



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ACTING COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

March 28, 2007 Government Records Council Meeting

Cynthia Colella-Gallenthin
Complainant

Complaint No. 2004-95

v.

Borough of Merchantville
Custodian of Record

At the March 28, 2007 public meeting, the Government Records Council (“Council”) considered the March 26, 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. The Council, therefore, accepts the Initial Decision of the Office of Administrative Law that based on the reasons stated and to the extent that the complaint seeks the imposition of statutory penalties for the knowing and willfully violation of OPRA and unreasonable denial of access under the totality of the circumstances, the complaint is dismissed.

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 28th Day of March, 2007



Vincent P. Maltese, Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: April 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Cynthia Colella-Gallenthin¹
Complainant**

GRC Complaint No. 2004-95

v.

**Borough of Merchantville²
Custodian of Records**

Records Requested: Solicitor fee agreements since 1998, including public notices of professional service contracts for Tim Higgins, Esq. (of Higgins & Maley), Jim Maddan, Esq., Maurice James Maley, Jr., Esq. (Bond Counsel), and the law firm of Parker, McCay & Criscuolo.

Request Made: June 10, 2004

Response Made: July 27, 2004

Custodian: Oren R. Thomas, IV

GRC Complaint Filed: July 13, 2004

Background

July 14, 2005

Government Records Council's ("Council") Interim Order. At its July 14, 2005 public meeting, the Council considered the July 8, 2005 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 the case shall be referred to the Office of Administrative Law to determine whether the failure to provide immediate access to the requested contract documents pursuant to N.J.S.A. 47:1A-5(e) constitutes a knowing and willful violation of the OPRA under the totality of the circumstances.

July 20, 2005

Council's Interim Order distributed to the parties.

September 13, 2005

The GRC submitted the referral documentation to the Office of Administrative Law.

October 16, 2006

The Office of Administrative Law record closed in this matter.

¹ The Complainant is represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² The Custodian is represented by Robert A. Baxter, Esq. (Annin and Baxter, LLC).

December 5, 2006

The first extension of time to complete the Initial Decision of Judge Martone was approved and executed by the GRC.

January 17, 2007

The second extension of time to complete the Initial Decision of Judge Martone was approved and executed by the GRC.

March 5, 2007

The Initial Decision of Judge Martone was completed. In the Initial Decision, the Judge found that for the reasons stated and to the extent that the complaint seeks the imposition of statutory penalties for the knowing and willfully violation of OPRA and unreasonable denial of access under the totality of the circumstances, the complaint is dismissed.

No exceptions were filed by either party to this complaint.

Analysis

The Initial Decision of Judge Martone states that under the scheme established by OPRA, the burden to defend a failure to answer a request for public documents rests with the custodian, who must respond to the request and indicate the specific basis for denying access to any documents that she will not produce. Here, as the custodian has supported his failure to respond in a timely fashion as having been ultimately based upon a misunderstanding and miscommunication between the parties, the burden of establishing that the custodian's actions in regard to this request constituted a "knowing and willful" violation despite the asserted defense, rests with the complainant.

After receiving the testimony of six (6) individuals (including the parties to this complaint) and based on the reasons stated in the decision (see attached) and to the extent that the complaint seeks the imposition of statutory penalties for the knowing and willfully violation of OPRA and unreasonable denial of access under the totality of the circumstances, the Judge dismissed the complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Initial Decision of Judge Martone that based on the reasons stated and to the extent that the complaint seeks the imposition of statutory penalties for the knowing and willfully violation of OPRA and unreasonable denial of access under the totality of the circumstances, the complaint is dismissed.

Prepared By:

Catherine Starghill, Esq.
Executive Director

March 26, 2007

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 6817-05

AGENCY DKT. NO. 2004-95

CYNTHIA COLELLA-GALLENTHIN,

Petitioner,

v.

BOROUGH OF MERCHANTVILLE,

Respondent.

Ted M. Rosenberg, Esq., for petitioner

Robert A. Baxter, Esq., for respondent (Kelley, Wardell, Carig, Annin & Baxter,
attorneys)

Record Closed: October 16, 2006

Decided: March 5, 2007

BEFORE **JOSEPH F. MARTONE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Government Records Council (GRC) transmitted this contested case concerning the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA) to the Office of Administrative Law (OAL) on September 20, 2005, with the direction to decide one issue; whether the records custodian of the Borough of Merchantville "knowingly and willfully violated the Act and is found to have unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11."

The case was initially assigned to Hon. Donald J. Stein, ALJ, and a hearing was scheduled for January 18, 2006. That hearing was adjourned because of a tentative

settlement of the matter. When the proposed settlement was not finalized, the matter was reassigned to me and I conducted hearings on June 16, 2006, and September 29, 2006. The record in this matter was then closed on October 20, 2006. By Orders of Extension entered on December 5, 2006, and January 17, 2007, the due date for issuing an initial decision was extended until March 5, 2007.

Under the scheme established by OPRA, the burden to defend a failure to answer a request for public documents rests with the custodian, who must respond to the request and indicate the specific basis for denying access to any documents that she will not produce. Here, as the custodian has supported his failure to respond in a timely fashion as having been ultimately based upon a misunderstanding and miscommunication between the parties, the burden of establishing that the custodian's actions in regard to this request constituted a "knowing and willful" violation despite the asserted defense, rests with the complainant.

FACTUAL DISCUSSION

Background

This matter commenced when on June 10, 2004, Cynthia Colella-Gallenthin, the complainant in this matter, requested that Oren R. Thomas, IV, the Municipal Clerk of the Borough of Merchantville and the Borough's Custodian of Records, provide copies of solicitor fee agreements since 1998, inclusive, and public notices of contracts for Tim Higgins (of Higgins Maley), Jim Madden, Maurice James Maley, Jr., bond counsel and Parker McCay Criscuolo. Mr. Thomas provided copies of these documents on July 27, 2004. In the meantime, the complainant filed a complaint with Government Records Council on July 13, 2004.

At its October 14, 2004, public meeting, the Government Records Council issued an interim decision to hold a hearing to determine whether the failure to provide immediate access to the requested contract documents pursuant to N.J.S.A. 47:1A-5(e) constituted a knowing and willful violation of the Open Public Records Act (OPRA) under the totality of the circumstances.

