Interim Order, however to date has not been able to complete his research nor the required legal certification pursuant to N.J. Court Rule 1:4-4. Counsel additionally states given the circumstances in a Township with two (2) full time employees, he hopes the GRC can work with the Township as to a timeframe within which to respond. Lastly, Counsel states that the Custodian's anticipated date of return to work is June 1, 2012.

May 24, 2012

E-mail from the Custodian to the GRC attaching a legal certification in response to the Council's Interim Order. The Custodian certifies that he provided the two (2) bid proposals responsive to the Complainant's request Item No. 1.[6]

June 5, 2012

E-mail from the GRC to the Complainant. The GRC requests a legal certification from the Complainant as to whether the Custodian provided the Complainant with the two (2) bid proposals responsive to request Item No. 1 in accordance with the Council's March 27, 2012 Order. The GRC also requests that the Complainant provide the legal certification within three (3) business days.

June 7, 2012

E-mail from the Complainant to the GRC attaching the requested legal certification. The Complainant certifies that the Custodian failed to provide her with the two (2) bid proposals responsive to her OPRA request in accordance with the Council's March 27, 2012 Order.

June 8, 2012

[6] The Custodian fails to certify when he provided copies of these bid proposals or whether he provided these bid proposals to the Complainant. The Custodian fails to provide to the Council a detailed list of all bid proposals provided to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request.

Letter from Custodian's Counsel to the GRC. Counsel attaches a copy of the legal certification from the Custodian, certifying that the Custodian provided the two (2) bid proposals responsive to the Complainant's request Item No. 1.

June 8, 2012

Letter from the GRC to the Complainant.[7] The GRC states that the Custodian provided the GRC with copies of the two (2) bid proposals responsive to request Item No. 1. The GRC attaches copies of the bid proposals provided to it by the Custodian in response to the March 27, 2012 Interim Order.

June 22, 2012

E-mail from the Complainant to the GRC. The Complainant states that she received the bid proposal letters which the GRC sent to her. The Complainant also states that her request sought the entire contents of the bid proposals. The Complainant further states that the Township's request for proposals listed all of the required components of the bid submission packet, many of which are required by State law. The Complainant additionally states that there are additional records responsive to her request. Lastly, the Complainant states that the Custodian informed her that these other records were in storage and that he needed additional time to locate these records.[8]

Analysis

Whether the Custodian complied with the Council's March 27, 2012 Interim Order?

The Council's March 27, 2012 Interim Order required the Custodian to 1) provide the two (2) identified bid proposals responsive to the Complainant's request for Item No. 1; 2) provide a detailed list to the Council of all bid proposals provided to the Complainant; 3) provide a legal certification to the Council that the bid proposals provided are the only bid proposals that exist that are responsive to request Item No. 1, in accordance with N.J. Court Rule 1:4-4. and 4) provide a certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director. The Council's Order required the Custodian to comply within five (5) business days from receipt of said Interim Order. The Council's Order directed the Custodian to respond to said Order no later than April 9, 2012.[9]

The GRC received an legal certification from the Custodian in response to the Council's March 27, 2012 Interim Order on May 24, 2012, thirty-eight (38) business days after receipt of the Council's Interim Order. The Custodian only certified that he provided the two (2) bid proposals responsive to request Item No. 1. The Custodian failed to certify when he provided the bid proposals responsive to request Item No. 1.

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[7] The GRC sent the June 8, 2012 letter via UPS overnight mail. Tracking Receipt No. 1ZF089042210066988 indicates that the Complainant received the GRC's letter on June 11, 2012.

[8] The Complainant stated in her Denial of Access Complaint that the Custodian wrote a note on her OPRA request stating, "need additional time" on July 23, 2010. Further, the Custodian certified in the Statement of Information that the bid proposals responsive to request Item No. 1 are in storage.

[9] The UPS Tracking Receipt No. 1ZF089042210070437 indicates that the Custodian received the Council's March 27, 2010 Order on March 30, 2012. Furthermore, UPS Tracking Receipt No. 1ZF089042210070437 also indicates that Custodian's Counsel received Council's Order on March 30, 2012.

