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

September 30, 2014 Government Records Council Meeting

Katalin Gordon
Complainant
v.
City of Orange (Essex)
Custodian of Record

Complaint No. 2013-255

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the July 22, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's April 29, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant the disability insurance payments Clerk Dwight Mitchell received from the City of Orange from January 1, 2010 to June 25, 2013, and all sick days accumulated by Mr. Mitchell from January 1, 2010 to June 25, 2013.

2. Although the Custodian failed to respond to the Complainant's OPRA request in a timely manner, failed to provide a specific legal basis for denying the requested records, and failed to prove that the denial of access to the requested records was authorized by law; the Custodian did comply with the terms of the Council's April 29, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 3, 2014

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting

Katalin Gordon[1] **GRC Complaint No. 2013-255**
Complainant

v.

City of Orange (Essex)[2]
Custodial Agency

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

1. All disability insurance payments City Clerk Dwight Mitchell has received from the City of Orange, a municipality self-insured through the Orange Insurance Fund, from January 1, 2010 to June 25, 2013.

2. All sick days accumulated by City Clerk Dwight Mitchell from January 1, 2010 to June 25, 2013.

Custodian of Records: Madeline F. Smith[3]
Request Received by Custodian: June 25, 2013
Response Made by Custodian: July 11, 2013
GRC Complaint Received: September 10, 2013

Background

At its April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

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

[1] No legal representation listed on record.
[2] No legal representation listed on record.
[3] Dwight Mitchell was the original Custodian.

2. The Custodian's July 11, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008) and Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).

3. The Custodian, by failing to provide the Complainant with a specific lawful basis for denying access to the requested records, failed to bear his burden of proving that the denial of access to said records was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant for the period January 1, 2010 to June 25, 2013, a record of City Clerk Dwight Mitchell's accumulated sick days and disability insurance payments received from the City of Orange.

4. **The Custodian shall comply with paragraph #3 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

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

Procedural History:

On May 1, 2014, the Council distributed its April 29, 2014 Interim Order to all parties. On May 8, 2014, the Custodian informed the GRC that she received the Council's Interim Order on May 5, 2014, and that she would submit the certification of compliance on May 9, 2014. On May 9, 2014, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director wherein the Custodian stated that she disclosed to the Complainant the records in compliance with the Order. At the request of the GRC, on May 16, 2014 the Custodian provided the GRC with a certification confirming she did not receive the Council's Interim Order until May 5, 2014.

On May 22, 2014, the Complainant informed the GRC that based upon other OPRA requests she filed, the Custodian was untruthful in her certification of compliance. The Complainant stated that in the instant complaint the Custodian averred that Mr. Mitchell received his regular bi-weekly salary as temporary disability; however, the Custodian provided the Complainant with the same response to another OPRA request when she sought his gross salary for the same period. The Complainant states that the Custodian's two responses attest to mutually exclusive outcomes. The GRC asked the Custodian to reply to the inconsistency raised by the Complainant, and by e-mail dated May 26, 2014, the assistant city attorney replied by stating that Chapter 23 of the Orange City Code provides that an employee injured on the job shall be entitled to full salary and benefits and a special leave of absence; therefore it would be consistent with the Orange City Code to pay continued salary as temporary disability. Counsel further stated that the Custodian's responses to her requests were not inconsistent.

On May 26, 2014, the Complainant asked the assistant city attorney to provide a precise citation to the section of the Orange City Code that provides for a special leave of absence. On May 27, 2014, the Custodian provided the Complainant with a copy of City Code Chapter 23:1-7.4, which was responsive to the Complainant's inquiry and confirmed the information that the assistant city attorney gave the Complainant on May 26, 2014.

On June 3, 2014, the Complainant submitted a certification in reply to the Custodian's certification of compliance. The Complainant's certification was framed in the form of an argument. The Complainant pasted the content of the Orange City Code Chapter 23:1-7.4 into the certification, including the procedures employees must follow with respect to job related injuries. The Complainant then interpreted and argued the procedures contained in subparagraphs 1 through 8 of the Code vis-à-vis the Custodian's responses to several OPRA requests the Complainant had previously submitted. The gravamen of the Complainant's argument is that Mr. Mitchell had not been granted, and could not have been receiving, the temporary disability benefits that the Custodian certified had been paid to him in her certification of compliance.[4]

Analysis

Compliance

On April 29, 2014, the Council ordered the above-referenced compliance. On May 1, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian certified that she received the Council's Order on May 5, 2014. Therefore, compliance was due on or before May 12, 2014. On May 9, 2014, the Custodian forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant the disability insurance payments Clerk Dwight Mitchell received from the City of Orange from January 1, 2010 to June 25, 2013, and all sick days accumulated by Mr. Mitchell from January 1, 2010 to June 25, 2013.