Testimony of Oren R. Thomas, IV

Oren R. Thomas, IV, testified at the evidentiary hearing before me that he has been the Borough Clerk in the Borough of Merchantville since February 2004, and prior to that he was Deputy Clerk for almost three years. He received his designation as a Registered Municipal Clerk on April 23, 2004. He received training regarding OPRA and is aware that he is required to follow its provisions.

Mr. Thomas IV recalls the events which occurred in June 2004. At that time the complainant came in and requested to see solicitor fee agreements. Mr. Thomas IV provided complainant a Borough of Merchantville Government Records Request Form which she then filled out (P-1). Mr. Thomas IV explained that he had never heard of a solicitor fee agreement and he tried to ascertain what the complainant was looking for. While the complainant provided all the information he requested, he said she was evasive and he was not certain what fee agreements she was looking for.

Mr. Thomas IV admitted that there is nothing evasive or confusing in what the complainant wrote on the request form (P-1). He admitted he was custodian of all contracts with the Borough and he was aware that the Borough contracted with attorneys, but he was not aware that an actual contract between the Borough and attorneys existed as of that date, or that the Borough entered into agreements with all its solicitors.

Mr. Thomas IV testified that after the complainant left he could not immediately locate the requested agreements and he then phoned the Borough attorney, Mr. Higgins, who explained that these agreements existed. He spoke to Mr. Higgins for a few minutes but there was no discussion about the requestor or her husband. It was Mr. Thomas IV who wrote on the request form the names "Tim Higgins" and "Jim Madden".

Mr. Thomas IV pulled the contracts that afternoon and although there was one missing fee agreement for Mr. Higgins for one year, he had all the others. Mr. Thomas

IV also spoke to Mr. Madden that day or the next day, and Mr. Madden informed him that there were no written agreements but only a hand shake. He then spoke to the Borough's retired clerk the next day who advised him that Parker McCay Criscuolo was bond counsel and told him where to look for a copy of that agreement. The next day he went into the archives and found three purchase orders and one fee agreement for Parker McCay Criscuolo. He did not see that Mr. Maley was with Parker McCay Criscuolo and he did not contact Mr. Maley. Thus he had all of the Higgins fee agreements except one, he had no fee agreements with Mr. Madden, and he had one fee agreement and some purchase orders with Parker McCay Criscuolo.

With regard to the request for the public notices of appointments, Mr. Thomas IV understood that the complainant was asking for newspaper ads, but only those for the current year plus the last year were kept, which he found within five minutes. The 1998 through 2002 newspaper ads were in the basement and he found one for Parker McCay Criscuolo and one for James Maley.

Mr. Thomas IV said that within a day or so he had all the information that was requested but he did know if that was everything.

Mr. Thomas IV testified that when the complainant originally made the records request she did not want to pay for any copies. He further testified that she also said to him that she was going to call him back to view what he had, and he agreed to that. He also explained to her at the time that there is an extraordinary service fee he was going to charge for his search of the Borough's records.

Mr. Thomas IV admitted that he is aware of the general rule of OPRA that these requests are to be responded to within seven days. He admitted that he did not honor this rule because there was a breakdown of communications. He believed that the complainant was going to call him to find out whether he had found the documents and to arrange a time when she could come in and look at them. However, he admitted that the complainant believed that he was going to call her. He did nothing within the seven days and admitted he did not telephone, e-mail or write to her. Once he received the complaint she filed with the GRC he immediately provided the documents. He

indicated he spent half a day of extra time looking for them, but he did eventually provide all of these documents free.

Mr. Thomas IV testified that prior to June 2004, he had never heard of Mr. Maley. He is aware that his father, Oren R. Thomas, III, sits as a municipal court judge in the Borough of Merchantville. He was not aware of a case pending in the Collingswood or the Merchantville municipal courts involving the complainant's husband, and the complainant said nothing to him about the Merchantville case. He learned long afterwards that there was a case involving complainant's husband and Mr. Maley pending in Merchantville.

On cross-examination, Mr. Thomas IV testified he did not know who the complainant or her husband were and did not know who Mr. Maley was. When complainant was in his office he explained to her he needed to find out if the agreements she was requesting actually existed. He stated he would find them and he was going to wait for her to contact him to come in and look at them. He denied that the failure to send them had anything to do with any pending case. He restated that he was waiting for the complainant to call him.

Testimony of Oren R. Thomas, III

Oren R. Thomas, III, testified that he is an attorney in New Jersey with a practice in Haddon Township, which is approximately two miles away from Merchantville. The present Mayor in Collinswood is James Maley who is also an attorney. In June 2004, it was his understanding that Mr. Maley was with the Parker McCay Criscuolo law firm. In June 2004, he was a Municipal Court Judge in Pinehill Borough and Merchantville. He was never appointed as a Municipal Court Judge in Collingswood. However, he served as a substitute judge in Collingswood. Judge Zane who is the judge in Collingswood, is not able to be there on various occasions and he would sit in as a substitute judge.

Mr. Thomas III explained that Judge Zane would simply call him to sit in as a substitute and he would receive remuneration in the amount of \$150 to \$175 per session. He had been called once or twice per year over the past. He acknowledged

that at some point in the last twelve years Mr. Maley became the Mayor of Collingswood. He testified that he never met Mr. Maley prior to June 2004.

In June 2004, a case was transferred to Merchantville Municipal Court involving Mr. Maley and Mr. Gallenthin. Mr. Thomas III said that he gave no consideration to the fact he had been receiving compensation from Collingswood. When he heard the case he did not give any thought to the fact that Mr. Higgins had been a partner with Mr. Maley and did not recall that partnership at the time, but now recalls it. As of June 9, 2004, there was no mention of the Higgins-Maley partnership. Eventually a motion for reconsideration of his decision in the Maley-Gallenthin case was made and he denied the motion. He explained that if there was a possible or remote conflict he would ask the presiding judge of municipal court in Camden County for his advice. He was unaware that Mr. Maley was a shareholder in Parker McCay Criscuolo which was also redevelopment counsel for Merchantville.

Mr. Thomas III testified that he talks with his son, Oren Thomas IV, sporadically but did not know about the Gallenthin case until a complaint was filed with GRC. He never discussed the Maley-Gallenthin municipal court case with his son prior to the present matter. He had no conversations with his son about the case.