The Custodian also failed to provide the GRC with: 1) a detailed list of all bid proposals provided to the Complainant; 2) a certified confirmation that the bid proposals provided to the Complainant are the only bid proposals responsive to request Item No. 1 that exist and 3) a certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4. The Complainant certified to the GRC on June 7, 2012 that the Custodian failed to provide her with the two (2) bid proposals responsive to her OPRA request in accordance with the Council's March 27, 2012 Order. Custodian's Counsel provided the GRC on June 8, 2012 via first class mail with copies of the two (2) bid proposals responsive to the Complainant's request and a legal certification from the Custodian certifying that the Custodian provided the two (2) bid proposals responsive. However, the Custodian and Custodian's Counsel failed to provide copies of these two (2) bid proposals to the Complainant. Therefore, the Custodian has failed to comply with the terms of the Council's March 27, 2012 Interim Order.

Therefore, the Custodian failed to comply with the Council's March 27, 2012 Interim Order because the Custodian failed to provide to the Complainant the two (2) bid proposals responsive to request Item No. 1 within the mandated five (5) business days from receipt of Council's Interim Order. The Custodian also failed to provide a detailed list of all bid proposals responsive to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request. Further, when the Custodian responded to the Council's Interim Order, he only provided a legal certification certifying that he provided the two (2) bid proposals responsive to the Complainant's request Item No. 1, however, he failed to certify when he provided copies of these bid proposals or whether he provided these bid proposals to the Complainant. In addition, when Custodian's Counsel eventually provided the two (2) bid proposals responsive to request Item No. 1, he only provided such bid proposals to the GRC and not to the Complainant.

Moreover, after the Complainant's receipt of the bid proposals that the GRC provided her on June 8, 2012, the Complainant stated on June 22, 2012 that there are additional records responsive to her request. The Complainant also stated that the Custodian informed her that these other records were in storage and he needed additional time to locate such records. In addition, the Custodian certified in the Statement of Information that the bid proposals were in storage. In accordance with the Council's Interim Order, the Custodian was required to certify that the bid proposals he provided are the only bid proposals that exist that are responsive to the request, however, he failed to do so.

Therefore, the GRC is unable to determine whether the Custodian provided copies of all the bid proposals and the contents thereof responsive to request Item No. 1. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's March 27, 2012 Interim Order because the Custodian failed to provide to the Complainant the two (2) bid proposals responsive to request Item No. 1 within the mandated five (5) business days from receipt of Council's Interim Order. The Custodian also failed to provide a detailed list of all bid proposals responsive to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request. Further, when the Custodian responded to the Council's Interim Order, he only provided a legal certification certifying that he provided the two (2) bid proposals responsive to the Complainant's request Item No. 1, however he failed to certify when he provided copies of these bid proposals or whether he provided these bid proposals to the Complainant. In addition, when Custodian's Counsel eventually provided the two (2) bid proposals responsive to request Item No. 1, he only provided such bid proposals to the GRC and not to the Complainant.

2. The GRC is unable to determine whether the Custodian provided copies of all the bid proposals and the contents thereof responsive to request Item No. 1. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Prepared By: Harlynne A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant
v.
Township of Downe (Cumberland)
Custodian of Record

Complaint No. 2010-197

At the March 27, 2012 public meeting, the Government Records Council ("Council") considered the March 20, 2012 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's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has failed to bear his burden of proof that he lawfully denied the Complainant access to the requested bid proposal contents. N.J.S.A. 47:1A-6. Because the Custodian identified two (2) bid proposals responsive to the Complainant's request for Item No. 1, the Custodian must provide these two (2) bid proposals and their contents to the Complainant.

3. **The Custodian shall comply with Item 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. The Custodian must also provide to the Council a detailed list of all bid proposals provided to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request, and simultaneously provide certified confirmation of**

compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2]

4. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request for the Code of Ethics adopted by the Township exists and therefore, no signed copies by the elected and appointed Township officials exists, and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

5. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.

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

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council
I attest the foregoing is a true and accurate record of the Government Records Council.

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: March 29, 2012

[1] "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."

[2] 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
March 27, 2012 Council Meeting

Mary Steinhauer-Kula[1] **GRC Complaint No. 2010-197**
Complainant

v.

Township of Downe (Cumberland)[2]
Custodian of Records

Records Relevant to Complaint: On-site inspection of the following:
1. Entire contents of all bid proposals submitted for the re-evaluation project
2. Code of Ethics adopted by Township and all signed copies by the elected and appointed Township officials agreeing to said Code of Ethics.