By certification dated June 3, 2014, the Complainant argued that based upon Orange City Code Chapter 23:1-7.4 and the Custodian's responses to past OPRA requests the Complainant submitted, Mr. Mitchell had not been granted, and could not have been receiving, temporary disability benefits. Therefore, the Complainant asserted that the Custodian's certification of compliance was defective because the content of the records cannot be responsive to the request.

In Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), the complainant was dissatisfied with the record that was disclosed. The Council determined that "…[t]he document requested has been disclosed to the Complainant. Pursuant to N.J.S.A. 47:1A-7(b), the content of the document is not in the Council's jurisdiction."

[4] On June 4, 2013, the Complainant forwarded a certified correction to her June 3, 2014 certification, wherein she corrected the captions of two (2) prior Denial of Access Complaints she cited (336 and 337) to reflect that the complaints were not 2013 complaints, but rather 2011 complaints. On June 11, 2014, the Complainant submitted another certification in which she purported to amend her Denial of Access Complaint by changing the name of one of the Orange city attorneys; however, the purported amendment to the complaint is not relevant to the Custodian's compliance with the Council's Interim Order.

Likewise here, the GRC has no authority to interpret the provisions of the Orange City Code and then apply the Code to the facts the Complainant gleaned from various responses to past OPRA requests in order to determine whether the Custodian complied with the Council's Interim Order by disclosing records with content responsive to the request. "[T]he content of the document is not in the Council's jurisdiction." Kwanzaa, GRC 2004-167.

Accordingly, the Custodian complied with the Council's April 29, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant the disability insurance payments Clerk Dwight Mitchell received from the City of Orange from January 1, 2010 to June 25, 2013, and all sick days accumulated by Mr. Mitchell from January 1, 2010 to June 25, 2013.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (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, 107 (App. Div. 1996)).

Although the Custodian failed to respond to the Complainant's OPRA request in a timely manner, failed to provide a specific legal basis for denying the requested records, and failed to prove that the denial of access to the requested records was authorized by law; the Custodian did comply with the terms of the Council's April 29, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 29, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant the disability insurance payments Clerk Dwight Mitchell received from the City of Orange from January 1, 2010 to June 25, 2013, and all sick days accumulated by Mr. Mitchell from January 1, 2010 to June 25, 2013.

2. Although the Custodian failed to respond to the Complainant's OPRA request in a timely manner, failed to provide a specific legal basis for denying the requested records, and failed to prove that the denial of access to the requested records was authorized by law; the Custodian did comply with the terms of the Council's April 29, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

July 22, 2014[5]

[5] Not heard due to recusal (not heard in August because the meeting was canceled due to lack of a quorum).

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Katalin Gordon
Complainant
v.
City of Orange (Essex)
Custodian of Record

Complaint No. 2013-255

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting 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's July 11, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008) and Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).

3. The Custodian, by failing to provide the Complainant with a specific lawful basis for denying access to the requested records, failed to bear his burden of proving that the denial of access to said records was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant for the period January 1, 2010 to June 25, 2013, a record of City Clerk Dwight Mitchell's accumulated sick days and disability insurance payments received from the City of Orange.

4. **The Custodian shall comply with paragraph #3 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2]

5. 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 29th Day of April, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 1, 2014

[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
April 29, 2014 Council Meeting

Katalin Gordon[1] **GRC Complaint No. 2013-255**
Complainant

v.

City of Orange (Essex)[2]
Custodial Agency

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

1. All disability insurance payments City Clerk Dwight Mitchell has received from the City of Orange, a municipality self-insured through the Orange Insurance Fund, from January 1, 2010 to June 25, 2013.
2. All sick days accumulated by City Clerk Dwight Mitchell from January 1, 2010 to June 25, 2013.

Custodian of Records: Dwight Mitchell, City Clerk[3]
Request Received by Custodian: June 25, 2013
Response Made by Custodian: July 11, 2013
GRC Complaint Received: September 10, 2013

Background

Request and Response:

On June 25, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 11, 2013, the eleventh (11th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request was denied because there is ongoing and pending litigation and the requested records involve issues regarding the ongoing litigation.