Testimony of Timothy J. Higgins

Timothy J. Higgins testified that he is an attorney-at-law in New Jersey and was associated with Mr. Maley as a tenant only through January 31, 2001. On February 1, 2001, they created a new law firm of Maley and Higgins which existed for 13 months until February 28, 2002. The firm dissolved and he withdrew with Mr. Maley going to the Parker McCay Criscuolo firm. He continued to rent office space for two more months in March and April 2002 with Mr. Maley. He and Mr. Maley have had no legal professional association with each other since March 2002. While he is cordial and friendly with Mr. Maley, they never socialized.

Mr. Higgins was appointed as attorney in Merchantville, on January 1, 1995. He holds no position in Collingswood. Mr. Maley knew the Mayor of Collingswood, Patrick

Brennan, very well and they are social friends. After parting as partners, he believes that Mr. Maley was involved as redevelopment counsel and that a client of Maley was the Borough of Merchantville. However, Mr. Maley's work as redevelopment counsel was probably completed in 2002 or 2003. He was also aware that Mr. Maley was the Mayor of Collinswood for 14 or 15 years. He is not aware of the alleged harassment by Mr. Gallenthin of Mr. Maley. He learned about the case transfer from Mr. Thomas IV.

Mr. Higgins indicated that at some point Mr. Thomas IV conversed with him and said to him that he had an OPRA request and he believed it related to a court case. He did not know if that conversation occurred on the same day that Mr. Thomas IV received the OPRA request. His understanding was that it was within a day or so of the request. Mr. Higgins' recollection was that he simply told Mr. Thomas IV to comply with the statute. He also believes that he learned of the transfer of the Maley-Gallenthin case to the Merchantville municipal court concurrently with his learning about the OPRA request. He did not contact Mr. Maley about the OPRA request or discuss it with anyone. He believes that the court case was over with when he was advised of this by Mr. Thomas IV. He also did not discuss the OPRA request with Judge Thomas III and had no recollection of any discussion of OPRA with Mr. Maley. He only had an initial conversation with Mr. Thomas IV, although he assumed he had subsequent conversations with him. Mr. Thomas IV was trying to get the records and comply with the request, and Mr. Thomas IV said to Mr. Higgins that he was working with the complainant to comply. He does not know when he became aware of the Gallenthin municipal court trial result.

Testimony of Cynthia L. Colella-Gallenthin

The complainant, Cynthia L. Colella-Gallenthin testified that she is married to George Gallenthin. On the day before she made the OPRA request which is the subject of this case, she and her husband appeared at a trial in Municipal Court in Merchantville before Judge Oren Thomas, III, in which Maurice James Maley, Jr., was the complainant. Mr. Maley had complained about an incident that allegedly occurred in the Borough of Collingswood. The case was transferred to the Merchantville Municipal Court because of a conflict. On June 9, 2004, a decision was rendered by

Judge Thomas III, but the question was raised about a conflict of interest. She then went to the Borough of Merchantville the next day to request the records in question because Maley and Higgins had a partnership, and Mr. Higgins had a business relationship with Mr. Maley through July 19, 2004. She also knew that Maley and Higgins had been law partners.

The complainant testified that she appeared at Merchantville at approximately 4:00 p.m., walked up to the window and said that she would like to file OPRA request. Mr. Oren Thomas, IV, reached under the desk and pulled out the form, and she wrote out everything that appears on the form (P-1) but the names "Tim Higgins" and "Jim Madden". It took her two minutes for her to fill it out and she handed it to Mr. Thomas IV. He said there was going to be a fee. She then asked for a copy of the request. Mr. Thomas IV said to her, "I will call you". She then said, "You're going to call me". He said "Yes". She then said, "I will wait for your call."

The complainant admitted that she wanted to make an initial inspection of the records and see all of the solicitor fee agreements so that she could determine which were to be copied, and this is part of the application. Mr. Thomas IV seemed very versed in processing the request. She denied that Mr. Thomas IV indicated he did not understand what these solicitor fees agreements were. She cannot imagine anything she said or did that was deceptive. Mr. Thomas IV did not state when he would get back to her.

The complainant explained that there was a motion pending before Judge Thomas III on June 30, 2004, to reconsider his decision. She requested these solicitor contracts for the purpose of the motion for reconsideration, but she received them too late. She wanted to contact Mr. Thomas IV, but was fearful of being charged with harassment.

After the complainant filed a complaint with the Government Records Council, she was contacted by John Fry, the Borough Administrator on or about July 28, 2004. Mr. Fry made an appointment for her to come in and she did so. When she arrived, she saw Mr. Thomas IV and said, "I came to see the originals" and in reply Mr. Thomas

IV said, "You want these". He then hissed, moved his head in a cocky way and gave her an envelope. She then walked out.

The complainant testified that she was present in court when there was an objection to Judge Thomas III because there may be a conflict. She indicated that the verdict in the municipal court case was based on the perjury of Mr. Maley. She already knew there was a connection between Mr. Maley and the Borough of Merchantville and its solicitor and she wanted to obtain copies of these contracts. She also said that it was absolutely clear that Mr. Thomas IV said he would call her, and she expected to receive a phone call for her to come to review the contracts. It was important to get these documents and they would be of assistance in the motion for reconsideration. She never called Mr. Thomas IV back because she was fearful of false charges being filed against her.

Testimony of Maurice James Maley, Jr.

The complainant called Maurice James Maley, Jr., as a witness. He testified that he is the Mayor of Borough of Collingswood and was elected as member of the Board of Commissioners in 1989. The Commissioners elect a Mayor from one of their membership. He was elected Mayor in 1997. Michael Brennan was the Mayor and he is the brother of Patrick Brennan. The municipal judges are appointed by the Commissioners and Bob Zane was appointed as municipal judge more than five years ago and is presently the judge. He indicated he has no idea how Judge Zane picks his substitute judge and has no knowledge of how Oren Thomas, III, was appointed as a substitute judge. He knows Oren Thomas, III, only as a lawyer and only from the court case he had against Mr. Gallenthin. He has no independent knowledge that Oren Thomas, III, served as a substitute judge and he was not involved with who is brought in as a conflicts judge.

Mr. Maley acknowledged that there were nine checks issued by the Borough of Collingswood payable to Oren Thomas, III, and that he is the same person who served as the judge in the court case heard in June 2004. These checks were paid from the Collingswood Borough account and one of the signatures on the checks is his. He

signed these checks in his official capacity as Mayor or Commissioner. He explained that he probably signs 300 checks at a time after a cursory review. He also knew Oren Thomas, III, as a lawyer with an office in his town.