Request Made: July 9, 2010
Response Made: Unknown
Custodian: Richard DeVillasanta
GRC Complaint Filed: August 3, 2010[3]

Background

July 9, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 23, 2010

Telephone call from the Complainant to the Custodian. The Complainant requests that the Custodian provide her with the status of her OPRA request in writing because she will be filing a Denial of Access Complaint with the Government Records Council ("GRC").

August 3, 2010

Denial of Access Complaint filed with the GRC attaching the Complainant's OPRA request dated July 9, 2010.[4]

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[1] No legal representation listed on record.
[2] Represented by John Carr, Esq., of Cresse & Carr (Woodbury, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The Complainant also attaches a copy of her OPRA request with the Custodian's notation made on July 23, 2010.

The Complainant states that when she filed her OPRA request the Custodian had been working for the Township for only four (4) weeks. The Complainant also states that after the Custodian informed her verbally several times that he had to look in storage for the records responsive, she asked for the status of her requests in writing on July 23, 2010. The Complainant states that she informed the Custodian multiple times that verbal communications regarding this request were unacceptable under OPRA.

The Complainant states that she believes the Township is not cooperating with her OPRA request because she appealed her property taxes at the county and State level. The Complainant also asserts that the trial in state tax court regarding such appeal is scheduled for September 8, 2010. The Complainant states that the Township was ordered by the court to provide certain records pursuant to discovery and to answer certain questions. The Complainant asserts that the Township did not provide such records and did not answer such questions. The Complainant also asserts that the records requested herein will provide her with the information needed to support her claims and prepare her case for tax court. The Complainant further argues that the Township's belief that it can withhold certain records until after trial amounts to a knowing and willful violation of OPRA. The Complainant requests that the GRC order the Custodian to disclose the requested records. The Complainant also requests that the GRC fine the Custodian if he is found to have knowingly and willfully violated OPRA. Lastly, the Complainant requests that the GRC develop and monitor a corrective action plan for the Township with specific attention to the Custodian's responsibilities and the handling of and response to OPRA requests.

Request Item No. 1: entire contents of all bid proposals submitted for the re-evaluation project:

The Complainant states that on July 14, 2010, the Custodian provided her with copies of letters submitted by each bidder. The Complainant states that she informed the Custodian that she wanted the entire bid proposal from each bidder and that Custodian stated that he was only provided copies of the letters. The Complainant further states that on July 23, 2010, she contacted the Custodian and requested the status of her OPRA request in writing because she intended to file a complaint with the GRC. The Complainant asserts that she tried working with the Custodian because he was new to the Municipal Clerk's position. The Complainant states that she informed the Custodian that the entire bid proposal should be with the cover letters. The Complainant also states that the Custodian made two (2) different notes next to the items sought on her OPRA request. The Complainant states that one note was written prior to July 23, 2010 and states "have." The Complainant also states that the Custodian added the second (2nd) note stating "need additional time" on July 23, 2010.

Request Item No. 2: Code of Ethics adopted by Township and all signed copies by the elected and appointed Township Officials agreeing to said Code of Ethics:

The Complainant states that the Custodian informed her that no Code of Ethics responsive to the request exists and further states that the Custodian provided the personnel policy to her in its place. The Complainant also states that she believes that all

local governments are required by the New Jersey Administrative Code to have a Code of Ethics policy.

The Complainant does not agree to mediate this complaint.

August 3, 2010
Request for the Statement of Information ("SOI") sent to the Custodian.

August 9, 2010
E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation requesting a five (5) business day extension to complete the SOI.

August 13, 2010
E-mail from the GRC to the Custodian. The GRC states that one (1) additional extension to complete the SOI will be granted. The GRC also states that the SOI must be submitted by August 27, 2010.

August 27, 2010[5]
Custodian's incomplete SOI.[6]

The Custodian asserts that he did not deny the Complainant access to any records. The Custodian certifies that at the time the Complainant filed her OPRA request he was new to the Municipal Clerk's position. The Custodian also certifies that the Township is extremely small with a population of less than 2,000 people. The Custodian further certifies that he is the only full time employee in the office from Monday through Wednesday.

