



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

VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
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FINAL DECISION

May 30, 2007 Government Records Council Meeting

William Langford
Complainant

Complaint No. 2005-181

v.

City of Perth Amboy
Custodian of Record

At the May 30, 2007 public meeting, the Government Records Council (“Council”) considered the May 23, 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 The Council, therefore, finds that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in a letter to the GRC dated April 13, 2007.

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 May, 2007

Vincent P. Maltese, Chairman
Government Records Council



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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 4, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting**

**William Langford¹
Complainant**

GRC Complaint No. 2005-181

v.

**City of Perth Amboy²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of New Age Builder Inc. contractor agreement signed by all parties
2. Copy of contractor's insurance policy
3. Copy of rules in order to obtain a loan
4. List of other contractors who were denied the job
5. Copy of signed agreement of monthly payments
6. Copy of all contractors who bid on the job³

Request Made: May 12, 2005, August 26, 2005 and September 21, 2005

Response Made: September 13, 2005⁴

Custodian: Elaine Jasko

GRC Complaint Filed: September 21, 2005

Background

March 28, 2007

Government Records Council's ("Council") Interim Order. At its March 28, 2007 public meeting, the Council considered the March 21, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not providing a written response to the Complainant's May 12, 2005 OPRA request which either granted or denied access within the statutorily mandated seven (7) business days, therefore resulting in a "deemed" denial.
2. Based on the GRC's decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Custodian should have provided the Complainant with the requested rules instead of informing the

¹ No legal representation listed on file.

² Represented by Frank G. Capece, Esq. (Westfield, NJ).

³ This request was made only on the August 26, 2005 records request.

⁴ Response was verbal. No written response was given to the requestor.

- Complainant where the requested rules are located (the Director of Human Services office). As such, the Custodian violated N.J.S.A. 47:1A-1.
3. The Custodian unlawfully denied access to the requested records since the Custodian failed to provide a written response to the Complainant's August 26, 2005 OPRA request within the statutorily mandated seven (7) business days violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and resulting in a "deemed" denial.
 4. Although the Complainant may have previously been provided with the requested documents, OPRA does not limit the amount of times a requestor may seek the same documents pursuant to Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq.⁵
 5. As the Custodian failed to provide a written response to the Complainant's September 21, 2005 OPRA request, either granting or denying access, she violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. which results in a "deemed" denial.
 6. As the Custodian failed to provide a written response to the Complainant's May 12, 2005 and September 21, 2005 OPRA requests creating a "deemed" denial, the Custodian should release the requested records to the Complainant, with appropriate redactions, if any, and provide a legal explanation for each redacted part thereof.
 7. **The Custodian shall comply with # 6 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
 8. While the Custodian believes that she has fully complied with the Complainant's request by releasing the requested records which exist, or informing of the requested records' location, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which she is statutorily mandated to adhere. Therefore, the Custodian's actions appear negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

March 30, 2007

Council's Interim Order distributed to the parties.

April 13, 2007⁶

Complainant's written withdrawal of this complaint.

Analysis

The Complainant voluntarily withdrew his complaint in a letter to the GRC dated April 13, 2007, therefore no analysis is needed.

⁵ Actual citation is Caggiano v. Borough of Stanhope, GRC Case Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, and 2005-252.

⁶ Additional records were submitted by the parties; however, as the Complainant has withdrawn his complaint, said submissions are no longer relevant to this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in a letter to the GRC dated April 13, 2007.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2007



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ACTING COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

March 28, 2007 Government Records Council Meeting

William Langford
Complainant

Complaint No. 2005-181

v.