Mr. Maley testified that he signed the complaint against Mr. Gallenthin two or three days after Mr. Gallenthin called his home. He appeared in Merchantville Municipal Court for the trial of the complaint against Mr. Gallenthin. He does not believe that he conversed with either Tim Higgins or Patrick Brennan, the Mayor of Merchantville, concerning this case. The prosecutor handled the case. At the time of this case he was no longer a partner with Mr. Higgins who is Borough Solicitor for Merchantville. He was associated with Mr. Higgins in 2000 or 2001. He testified that he never did any work for Merchantville. He started with Parker McCay Criscuolo in May 2003. From May 2003 through June 2004, he did work for the Borough of Merchantville as special counsel in a redevelopment project.

Mr. Maley testified that when the case was transferred from Collingswood to Merchantville he mentioned to the court clerk that he did work for Merchantville, and the court clerk said that was no problem. He also identified his certification which he signed on June 23, 2004, and which was submitted to the Merchantville Municipal Court (P-4). He admitted he became shareholder in Parker McCay Criscuolo May 1, 2002, and that Parker McCay Criscuolo acts as a redevelopment attorney. He never made it known to Judge Thomas III. His relationship with Mayor Patrick Brennan is that he is a friend. He knows the Brennan family and it is a professional friendship. He never talked to Mayor Brennan about the case. He does not know if Mayor Brennan spoke to Judge Thomas III. He never conversed with Judge Thomas III about the case. He never did any work for Merchantville.

Testimony of Patrick Brennan

The complainant called Patrick Brennan who testified that he has been the Mayor of Merchantville for twelve years. He knows Jim Maley who represented AST Development and who was involved in redevelopment in the Borough of Merchantville. He knows Judge Thomas III who was the judge in Merchantville for about three years.

He does not recall a telephone conversation with Judge Thomas III about Jim Maley. He is aware that Jim Maley had a criminal complaint in Merchantville in June 2004. Subsequent to the court hearing someone told him about it but he does not recall who. He testified that he never instructed Oren Thomas, IV, not to respond to the request for information.

LEGAL DISCUSSION AND ANALYSIS

The Open Public Records Act, N.J.S.A. 47:1A-1, et seq., known as "OPRA," declares the public policy of the State of New Jersey to be that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access.

N.J.S.A. 47:1A-5 provides:

g. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If 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. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

h. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the

record.

i. Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. 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, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. . . . If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-6 reads

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7).

N.J.S.A. 47:1A-11 provides

a. A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), 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 of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and

enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

Thus, the Legislature has determined that where a public official does not respond appropriately to a request for a public record made in accordance with OPRA, that official may be liable to civil monetary penalties. However, it did not make the mere violation of the Act's provisions the basis for the imposition of these penalties. Only where the official acted "knowingly and willfully" and "unreasonably" denied access does the legislation authorize the penalties set forth in 11a. Thus, the evidence in this case must be tested to determine if the custodian's conduct was sufficiently egregious as to warrant the label "knowing and willful."

OPRA contains no definition of these terms. Therefore, in order to understand their meaning and the burden they place upon one seeking to justify the imposition of such penalties, one must look to case law that has sought to understand these terms in the context of other legislation.

In Executive Comm'n on Ethical Stds. v. Salmon, 295 N.J. Super. 86, (App. Div. 1996) (Executive Comm'n), an ethics case brought against a sitting Commissioner of the Board of Public Utilities, the Executive Commission on Ethical Standards (ECES) sought Commissioner Salmon's removal on the grounds that he had acted in "willful and continuous disregard of his ethical obligations." The Appellate Division addressed charges of "willful and continuous disregard" of ethical obligations as a State officer under the provisions of N.J.S.A. 52:13D-21(i). In a comprehensive discussion of this issue, the Court stated:

In the absence of a definition of the term "willful" contained in the Conflicts of Interest Law or the BPU Code of Ethics, the ECES looked to cases arising under section 255 of the Federal Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 255(a), particularly Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir.1971), cert. denied, 409 U.S. 948, 93 S. Ct. 292, 34 L. Ed. 2d 219 (1972). In Jiffy June, an infraction of the FLSA was deemed to be willful when the employer changed employees' rates of pay with knowledge that the FLSA was applicable to its operations. The final

order of the ECES failed to recognize that the Jiffy June standard of willful conduct was specifically rejected by the United States Supreme Court in McLaughlin v. Richland Shoe Co., 486 U.S. 128, 134, 108 S. Ct. 1677, 1682, 100 L. Ed. 2d 115, 123 (1988), where the Court said the Jiffy June standard "is not supported by the plain language of the statute (FLSA), we readily reject it."

The Jiffy June standard was criticized by the United States Supreme Court as permitting "a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good faith but incorrect assumption" that the challenged conduct was lawful. Id. at 135, 108 S. Ct. at 1682, 100 L. Ed. 2d at 124.

The meaning of "willful" was defined by the McLaughlin Court as follows:

In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional". . . . The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. [Id. at 133, 108 S. Ct. at 1681, 100 L. Ed. 2d at 123 (citations omitted).]

This court is not bound by an agency's interpretation of a statute. See Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93, 312 A.2d 497 (1973). We reject the Jiffy June standard as no longer persuasive.

In Fielder v. Stonack, 141 N.J. 101, 125, 661 A.2d 231 (1995), the New Jersey Supreme Court dealt with the meaning of the phrase "willful misconduct" in the context of a police pursuit. The police officer who collided with an innocent motorist could not be exonerated under the applicable statute if his conduct constituted "willful misconduct." In holding that willful misconduct in the context of a police pursuit means "the knowing failure [of a police officer] to follow specific orders[.]" id. at 126, 661 A.2d 231, the Court noted that the phrase "willful misconduct" is not immutably fixed but takes its meaning from the context and purpose of its use. Id. at 125, 661 A.2d 231. The Court further said:

Although willful misconduct need not involve the actual intent to cause harm . . . there must be some knowledge that the act is wrongful. . . . "Willful misconduct" is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.

[Fielder, supra, 141 N.J. at 124, 661 A.2d 231.]

Although the Fielder court formulated its "willful" standard expressly for police-chase scenarios, we find its reasoning to be pertinent in the context of ethics violations. Both scenarios deal with possible malfeasance of a

person charged with protection of the public. Cases in the criminal context define the word "willful" as signifying an intentional execution of an unlawful plan which has been conceived and deliberated upon. See, e.g., State v. DiPaolo, 34 N.J. 279, 295, 168 A.2d 401 (1961), cert. denied, 368 U.S. 880, 82 S. Ct. 130, 7 L. Ed. 2d 80 (1961).