[1] No legal representation listed on record.
[2] No legal representation listed on record.
[3] Although Lauressa Bradshaw responded to the complaint as well as to the Complainant's subsequent e-mails, no one notified the GRC that there was a custodian of records other than the statutorily delineated custodian, City Clerk Dwight Mitchell. Further, no Statement of Information setting forth the name of a custodian other than Dwight Mitchell was submitted by the City of Orange.

Denial of Access Complaint:

On September 10, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that on June 25, 2013, she filed an OPRA request for the records relevant to this complaint. The Complainant further asserts that on July 11, 2013, she received a response denying her request due to ongoing and pending litigation.

On July 18, 2013, the Complainant e-mailed the Custodian asking for the specific citation in OPRA which allows denial of access to records based upon ongoing litigation. On July 22, 2013, the Custodian e-mailed the Complainant and informed her that if she wants the specific citation to OPRA for the denial of her June 25, 2013 request, the Complainant will have to file another OPRA request.

The Complainant states that on July 22, 2013, she sent another e-mail to the Custodian objecting to the requirement that she submit another OPRA request in order to obtain the legal reason that she was denied access to the records she sought in her June 25, 2013 request. The Complainant states that on July 23, 2013, she received an e-mail from Deputy City Clerk Madelie Smith, who told her that her OPRA request was closed.

The Complainant contends that the Custodian gave no lawful reason for the Custodian to deny her OPRA request. The Complainant further contends that when she asked the Custodian to provide a legal reason for denying her request, the Custodian closed the matter.

Statement of Information:

On September 11, 2013, the GRC sent the Custodian a request for the Statement of Information ("SOI"). The Custodian failed to submit the SOI to the GRC.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).[4] 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).

[4] 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.

Here, the Custodian failed to respond in writing to the Complainant's June 25, 2013 request until July 11, 2013, the eleventh (11th) business day following receipt of the request. The Custodian stated in the response that the Complainant agreed to an extension of time until July 16, 2013 for the Custodian to submit the response; however, nothing in the evidence of record supports such an agreed-upon extension of time.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting 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, GRC 2007-11.

Sufficiency of Response

In Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. The custodian, without further elaboration, stated that access to the requested records was denied. The Council, in finding that the custodian violated OPRA, stated "…the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g)." Subsequently, in Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that, "…N.J.S.A. 47:1A-5(g) provides that if a custodian is 'unable to comply with a request for access, then the custodian shall indicate the specific basis' for noncompliance."

Here, the Custodian responded to the Complainant's request by informing the Complainant that the requested records could not be disclosed because "…there is ongoing and pending litigation." The Custodian did not cite to any provision of OPRA, another State statue, executive order, or regulation as authority for lawfully denying the Complainant's request.

Therefore, the Custodian's July 11, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also* Morris, GRC 2007-160 and Rader, GRC 2007-239.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011), the complainant sought records concerning litigation that was currently pending before the Appellate Division. The custodian responded by denying access to the requested records until conclusion of the litigation and failed to otherwise provide a lawful basis

for denying access. The GRC determined that "…pending litigation is not a lawful basis for denial of access to records requested under OPRA. OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation."

Here, the Custodian denied the Complainant access to the requested records because he stated "there [was] ongoing and pending litigation." However, as the Council stated in Darata, "OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation." As such, the Custodian was required under N.J.S.A. 47:1A-5(g) to provide the Complainant with a detailed lawful basis for denying the requested records but the Custodian failed to do so. Moreover, the Custodian was provided with an opportunity to set forth a lawful basis for denying access in the SOI. A request for the SOI was sent by the GRC to the Custodian on September 11, 2013. The Custodian, however, failed to complete and submit the SOI to the GRC.

Accordingly the Custodian, by failing to provide the Complainant with a specific lawful basis for denying access to the requested records, failed to bear his burden of proving that the denial of access to said records was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant for the period January 1, 2010 to June 25, 2013, a record of City Clerk Dwight Mitchell's accumulated sick days and disability insurance payments received from the City of Orange.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting 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's July 11, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008) and Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).

3. The Custodian, by failing to provide the Complainant with a specific lawful basis for denying access to the requested records, failed to bear his burden of proving that the denial of access to said records was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant for the period January 1, 2010 to June 25, 2013, a record of City Clerk Dwight Mitchell's accumulated sick days and disability insurance payments received from the City of Orange.

4. **The Custodian shall comply with paragraph #3 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[5] to the Executive Director.[6]**

5. 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: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014

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

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