City of Perth Amboy
Custodian of Record

At the March 28, 2007 public meeting, the Government Records Council (“Council”) considered the March 21, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not providing a written response to the Complainant’s May 12, 2005 OPRA request which either granted or denied access within the statutorily mandated seven (7) business days, therefore resulting in a “deemed” denial.
2. Based on the GRC’s decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Custodian should have provided the Complainant with the requested rules instead of informing the Complainant where the requested rules are located (the Director of Human Services office). As such, the Custodian violated N.J.S.A. 47:1A-1.
3. The Custodian unlawfully denied access to the requested records since the Custodian failed to provide a written response to the Complainant’s August 26, 2005 OPRA request within the statutorily mandated seven (7) business days violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and resulting in a “deemed” denial.
4. Although the Complainant may have previously been provided with the requested documents, OPRA does not limit the amount of times a requestor may seek the same documents pursuant to Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq.¹

¹ Actual citation is Caggiano v. Borough of Stanhope, GRC Case Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, 2005-252.



5. As the Custodian failed to provide a written response to the Complainant's September 21, 2005 OPRA request, either granting or denying access, she violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. which results in a "deemed" denial.
6. As the Custodian failed to provide a written response to the Complainant's May 12, 2005 and September 21, 2005 OPRA requests creating a "deemed" denial, the Custodian should release the requested records to the Complainant, with appropriate redactions, if any, and provide a legal explanation for each redacted part thereof.
7. **The Custodian shall comply with # 6 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
8. While the Custodian believes that she has fully complied with the Complainant's request by releasing the requested records which exist, or informing of the requested records' location, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which she is statutorily mandated to adhere. Therefore, the Custodian's actions appear negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

Interim Order 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: March 30, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**William Langford¹
Complainant**

GRC Complaint No. 2005-181

v.

**City of Perth Amboy²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of New Age Builder Inc. contractor agreement signed by all parties.
2. Copy of contractor's insurance policy.
3. Copy of rules in order to obtain a loan.
4. List of other contractors who were denied the job.
5. Copy of signed agreement of monthly payments.
6. Copy of all contractors who bid on the job.³

Request Made: May 12, 2005, August 26, 2005 and September 21, 2005

Response Made: September 13, 2005⁴

Custodian: Elaine Jasko

GRC Complaint Filed: September 21, 2005

Background

May 12, 2005

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the following records:

1. Copy of New Age Builder Inc. contractor agreement signed by all parties.
2. Copy of contractor's insurance policy.
3. Copy of rules in order to obtain a loan.
4. List of other contractors who were denied the job.
5. Copy of signed agreement of monthly payments.

August 26, 2005

Complainant's second OPRA request. The Complainant requests the following records:

1. Copy of New Age Builder Inc. contractor agreement signed by all parties.

¹ No legal representation listed on record.

² Represented by Frank G. Capece, Esq. of Garrubbo, Capece, D'Arcangelo, Millman & Smith, P.C. (Westfield, NJ).

³ This request was made only on the August 26, 2005 records request.

⁴ Response was verbal. No written response was given to the requestor.

2. Copy of contractor's insurance policy.
3. Copy of rules in order to obtain a loan.
4. List of other contractors who were denied the job.
5. Copy of signed agreement of monthly payments.
6. Copy of all contractors who bid on the job.

September 13, 2005

Custodian's verbal response to the Complainant's OPRA request, eleven (11) business days following the Complainant's August 26, 2005 request. The Complainant asserts that he only received a verbal response via the telephone. The Complainant alleges that he was told he could obtain the records the following day. However, on September 14, 2005, the Complainant claims he was told to contact the City attorney's office.

September 21, 2005

Complainant's third OPRA request. The Complainant requests the following records:

1. Copy of New Age Builder Inc. contractor agreement signed by all parties.
2. Copy of contractor's insurance policy.
3. Copy of rules in order to obtain a loan.
4. List of other contractors who were denied the job.
5. Copy of signed agreement of monthly payments.