Interpretation of N.J.S.A. 52:13D-21(i) must center upon its structure and plain language. Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128, 527 A.2d 1368 (1987). Our consideration is guided by N.J.S.A. 1:1-1 which provides:

In the construction of the laws and statutes of this state . . . words and phrases shall be read and construed with their context, and shall . . . be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

The evident purpose of N.J.S.A. 52:13D-21(i) is to delineate the penalties for those found guilty of violating any provision of the Conflicts of Interest Law or Codes of Ethics promulgated pursuant to such Law. Two levels of penalties are established depending upon the degree of culpability of the ethics offender. The initial or lower level, in addition to fines, permits an offender to "be suspended from his office or employment for a period not in excess of 1 year." The second or more severe level permits an offender to be removed from his office or employment and barred from holding any public office or employment for a period not exceeding five years after crossing a threshold finding that the conduct of the offender constitutes a "willful and continuous disregard" of the ethics laws.

Thus, the structure and plain language of N.J.S.A. 52:13D-21(i) contemplate that a distinction be made with respect to the degree of culpability of the ethics offender. By reserving the more severe level of punishment for offenders whose conduct constitutes a "willful and continuous disregard" of the ethics laws, the Legislature intended to and did draw a distinction between those offenders whose conduct was merely negligent, heedless, or unintentional even though the offender was aware of the ethics laws. By drawing such distinction, it is clear that the Legislature intended to reject a finding of willfulness for conduct that was merely negligent, heedless, or unintentional. Consequently, the *Jiffy June* standard, which permits a finding of willfulness based upon nothing more than negligence or, perhaps, upon a completely good faith but incorrect assumption, was not within the contemplation of the Legislature as expressed by the plain language of the statute.

The legislative use of the words "continuous disregard" in conjunction with the word "willful" conveys the intention that something more than mere

negligence, inattention, or heedlessness is required for conduct to constitute a "willful and continuous disregard" of the ethics laws. Accordingly, we determine that conduct, to be considered willful under N.J.S.A. 52:13D-21(i), must be intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional.

[Executive Comm'n on Ethical Stds. v. Salmon, *supra*, 295 N.J. Super. at 104-07.]

In Alston v. City of Camden, 168 N.J. 170, the Supreme Court dealt with the issue of willful misconduct, and stated:

Plaintiff contends that the trial court erred in instructing the jury that willful misconduct "does not include and is above what you might understand to be gross negligence or recklessness." Citing Fielder, *supra*, 141 N.J. at 124, 661 A.2d 231, plaintiff argues that this Court has long recognized that one who acts with the knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, commits an act of willful misconduct.

In Fielder, *supra*, this Court held that "in the context of a police officer's enforcement of the law, including the pursuit of a fleeing vehicle, willful misconduct is ordinarily limited to a knowing violation of a specific command by a superior, or a standing order, that would subject that officer to discipline." 141 N.J. at 125, 661 A.2d 231. "More particularly, willful misconduct in a police vehicular chase has two elements: 1) disobeying either a specific lawful command of a superior or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated and, intending to violate it." *Id.* at 126, 661 A.2d 231.

This Court was careful to note that it did "not presume to define willful misconduct in any context other than police vehicular pursuit under 5-2b(2)." *Id.* at 125, 661 A.2d 231. That is because "[i]ike many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use." *Id.* at 124, 661 A.2d 231. This Court did note, however, that "[p]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety." *Ibid.* "It is more than an absence of 'good faith.'" *Ibid.* (quoting Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95, 473 A.2d 554 (Law Div. 1983)).

We conclude that the trial court's instruction that willful misconduct required something between simple negligence and the intentional infliction of harm was not improper. It is clear that willful misconduct requires "much more" than mere negligence. Fielder, *supra*, 141 N.J. at 124, 661 A.2d 231. It also is clear that willful misconduct will fall

somewhere on the continuum between simple negligence and the intentional infliction of harm. Id. at 123, 661 A.2d 231 (citing Foldi v. Jeffries, 93 N.J. 533, 549, 461 A.2d 1145 (1983)). What is not clear, however, is where on the scale willful misconduct should fall in a case such as this. In Fielder, supra, this Court noted that "[p]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety." 141 N.J. at 124, 661 A.2d 231 (citing McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305, 266 A.2d 284 (1970)). However, McLaughlin also may be interpreted to suggest that "reckless" applies only to the "indifference to the consequences" aspect of its holding.

[Alston v. City of Camden, supra, 168 N.J. at 184-85.]

These cases make it clear that there can be no presumption of "willful" misconduct arising simply from the failure of a public official to respond in a timely fashion to a request for production of a public record. Had the Legislature intended to impose civil monetary penalties upon such officials merely for failing to reply within the statutory time frame of seven days, there would have been no need to include the "willful" standard. As the cases discussed above explain, mere negligence or heedlessness of the need to comply with the statute in a timely manner is not enough to label the failure as "willful." There must be some other element of proof to demonstrate that the official acted in reckless disregard of the statutory command, that the lack of response was "intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional." Executive Comm'n, supra. 295 N.J. Super. at 107.

In the present case, I **FIND** that as a custodian of records of the Borough of Merchantville, Oren R. Thomas IV violated the provisions of N.J.S.A. 47:1A-5g by: (1) failing to comply promptly with a request to inspect, examine, copy, or provide a copy of a government record; (2) failing to indicate the specific basis for being unable to comply with the request for access on the request form and promptly returning it to the requestor. In addition, I **FIND** that as a custodian of records of the Borough of Merchantville, Oren R. Thomas IV violated the provisions of N.J.S.A. 47:1A-5i. by failing to grant access to government records or deny a request for access to government records as soon as possible, but not later than seven business days after receiving the request.

I also **FIND** that certain of the requested records in this matter were not immediately available and were in storage or archived, and they were subsequently located by Mr. Thomas IV within the seven-day period. I **FIND** that the complainant elected to provide her name, address and telephone number as a means of contacting her. N.J.S.A. 47:1A-5i provides that if the government record is in storage or archived, the custodian is required to advise the requestor of this fact and the requestor is required to be advised by the custodian when the record can be made available, and if the record is not made available by that time, access shall be deemed denied. I **FIND** that as a custodian of records of the Borough of Merchantville, Oren R. Thomas IV also violated this provision of N.J.S.A. 47:1A-5i.