The Custodian certifies that the Complainant requested several records and he cooperated with her request. The Custodian also certifies that he was unfamiliar with the immediate location of some of the records since he was relatively new to the Municipal Clerk's position. The Custodian certifies that at the time of the Complainant's request, the Township was in the process of inventorying its records and thus some records were not readily accessible. The Custodian also certifies that he explained to the Complainant that he did not intentionally withhold records from her and that his office was complying with her OPRA requests as quickly and efficiently as possible.

The Custodian certifies that only two (2) vendors applied for the re-evaluation project which is the subject of request Item No. 1. The Custodian also certifies that the bid proposals responsive to request Item No. 1 might be in storage. The Custodian further certifies that the Township does not have a Code of Ethics responsive to request

[5] The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
[6] The Custodian included additional materials which are not relevant to the adjudication of this complaint.

Item No. 2. The Custodian certifies that he provided the Complainant with a copy of the personnel policy instead of the Code of Ethics sought in request Item No. 2.

August 30, 2010

Letter from the GRC to the Custodian. The GRC states that the Custodian's SOI is incomplete and is being returned to him for completion. The GRC states that the Custodian must complete pages three (3) and four (4) of the SOI form and provide a copy of the Complainant's OPRA request and the Custodian's response to the OPRA request. Lastly, the GRC states that the Custodian must submit the completed SOI by September 2, 2010.

September 3, 2010

Facsimile from the Custodian to the GRC, attaching a copy of the Complainant's OPRA request dated July 9, 2010. The Custodian certifies that the records search was difficult because he was the only person in the office and was not familiar with the file system. The Custodian also certifies that the records responsive to the Complainant's OPRA request have not been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management. The Custodian further certifies that he informed the Complainant that the bid packets responsive to request Item No. 1 were not available due to the inventory process.

December 2, 2011

E-mail from the GRC to the Custodian. The GRC states that upon reviewing the complaint and the SOI, it is unclear when the Custodian responded to the Complainant's OPRA request. The GRC requests that the Custodian provide in a legal certification format the date that the Custodian responded to the Complainant's OPRA request and the manner in which he responded. The GRC also requests that if the Custodian's response was written, he should provide a copy of that correspondence. The GRC further states that the Custodian must submit the legal certification within five (5) business days.

December 7, 2011

E-mail from the Custodian to the GRC. The Custodian states that he arranged a meeting with Custodian's Counsel on December 9, 2011 to respond to the GRC's request for a legal certification.

December 14, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification.[7] The Custodian certifies that the Complainant inspected the bid proposals responsive to request Item No. 1 on July 23, 2010. The Custodian also certifies that the Complainant conducted an inspection of the Code of Ethics and signed copies on July 20, 2010.[8]

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[7] The Custodian does not certify as to when or in what manner he responded to the Complainant's OPRA request.

[8] The GRC telephoned the Custodian on February 22, 2012 to clarify the Custodian's conflicting legal certifications. The Custodian stated that the Complainant viewed the personnel policy on July 20, 2010.

January 9, 2012

E-mail from the GRC to Custodian's Counsel. The GRC informs Counsel that after review of the complaint and the SOI, it is unclear as to the specific date when the Custodian initially responded to the Complainant's request. The GRC requests a legal certification from the Custodian as to the specific date and in what format he responded to the Complainant's OPRA requests. The GRC also states that it is not necessary to provide the dates that the records were made available for inspection to the Complainant. The GRC requests that the legal certification be submitted within three (3) business days.

January 12, 2012

E-mail from the Custodian to the GRC, attaching the document index from the SOI with the Custodian's notations thereon. The Custodian states that he provided the Complainant with an onsite inspection of the bid proposals responsive to request Item No. 1.[9] The Custodian also states that the Township does not have a Code of Ethics responsive to request Item No. 2. The Custodian further states that he provided the Complainant with a copy of the personnel policy in July 2010.

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request?

OPRA provides that:

> "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof …" N.J.S.A. 47:1A-5.g.

Further, OPRA provides 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.

The Custodian also stated that the Township does not have a Code of Ethics Policy; however the State of New Jersey's Code of Ethics Policy is posted in the Township office.

[9] The Custodian does not state when he provided the Complainant with an on-site inspection of the records responsive to request Item No. 1. However, the Complainant stated in the Denial of Access Complaint that that she conducted an on-site inspection of the letters from each bidder responsive to request Item No.1 on July 14, 2010.