September 21, 2005

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated May 12, 2005
- Complainant's OPRA request dated August 26, 2005
- Complainant's OPRA request dated September 21, 2005

The Complainant alleges that he did not receive any of the requested records. The Complainant further alleges that the only information he received regarding his requests was via a telephone conversation on September 13, 2005 in which he was told that he would be able to obtain the requested records on September 14, 2005. The Complainant claims that he was contacted on September 14, 2005 and was told to contact the City attorney's office. The Complainant asserts that the Custodian's Counsel advised him that he could not obtain the requested records.

September 29, 2005

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

September 30, 2005

E-mail to GRC from Custodian's Counsel stating that the City of Perth Amboy is involved in litigation with the Complainant and has provided the requested documents pursuant to the requests subject of this complaint.

October 3, 2005

Request for Statement of Information sent to Custodian's Counsel.

October 5, 2005

E-mail correspondence from GRC to Custodian's Counsel. GRC requests clarification regarding Counsel's October 3, 2005 e-mail indicating that the City of Perth Amboy is involved in litigation with the Complainant. GRC staff requests the docket number, as well as a brief explanation of the litigation.

October 5, 2005

Faxed copy of a letter from Custodian's Counsel to GRC dated September 30, 2005.⁵ Counsel provides the docket number of DC-9700-05 for the specific case before the NJ Superior Court involving the Complainant and the City of Perth Amboy. Counsel asserts that the City of Perth Amboy has already complied with the Complainant's OPRA requests. Counsel alleges the Complainant's assertion that he never received any of the requested records is without merit.

Counsel addresses the items listed as numbers one (1) through six (6) in the Complainant's Denial of Access Complaint. Counsel provided the following explanation as it correlates to the complaint:

Complainant's requested records	Custodian's Certified response regarding the requested record
1. Copy of New Age Builder Inc. contractor agreement signed by all parties.	Provided via fax on September 13, 2005.
2. Copy of contractor's insurance policy.	Provided via fax on September 15, 2005.
3. Copy of rules in order to obtain a loan.	The rules governing the granting of these loans are Code of Federal Regulations, Rules and Regulations which govern federal housing programs. Copies are available for review at the Director of Human Service's office.
4. List of other contractors who were denied the job.	No other contractors chose to bid on this project, therefore there are no documents which list contractors who were "denied" the job.
5. Copy of signed agreement of monthly payments.	Provided via fax on September 13, 2005.

⁵ This letter advised the GRC that the entire file was enclosed upon receipt of the mailed submission.
William Langford v. City of Perth Amboy, 2005-181 – Findings and Recommendations of the Executive Director

6. Copy of all contractor's that bid on the job.	No other contractor bid on this job, therefore no list exists.
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Counsel further states that he has enclosed the entire file that was sent to the Complainant.⁶ Counsel contends that the Complainant has filed suit to have additional work done on his home and is using this GRC complaint as leverage to have the additional work done. Counsel again asserts that the City has not denied the Complainant access to any documents. Counsel contends that this complaint should be dismissed.

The attachments to this submission are as follows:

- Memo from the City Clerk to the Director of Human Services, dated April 22, 2004, regarding a Home Improvement Loan application from the Complainant. Attached to said memo are the following documents:
 - City of Perth Amboy Office of Housing Contractual Agreement dated March 17, 2005
 - Copy of Building Subcode Technical Section dated April 6, 2005
 - Untitled document including handwritten notes about a home and a sketch dated April 30, 2005
 - Letter from the Complainant to the Director of Human Services dated August 14, 2004
- Copy of Complainant's mortgage dated April 27, 2005
- Copy of a bill for home repairs dated May 4, 2005
- Copy of invoice for home repairs dated May 4, 2005
- Copy of a check from Perth Amboy Housing Development payable to Magic Construction LLC dated May 5, 2005
- Letter from the Complainant to the Director of Human Services dated May 5, 2005
- Copy of a FedEx Airbill from the Director of Human Services to Provident Bank dated May 6, 2005
- Letter from the Director of Human Services to Provident Bank dated May 6, 2005
- Copy of a proposal for home repairs dated May 9, 2005
- Letter from the Director of Human Services to the Complainant dated May 10, 2005
- Copy of envelope addressed as a hand delivery from the City to the Complainant. (Handwritten note on the cover of envelope stating that the Complainant refused to accept the envelope from the driver on May 10, 2005)
- Copy of a certified mail receipt dated May 11, 2005. (Certified mail was sent from the Director of Human Services to the Complainant)
- Letter from the Complainant to the Custodian regarding mortgage information dated May 12, 2005
- Complainant's OPRA request dated May 12, 2005
- Letter from the Director of Human Services to the Complainant dated June 2, 2005
- Handwritten note titled, "Meeting with Mr. Langford" dated June 14, 2005