I have carefully reviewed all of the testimony and evidence elicited in this matter to determine if there is any direct evidence which demonstrates that these violations by Mr. Thomas IV were "reckless," and that they were "intentional and deliberate" acts, taken with "knowledge of [their] wrongfulness." I **FIND** that the only direct evidence which would support these conclusions consists of: (1) Ms. Colella-Gallenthin's testimony that Mr. Thomas IV stated to her that he would call her when he located the documents; (2) Mr. Higgins' testimony that Mr. Thomas IV conversed with him and said to him that he had an OPRA request that he believed was related to a court case. However, Mr. Higgins also provided what may be inconsistent testimony to the effect that the court case was over with when he was advised of the OPRA request and court case by Mr. Thomas IV, and Mr. Higgins never specified the date when this occurred; and, (3) Mr. Thomas IV's admission that there was nothing evasive or confusing in the complainant's request form (P-1) or in what the complainant was requesting.

I **FIND** that the foregoing direct evidence is insufficient to demonstrate that these violations by Mr. Thomas IV were "reckless," and that they were "intentional and deliberate" acts, taken with "knowledge of [their] wrongfulness." While the complainant may very well suspect that the conduct of Mr. Thomas IV was motivated by a desire to cover up an alleged conflict of interest on the part of the municipal court judge who happened to be his father, mere suspicion, assumption and speculation is not sufficient to establish that the act was in fact "reckless" and "deliberate."

Because of the absence of sufficient direct evidence the complainant relies on the surrounding circumstances to show that the actions of Mr. Thomas IV were "reckless," that they were "intentional and deliberate" acts, taken with "knowledge of [their] wrongfulness." Such an approach is authorized by N.J.S.A. 47:1A-11a, which subjects to penalties a public official, officer, employee or custodian who knowingly and willfully violates the Act and is found to have unreasonably denied access **under the totality of the circumstances**.

In the present matter, the evidence that the complainant has proffered respecting the alleged "knowing and willful" nature of Mr. Thomas' violation of the statute is circumstantial evidence. In discussing circumstantial evidence in the setting of a civil case, it was stated in Jochim v. Montrose Chem. Co., 3 N.J. 5, 8 (1949):

[T]he settled rule [is] that the burden may be sustained by circumstantial evidence, and that direct evidence is not necessary. In civil cases it is sufficient if the circumstantial evidence be such as to afford a fair and reasonable presumption of the facts inferred. Circumstantial or presumptive evidence, as the basis for deductive reasoning in the determination of civil causes, is a mere preponderance of probabilities. The only requirement is that the claimed conclusion from the offered fact must be a probable or more probable hypothesis, with reference to the possibility of other hypotheses. This is merely a rational inference, i.e., based upon the common experience of mankind. In the final analysis "probability, and not the ultimate degree of certainty is the test." [Citations omitted.]

The undisputed circumstantial evidence found in the record of this matter supporting a finding of a knowing and willful violation against Mr. Thomas IV may be summarized as follows.

1. Mr. Thomas IV is the son of Judge Thomas III, who was the subject of the conflict of interest claimed by the complainant's husband.
2. Mr. Thomas IV admitted that there was nothing evasive or confusing in what the complainant was requesting in her OPRA request form (P-1) and, within a day or so, he had all of the requested information.

3. Mr. Thomas claimed that the complainant said to him that she would call him back to view what he had found, but there is no notation of this on the OPRA request form (P-1).
4. Judge Thomas III, the Merchantville municipal court judge, admitted that he would serve as a substitute judge for Collingswood when its judge was not available or had a conflict. He received checks in payment for his services signed by James Maley who was the Mayor of Collingswood, but when the case involving Mr. Maley and Mr. Gallenthin was transferred to him in June 2004, he gave no consideration to the fact he had been receiving compensation from Collingswood.
5. Timothy J. Higgins, the Merchantville solicitor, and Mr. Maley are former law partners, and they are cordial and friendly.
6. Mr. Higgins learned about the transfer of Mr. Maley's case against Mr. Gallenthin to the Merchantville municipal court from Mr. Thomas.
7. Mr. Maley, who is the Mayor of Collingswood, acknowledged that there were nine checks issued by Collingswood and signed by him as Mayor or Commissioner payable to Judge Thomas III for services as a substitute judge for Collingswood.
8. Mr. Maley is also a former law partner of Mr. Higgins, the Merchantville Solicitor, and his subsequent law firm, Parker McCay Criscuolo, represented Merchantville as its redevelopment counsel.

Taken as a whole, the foregoing circumstances clearly give rise to suspicions as to the motive of Mr. Thomas IV in failing to comply with the complainant's OPRA request. However, before a fact-finder may infer from the foregoing that it is more probable that the acts of Mr. Thomas IV were intentional and deliberate, I must consider any contrary evidence.

The following items of testimony and evidence are responsive to the foregoing circumstantial evidence:

1. Mr. Thomas IV denied any discussion with Mr. Higgins, the Merchantville solicitor, about the complainant or her husband.

2. Mr. Thomas IV said that the complainant had agreed to call him back to find out whether he found the documents and to arrange a time when she could come in and look at them.
3. Mr. Thomas IV denied knowing who Mr. Maley was, denied being aware of the case involving the complainant's husband in the Merchantville Municipal Court until long afterwards, and denied that his failure to respond to the complainant's OPRA request had anything to do with any pending case.
4. Mr. Thomas IV testified that the complainant said nothing to him about the municipal court case when she came in.
5. Despite the failure of Mr. Thomas IV to contact the complainant, she never contacted him to follow up on her request. (However, the complainant explained that she was reluctant to do so because she was concerned that she would be charged with harassment if she called.)
6. Judge Thomas III denied ever meeting Mr. Maley prior to June 2004.
7. Despite the fact that Mr. Thomas IV is his son, Judge Thomas III denied ever discussing the Maley-Gallenthin municipal court case with his son prior to the present matter.
8. Mr. Higgins testified that he did not discuss complainant's OPRA request with Judge Thomas III, and he had no recollection of any discussion of it with Mr. Maley.
9. Mr. Maley acknowledged that he signed the nine checks issued by Collingswood as Mayor or Commissioner payable to Judge Thomas III for services as a substitute judge for Collingswood, but explained that these were probably among 300 checks at a time that he signed after a cursory review.
10. Mr. Maley testified that when the Maley-Gallenthin case was transferred from Collingswood to Merchantville he mentioned to the court clerk that he had done work for Merchantville, and the court clerk said that was no problem.