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. As also prescribed under 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. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.[10] 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, there is no evidence in the record to establish when or in what manner the Custodian responded to the Complainant's OPRA request. Indeed, neither the Complainant nor Custodian could identify when the Custodian initially responded to the OPRA request. The GRC twice requested a legal certification from the Custodian as to when he responded to the OPRA request. However, the Custodian failed to provide a specific date when he responded to the Complainant's OPRA request and failed to state the manner in which he responded to same. Thus, there is no evidence in the record as to when the Custodian responded to the Complainant's OPRA request. Therefore, Custodian has failed to bear his burden of proof that he responded to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days. N.J.S.A. 47:1A-6.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the 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, *supra*.

Whether the Custodian unlawfully denied access to the requested bid proposals?

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

[10] It is the GRC's position that 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.

> 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 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.

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.

Request Item No. 1 of the Complainant's OPRA request sought inspection of the entire contents of all bid proposals submitted for the re-evaluation project. The Complainant asserted in her Denial of Access Complaint that on July 14, 2010, the Custodian provided her with copies of the letters submitted by each bidder. The evidence of record shows that in the SOI submitted to the GRC, the Custodian identified two (2) bid proposals responsive to the request.

However, the evidence of record also shows that the Custodian provided conflicting evidence to the GRC as to whether he granted the Complainant access to the requested records. Although the Custodian certified in the SOI that the responsive bid proposals might be in storage and further certified on September 3, 2010 that he informed the Complainant that the bid proposals responsive to request Item No. 1 were not available due to the inventory process, the Custodian also certified an e-mail to the GRC dated December 14, 2011 that he provided the Complainant with an inspection of all bid proposals responsive to the request on July 23, 2010. Moreover, there is no evidence in the record to support the Custodian's certification that he provided the Complainant with inspection of the bid proposals requested.

Therefore, the Custodian has failed to bear his burden of proof that he lawfully denied the Complainant access to the requested bid proposal contents. N.J.S.A. 47:1A-6. Because the Custodian identified two (2) bid proposals responsive to the Complainant's request for Item No. 1, the Custodian must provide these two (2) bid proposals and their contents to the Complainant.

Whether the record responsive to the Complainant's request for a Code of Ethics exists?

Request Item No. 2 of the Complainant's OPRA request sought inspection of the Code of Ethics adopted by the Township and all signed copies by the elected and appointed Township officials agreeing to said Code of Ethics. The Custodian certified in

the SOI that no Code of Ethics responsive to request Item No. 2 exists. The Custodian also certified that he provided the Township's personnel policy to the Complainant in lieu of the Code of Ethics. The GRC requested clarification from the Custodian regarding his certification. The Custodian stated that the Complainant viewed the personnel policy and also stated that the Township does not have a Code of Ethics Policy; however the State of New Jersey's Code of Ethics Policy is posted in the Township office.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In the matter before the Council, the Custodian certified in the SOI that no Township Code of Ethics exists which is responsive to the request; it therefore follows that there can be no signed copies by the elected and appointed Township officials agreeing to said Code of Ethics. There is no evidence in the record to refute the Custodian's certification.

Therefore, because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request for the Code of Ethics adopted by the Township exists and therefore, no signed copies by the elected and appointed Township officials exists, and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Whether the GRC has the authority under OPRA to establish and/or monitor a corrective action plan for the Township?

OPRA provides that the Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding

access, which records custodians shall make available to persons requesting access to a government record;

- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied.

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints filed under OPRA.

In this complaint, the Complainant requested that the GRC develop and monitor a corrective action plan for the Township, with specific attention to the Custodian's responsibilities and the handling of and responds to OPRA requests.

The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has failed to bear his burden of proof that he lawfully denied the Complainant access to the requested bid proposal contents. N.J.S.A.

47:1A-6. Because the Custodian identified two (2) bid proposals responsive to the Complainant's request for Item No. 1, the Custodian must provide these two (2) bid proposals and their contents to the Complainant.

3. **The Custodian shall comply with Item 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. The Custodian must also provide to the Council a detailed list of all bid proposals provided to the Complainant and a certification that the bid proposals provided are the only bid proposals that exist that are responsive to the request, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[11] to the Executive Director.[12]**

4. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request for the Code of Ethics adopted by the Township exists and therefore, no signed copies by the elected and appointed Township officials exists, and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

5. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.

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

Prepared By: Harlynne A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

[11] "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."

[12] 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.

March 20, 2012