⁶ The attachments were received by the GRC via mail on October 11, 2005.

- Letter signed by the Director of Human Services addressed to the Complainant dated July 1, 2005
- Note regarding the work and procedures that were done at the Complainant's residence dated July 13, 2005
- Memo from the Director of Human Services to Custodian's Counsel dated July 26, 2005
- Fax cover sheet from Custodian's Counsel to Department of Code Enforcement dated July 27, 2005
- Complainant's OPRA request dated August 26, 2005
- Letter from Custodian's Counsel to the Complainant dated September 15, 2005
- Unlabeled copies of house photographs

October 6, 2005

- Custodian's Statement of Information ("SOI") with the following attachments:
- Memo from the City Clerk to the Director of Human Services, dated April 22, 2004, regarding a Home Improvement Loan application from the Complainant. Attached to said memo are the following documents:
 - City of Perth Amboy Office of Housing Contractual Agreement dated March 17, 2005
 - Copy of Building Subcode Technical Section dated April 6, 2005
 - Untitled document including handwritten notes about a home and a sketch dated April 30, 2005
 - Letter from the Complainant to the Director of Human Services dated August 14, 2004
 - Copy of Complainant's mortgage dated April 27, 2005
 - Copy of a bill for home repairs dated May 4, 2005
 - Copy of invoice for home repairs dated May 4, 2005
 - Copy of a check from Perth Amboy Housing Development payable to Magic Construction LLC dated May 5, 2005
 - Letter from the Complainant to the Director of Human Services dated May 5, 2005
 - Copy of a FedEx Airbill from the Director of Human Services to Provident Bank dated May 6, 2005
 - Letter from the Director of Human Services to Provident Bank dated May 6, 2005
 - Copy of a proposal for home repairs dated May 9, 2005
 - Letter from the Director of Human Services to the Complainant dated May 10, 2005
 - Copy of envelope addressed as a hand delivery from the City to the Complainant. (Handwritten note on the cover of envelope stating that the Complainant refused to accept the envelope from the driver on May 10, 2005)
 - Copy of a certified mail receipt dated May 11, 2005. (Certified mail was sent from the Director of Human Services to the Complainant)
 - Letter from the Complainant to the Custodian regarding mortgage information dated May 12, 2005
 - Complainant's OPRA request dated May 12, 2005
 - Letter from the Director of Human Services to the Complainant dated June 2, 2005

- Handwritten note titled, “Meeting with Mr. Langford” dated June 14, 2005
- Letter signed by the Director of Human Services addressed to the Complainant dated July 1, 2005
- Note regarding the work and procedures that were done at the Complainant’s residence dated July 13, 2005
- Memo from the Director of Human Services to Custodian’s Counsel dated July 26, 2005
- Fax cover sheet from Custodian’s Counsel to Department of Code Enforcement dated July 27, 2005
- Complainant’s OPRA request dated August 26, 2005
- Letter from Custodian’s Counsel to the Complainant dated September 15, 2005
- Letter from the Director of Human Services to Custodian’s Counsel regarding home repairs of the Complainant, dated October 6, 2005
 - Letter from T/A Services to the Director of Human Services dated June 20, 2003 regarding CDBG grants.
 - Page Labeled Cost Estimates dated February 27, 2003 (with attachment of a City of Perth Amboy Purchase Requisition, Invoice from T/A Services dated October 7, 2003)
 - Office of Economic and Community Development Departmental Agreement dated July 1, 2005
 - Undated City of Perth Amboy CDBG Grants and Loan Program Request for Bid and Bid Announcement.
- Unlabeled copies of house photographs