The only one of the foregoing items of responsive testimony in dispute is item #2, the testimony of Mr. Thomas IV that the complainant had agreed to call him back to find out whether he found the documents and to arrange a time when she could come in and look at them. While it was clear from the tone of the cross-examination of these witnesses by complainant's attorney that the complainant disputed much of their

testimony, the fact remains that there is no testimony or evidence of record disputing item # 1 and items #3 through #10 of this responsive testimony.

Based upon the foregoing discussion, I **FIND** that under all of the circumstances, there is insufficient evidence in the record from which I may infer that it is more probable than not that the acts of Mr. Thomas IV were intentional and deliberate, that the actions of Mr. Thomas IV were "reckless," and that they were "intentional and deliberate" acts, taken with "knowledge of [their] wrongfulness."

It may be argued that the complete failure of the custodian to respond to the June 10, 2004, request for the information until July 27, 2004, after the complainant filed a complaint with the GRC, establishes the element of "willfulness." However, since under the case law even a negligent failure to respond would not amount to willfulness, to find that the custodian was acting in a reckless, intentional, deliberate, and knowledgeable fashion to purposely deny the complainant's rights under OPRA, when he did not respond to the request for 47 days would also require some element(s) of evidential proof beyond what can be found in the record. Therefore, I **FIND** that on the record before me, the element of proof that would take this delay to the level of "knowing and willful" action is not present.

In the face of an asserted "good faith" reason presented by the alleged violator for a failure to provide requested records or to respond in a timely manner, the burden of establishing the grounds for determining "willful" violations rests with the complainant. Complainants face a difficult task to prove that violations were "knowing and willful". For the reasons stated, I **FIND** that here the complainant herein has failed to produce evidence from which I could conclude that the failure of the custodian to respond timely to the request for records was a "knowing and willful" violation of the statute warranting the imposition of civil monetary penalties.

DECISION AND ORDER

For the reasons stated above, and to the extent the complaint seeks the imposition of statutory penalties, I hereby **ORDER** that it is **DISMISSED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 5, 2007
DATE


JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

DATE

GOVERNMENT RECORDS COUNCIL

Mailed to Parties:

DATE
mph/mh

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES:

For Complainant:

Oren R. Thomas, IV
Oren R. Thomas, III
Timothy Higgins
Cynthia Colella-Gallenthin
Maurice James Maley, Jr.
Patrick Brennan

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

- P-1 Borough of Merchantville Government Records Request, dated June 10, 2004
- P-2 Borough of Collingswood Detail Vendor Activity Report for Oren Thomas, III
- P-3 Photocopy of Borough of Collingswood \$350 Check Payment to Oren Thomas, III, dated September 7, 2004
- P-4 Certification of Mr. James Maley, Jr., dated June 23, 2004
- P-5 Letter of John T. Kelly, Esq., dated June 24, 2004
- P-6 Borough of Merchantville envelope addressed to Cynthia L. Gallenthin
- P-7 Photocopies of nine Borough of Collingswood checks, payments to Oren Thomas, III
- P-8 Timothy J. Higgins, Esq., bill for professional services to Borough of Merchantville

For respondent:

- R-1 E-mail from Cynthia Colella-Gallenthin to Anthony Carabelli, dated July 29, 2004
- R-2 Letter from Cynthia Colella-Gallenthin to Gloria Luzzatto, dated November 8, 2004



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

VINCENT P. MALTESE, Chair
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Interim Decision on Access
July 14, 2005 Government Records Council Meeting

Cynthia Colella-Gallenthin
Complainant

Complaint No. 2004-95

v.

Borough of Merchantville
Custodian of Record

At the July 14, 2005 public meeting, the Government Records Council (“Council”) considered the July 8, 2005 Executive Director’s Supplemental Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council hereby finds that the case shall be referred to the Office of Administrative Law to determine whether the failure to provide immediate access to the requested contract documents pursuant to N.J.S.A. 47:1A-5(e) constitutes a knowing and willful violation of the OPRA under the totality of the circumstances.

Interim Decision Rendered by the
Government Records Council
On The 14th Day of July, 2005

Vincent P. Maltese, Chairman
Government Records Council

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



DeAnna Minus-Vincent, Secretary
Government Records Council

Decision Distribution Date: July 20, 2005

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 14, 2005 Council Meeting**

**Cynthia Colella-Galenthin
Complainant**

GRC Complaint No. 2004-95

v.

**Borough of Merchantville
Custodian of Records**

Records Requested: Solicitor fee agreements since 1998, inclusive and public notices of contracts for Tim Higgins (of Higgins Maley), Jim Maddan, Maurice James Maley, Jr. Bond Counsel and Parker McCay Criscuolo.

Request Made: June 10, 2004

Response Made: July 27, 2004

Custodian: Oren R. Thomas, IV

GRC Complaint Filed: July 13, 2004

Background

The Government Records Council (Council) issued an interim decision this case at the October 14, 2004 public meeting. The Council voted unanimously to hold a hearing to determine whether the failure to provide immediate access to the requested contract documents pursuant to N.J.S.A. 47:1A-5(e) constitutes a knowing and willful violation of the Open Public Records Act (OPRA) under the totality of the circumstances. A hearing was scheduled for November 9, 2004 and December 9, 2004; however, both hearings were postponed due to issues presented by the parties.

Analysis

No analysis is required at this time.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council refer the case to the Office of Administrative Law to determine whether the failure to provide immediate access to the requested contract documents pursuant to N.J.S.A. 47:1A-5(e) constitutes a knowing and willful violation of the OPRA under the totality of the circumstances.

Prepared By:

Approved By:

Paul F. Dice
Executive Director
Government Records Council

July 8, 2005

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 14, 2004 Council Meeting**

**Cynthia L. Colella-Gallenthin,
Complainant**

GRC Complaint No. 2004-95

v.