Counsel provides the same response as indicated in his October 5, 2005 submission to the GRC regarding the requested records being provided. Counsel asserts that this complaint should be dismissed since the City has fully complied with the Complainant’s request. Counsel further alleges that a copy of every document concerning this matter has been provided to the Complainant.

October 19, 2005

Certification page from the SOI signed by the Custodian’s Counsel and submitted to the GRC. (The SOI certification page must be signed by the Custodian not the Custodian’s Counsel).

November 7, 2005

Custodian submitted to GRC a copy of an October 24, 2005 Civil Action Order of Dismissal from the Superior Court of New Jersey Law Division – Special Civil Part, Middlesex County Docket No.: DC-9700-05.

April 27, 2006

Letter from GRC to the Complainant regarding his verbal assertion that he would like to withdraw his Denial of Access Complaint from the adjudication process. GRC attached a form and requests that the Complainant sign and return said form. (The Complainant did not return the complaint withdrawal form or respond to this correspondence.)

May 17, 2006

GRC sends the Complainant a copy of the GRC file William Langford v. City of Perth Amboy, GRC Complaint No. 2005-181.

October 24, 2006

Letter from GRC to Custodian's Counsel. GRC states that in a prior submission dated September 30, 2005, Counsel indicated that all the requested records had been provided to the Complainant. GRC requests that Counsel submit a legal certification to this effect in accordance with the NJ Court Rules.

November 6, 2006

Letter from GRC to Custodian's Counsel. GRC requests that the Custodian sign the signature page of the Statement of Information since same was erroneously signed by the Custodian's Counsel and submitted to the GRC on October 19, 2005.

November 8, 2006

Certification page of the Custodian's SOI signed by the Custodian.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA states that:

“...[i]f 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 requestor*. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA also provides that:

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

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

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

The Complainant states that he submitted his OPRA requests on May 12, 2005, August 26, 2005 and September 21, 2005. The Complainant asserts that on September 13, 2005, he was verbally informed that he would be able to receive the requested records on the following day, September 14, 2005. The Complainant contends that upon speaking with the Custodian’s attorney, he was advised that he could not obtain the requested records.

The Custodian’s Counsel provides the following explanation with regard to the itemized list of requested records in the Denial of Access Complaint:

Complainant’s requested records.	Custodian’s Certified response regarding the requested record.
1. Copy of New Age Builder Inc. contractor agreement signed by all parties.	Provided via fax on September 13, 2005.
2. Copy of contractor’s insurance policy.	Provided via fax on September 15, 2005.
3. Copy of rules in order to obtain a loan.	The rules governing the granting of these loans are Code of Federal Regulations, Rules and Regulations which govern federal housing programs. Copies are available for review at the Director of Human Service’s office.
4. List of other contractors who were denied the job.	No other contractors chose to bid on this project, therefore there are no documents which list contractors who were “denied” the job.

5. Copy of signed agreement of monthly payments.	Provided via fax on September 13, 2005.
6. Copy of all contractor's that bid on the job.	No other contractor bid on this job, therefore no list exists.

Counsel asserts that this complaint should be dismissed since the City has fully complied with the Complainant's OPRA request. Counsel further alleges that a copy of every document concerning this matter has been given to the Complainant.

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

Complainant's May 12, 2005 OPRA Request

Pursuant to N.J.S.A. 47:1A-5.i., a custodian must either grant or deny access within seven (7) business days of receiving a request for records. The Complainant asserts submitting his OPRA request on May 12, 2005 and states that he did not receive any response from the Custodian. OPRA's provisions also provide that if a custodian fails to respond to a request within the statutorily mandated seven (7) business days, the result is a "deemed" denial of the request.

As such, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not providing a written response to the Complainant's May 12, 2005 OPRA request which either granted or denied access within the statutorily mandated seven (7) business days, therefore resulting in a "deemed" denial.

Complainant's August 26, 2005 OPRA Request

The Complainant acknowledges receiving a verbal response on September 13, 2005, eleven (11) business days following the date of his request, in which the Complainant was advised that he would be able to obtain the requested records on the following day, September 14, 2005. The Custodian's Counsel asserts that the requested New Age Builder contract and the signed agreement of monthly payments were released to the Complainant on September 13, 2005, eleven (11) business days following the date of the Complainant's request. Counsel also asserts that the requested contractor's insurance policy was faxed to the Complainant on September 15, 2006, thirteen (13) business days following the date of this request, and includes a copy of the successful fax transmittal page. Regarding the Complainant's request for a copy of the rules for obtaining a loan, Counsel states that these are available for review in the Human Resources Department. Additionally, Counsel asserts that no documents exist regarding the Complainant's request for a list of other contractors who were denied the job as well as a copy of all contractors who bid on the job.

While Counsel did release three (3) out of the six (6) requested documents to the Complainant, he did not do so within the statutorily mandated seven (7) business days required to respond to requests as prescribed under N.J.S.A. 47:1A-5.i. Additionally, the Custodian never provided a written response to the Complainant regarding the remaining three (3) requested documents, either indicating that they did not exist or that they were available for review, pursuant to N.J.S.A. 47:1A-5.g.

In John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Complainant requested a breakdown of actual copying costs for paper copies for government records. In response to the Complainant’s request, the Custodian informed the Complainant that the Board’s copy fees were set forth on the agency’s OPRA request form. In said complaint, the GRC held that “[p]ursuant to the fact that the Complainant made an official OPRA request on October 20, 2005 asking for ‘a breakdown of actual copying costs for paper copies of government records as per N.J.S.A. 47:1A-5.b.’ the Custodian should have given the Complainant a copy of the Board of Education’s OPRA request form instead of just informing him where he could find that information. Based on the above, the Custodian is in violation of N.J.S.A. 47:1A-1.”

While the requested records are different in this instant complaint, the issue is similar to that in Windish. The Complainant requested a copy of the rules in order to obtain a loan. In response, the Custodian indicated that copies are available for review at the Director of Human Service’s office. Therefore, based on the GRC’s decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Custodian should have provided the Complainant with the requested rules instead of informing the Complainant where the requested rules are located. As such, the Custodian violated N.J.S.A. 47:1A-1.

Further, the Custodian unlawfully denied access to the requested records since the Custodian failed to provide a written response to the Complainant’s August 26, 2005 OPRA request within the statutorily mandated seven (7) business days violating N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, and resulting in a “deemed” denial.

Complainant’s September 21, 2005 OPRA Request

The Custodian’s Counsel asserts the following regarding the Complainant’s request for records:

Complainant’s requested records.	Custodian’s Certified response regarding the requested record.
1. Copy of New Age Builder Inc. contractor agreement signed by all parties.	Provided via fax on September 13, 2005.
2. Copy of contractor’s insurance policy.	Provided via fax on September 15, 2005.
3. Copy of rules in order	The rules governing the granting

to obtain a loan.	of these loans are Code of Federal Regulations, Rules and Regulations which govern federal housing programs. Copies are available for review at the Director of Human Service's office.
4. List of other contractors who were denied the job.	No other contractors chose to bid on this project, therefore there are no documents which list contractors who "denied" the job.
5. Copy of signed agreement of monthly payments.	Provided via fax on September 13, 2005.