**Borough of Merchantville,
Custodian of Records**

Relevant Records Requested: Solicitor fee agreements since 1998, inclusive and public notices of contracts for Tim Higgins (of Higgins Maley), Jim Maddan, Maurice James Maley, Jr. bond counsel and Parker McCay Criscuolo

Request Made: June 10, 2004

Response Made: July 27, 2004

Custodian: Oren R. Thomas, IV

GRC Complaint Filed: July 13, 2004

Background

Complainant's Case Position

The Complainant filed a Denial of Access Complaint with the Government Records Council on July 13, 2004 pursuant to N.J.S.A. 47:1A-1 et seq. alleging that:

1. She received no response to her written request made in person on June 10, 2004. "The Borough clerk advised that he would charge a research fee and upon collection of documents would call to schedule a time for viewing of the documents." She asserts that the Borough did not contact her with the cost for the research or schedule a date to view the documents.
2. She was denied access to view the contracts between the Borough of Merchantville and Bond Counsel, the Borough's Solicitor and the Redevelopment Counsel since 1998.

Public Agency's Case Position

In response to the Complainant's allegations, the Custodian asserts the following in the Statement of Information supplemental certification:

1. The Custodian states that the subject request was hand delivered to the Custodian on June 10, 2004 and asserts that he verbally informed the Complainant the Borough "only keeps records readily available for the present year and the prior year" and prior years records were in storage, requiring an "extensive" search. He asserts further that he informed the Complainant there would be a charge for the time spent responding to the request and "understood" that the Complainant would get back to him about whether she wanted to incur the cost for the records search. The Custodian contends that he took no further action on the records request since he received no response from the Complainant. The Custodian states "the only reason that documents were not supplied

- to the Complainant prior to those dates, was my apparent misunderstanding that I was supposed to wait to hear from the Complainant before incurring search charges that she may not want to pay.”
2. After receiving a copy of the July 22, 2004 Denial of Access Complaint, the Custodian states he began compiling the requested records, including the search for the documents in storage. Copies of the requested records were mailed and faxed to the Complainant on July 27, 2004. In the July 27, 2004 letter to the Complainant, the Custodian identifies the following documents provided:
 - a. Timothy Higgins Fee Agreements: 1999, 2001-2004
 - b. Timothy Higgins notices of public contract: 1998-2004
 - c. Parker, McKay & Criscuolo Fee Agreement: 2001
 - d. Parker, McKay & Criscuolo notices of publication: 1999-2001A cost of \$18.75 was requested for copies of the 34 pages and \$1.75 postage.
 3. The Custodian states that the Complainant came to the Borough office several days after receiving copies of the documents by mail to view the documents and was informed that all available records responsive to the request had been provided.

Analysis

The issue in this complaint concerns the claim that there was a lack of response by the Custodian to the Complainant’s records request to view the documents pertaining to the professional contracts between the Borough of Merchantville and Bond Counsel, Borough’s Solicitor, and Redevelopment Counsel since 1998. In addressing the issues in this complaint, the relevant provisions of the Open Public Records Act (“OPRA”) states in part:

1. **“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts ...” N.J.S.A. 47:1A-5(e)**

The Complainant was not provided immediate access to the contract documents sought. While the Custodian states that some of the contracts were in storage, he acknowledges that the present year and prior year contracts were “readily” available, but did not provide them to the Complainant at the time the OPRA request was filed. Instead, he claims to have explained that there would be a charge for conducting the search for those contracts and other requested documents in storage, but offered no estimate of the cost or when the records would be available. The Custodian asserts that he thought the Complainant would get back to him about whether she wanted to incur the cost. The Complainant contends that she was expecting a response, but received none.

More than a month later and after the Complainant files his Denial of Access Complaint, the Custodian sends copies of the documents responsive to the request to the Complainant and requests payment for only copying the documents and postage; there is no mention of any other charges for the document search which the Custodian contends was the basis for his initial response to the Complainant.

The Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested contracts for the present year and prior year contracts which he admittedly stated were “readily” available.

2. “A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record.

If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the request.”
N.J.S.A. 47:1A-5(g)

While the statements from the parties indicate there was an initial response from the Custodian to the Complainant concerning the records request, there is no evidence in the record to indicate the Custodian provided a written response to the Complainant concerning her June 10, 2004. In fact, there is no evidence to indicate the Custodian had any follow up communication with the Complainant until after the Denial of Access Complaint was filed by the Complainant, more than one month later. It is clear under the Open Public Records Act that the Custodian has the sole responsibility to inform the Complainant in writing when he unable to promptly comply with a request for access. This was not done in the case and the parties do not have the same understanding of what transpired in the communication they did have when the OPRA request was filed. Additionally, when the Custodian ultimately responded to the request on July 27, 2004, he only sought charges for copying. There was no indication of additional charges for conducting the search for documents in storage and the alleged basis for not responding to the OPRA request sooner.

The Custodian failed to respond to the Complainant’s OPRA request in a timely manner pursuant to OPRA. Although the Custodian ultimately responded to the request, the question exists whether there is a knowing and willful violation pursuant to the OPRA under the totality of the circumstances. Therefore, the Council should refer the case to the Office of Administrative Law for a determination of whether a knowing and willful violation exists under the totality of the circumstances pursuant to OPRA.

Documents Reviewed

The following documents were reviewed in preparing the Findings and Recommendations for this case:

1. July 13, 2004 – Denial Of Access Complaint Filed
2. July 22, 2004 – Borough Administrator inquiry to Government Records Council Staff regarding complaint
3. July 21, 2004 – Offer of Mediation to the Complainant and Custodian
4. July 27, 2004 – Custodian’s Signed Agreement to Mediate
5. July 28, 2004 - Custodian sends letter and documents to Complainant
6. July 29, 2004 – E-mail from Complainant to GRC Staff advising she was dissatisfied with Custodian’s response to her OPRA request

7. August 11, 2004 - Custodian's Statement of Information with copy of OPRA request
8. August 25, 2004 – Letter to Custodian from Government Records Council Staff (“GRC”) requesting clarifying information in a certification
9. August 27, 2004 – Custodian's certification in response to GRC

Conclusions and Recommendations of the Executive Director

The Executive Director respectfully recommends the Council find that the Custodian failed to respond to the Complainant's OPRA request in a timely manner pursuant to OPRA. Therefore, the Council should refer the case to the Office of Administrative Law for a determination of whether a knowing and willful violation exists under the totality of the circumstances pursuant to OPRA.

Prepared By:

Approved By:

Paul F. Dice
Executive Director
Government Records Council

October 5, 2004