In a similar case, Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq.,⁷ the Council held that "OPRA does not limit the number of times a requestor may ask for the same record even when the record was previously provided. N.J.S.A. 47:1A-5.g. requires that the Custodian must comply with a request or provide a lawful basis for denying access pursuant to N.J.S.A. 47:1A-6..." The same applies in the complaint at issue here. Although the Complainant may have previously been provided with the requested documents, OPRA does not limit the amount of times a requestor may seek the same documents. The Custodian must properly respond to each request in accordance with the provisions of OPRA.

Therefore, as the Custodian failed to provide a written response to the Complainant's September 21, 2005 OPRA request, either granting or denying access, she violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. which results in a "deemed" denial.

Whether the Custodian's delay and/or failure to respond to the Complainant's requests rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to

⁷ Actual citation is Caggiano v. Borough of Stanhope, GRC Case Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252.

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.

The Complainant states that he submitted his OPRA requests on May 12, 2005, August 26, 2005 and September 21, 2005. The Complainant states that he did not receive a response to his May 12, 2005 request. The Complainant also states that on September 13, 2005, he was verbally informed that he would be able to receive the requested records on the following day, September 14, 2005. The Complainant contends that upon speaking with the Custodian’s attorney, he was advised that he could not obtain the requested records. (The Complainant did receive some of the records requested. However, the Custodian’s response to the Complainant’s August 26, 2005 and September 21, 2005 requests were legally insufficient).

The Custodian’s Counsel asserts that this complaint should be dismissed since the City has fully complied with the Complainant’s request. Counsel further alleges that a copy of every document concerning this matter has been given to the Complainant.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. for not providing the Complainant with a written response to his OPRA request dated May 12, 2005 within the seven (7) business day time frame prescribed under OPRA. The Custodian also violated OPRA for same regarding the Complainant’s OPRA request dated August 26, 2005, although the Custodian did attempt to fulfill the Complainant’s request by releasing some of the requested records on September 13, 2005 and September 15, 2005. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. again for not providing the Complainant with a written response to his OPRA request dated September 21, 2005. While the Custodian believes that she has fully complied with the Complainant’s request by releasing the requested records which exist, or informing of the requested records’ location, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which she is statutorily mandated to adhere. Therefore, the Custodian’s actions appear negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not providing a written response to the Complainant's May 12, 2005 OPRA request which either granted or denied access within the statutorily mandated seven (7) business days, therefore resulting in a "deemed" denial.
2. Based on the GRC's decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Custodian should have provided the Complainant with the requested rules instead of informing the Complainant where the requested rules are located (the Director of Human Services office). As such, the Custodian violated N.J.S.A. 47:1A-1.
3. The Custodian unlawfully denied access to the requested records since the Custodian failed to provide a written response to the Complainant's August 26, 2005 OPRA request within the statutorily mandated seven (7) business days violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and resulting in a "deemed" denial.
4. Although the Complainant may have previously been provided with the requested documents, OPRA does not limit the amount of times a requestor may seek the same documents pursuant to Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq.⁸
5. As the Custodian failed to provide a written response to the Complainant's September 21, 2005 OPRA request, either granting or denying access, she violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. which results in a "deemed" denial.
6. As the Custodian failed to provide a written response to the Complainant's May 12, 2005 and September 21, 2005 OPRA requests creating a "deemed" denial, the Custodian should release the requested records to the Complainant, with appropriate redactions, if any, and provide a legal explanation for each redacted part thereof.
7. **The Custodian shall comply with # 6 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
8. While the Custodian believes that she has fully complied with the Complainant's request by releasing the requested records which exist, or informing of the requested records' location, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which she is statutorily mandated to adhere. Therefore, the Custodian's actions appear negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

⁸ Actual citation is Caggiano v. Borough of Stanhope, GRC Case Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, 2005-252. William Langford v. City of Perth Amboy, 2005-181 – Findings and Recommendations of the Executive Director

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March 21, 2007