



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

May 28, 2008 Government Records Council Meeting

Thomas Caggiano
Complainant

Complaint No. 2006-2

v.

Borough of Stanhope
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge’s Initial Decision dated April 17, 2008. No further adjudication is required.

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 May, 2008

Robin Berg Tabakin, 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, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Thomas Caggiano¹
Complainant**

GRC Complaint No. 2006-02

v.

**Borough of Stanhope²
Custodian of Records**

Records Relevant to Complaint:

1. Site Plan/Soil Erosion and Sediment Control Plan (“SESCP”) for Block 10902, Lots 10 and 12
2. SH#44 approved for Block 10902, Lot 10
3. All certification letters received from the Sussex County Soil Conversation District (“SCSCD”) concerning a SESCO regarding Block 10902, Lots 10 and 12
4. Certificate of Occupancy for Lot 12, 6 Oak Drive
5. The deed from E.N.F. Development Co. LLC to the Lamicellas dated July 12, 2002
6. Petition signed by adjacent property owners dated July 26, 2002
7. Report prepared by Mr. Cilo, Jr. dated July 27, 2002
8. All e-mails sent to the Borough Engineer from Thomas Caggiano regarding the preservation of trees
9. Letter from Mr. Cilo, Jr., to the Town Administrator regarding Thomas Caggiano’s e-mails
10. Letter from Thomas Caggiano to the Code Enforcement Official
11. Report prepared by the Code Enforcement Official, the Shade Tree Commission, and the Chief of Police regarding Thomas Caggiano’s letters
12. Franklin Dawalt, Jr. letter with attached memorandum signed by Judith Keith
13. Board of Adjustment Resolution dated November 1, 2000
14. Letter signed by Mr. Sadley, the Executive Secretary of the State Soil Conservation Committee (“SSCC”), that was provided to the Town Council by Thomas Caggiano
15. Certificate of Occupancy, Borough Engineer’s letter, and a SESCO approved for Lot 10 or 12 or the minor subdivision
16. All the Borough Engineer’s photos and inspection reports
17. Letter dated May 8, 2000 from John Cilo, Jr. Associates, Inc.
18. Letter dated November 24, 2002 from Wendell Inhoffer to Wini Straub regarding Lot 10
19. Certification by SCSCD of SH#44 on October 8, 2002
20. Minutes of the Land Use Board in which SH#44 was reviewed and approved

¹ No legal representation listed on file.

² Represented by Richard Stein, Esq. (Sparta, NJ).

21. Invoices paid by E.N.F. Development Co. LLC for review of SH#44
22. Notification to the public of a variance on the site plan or SH#44
23. All the Borough Engineer's inspection reports and billings on the Oak Drive development and Paramount Self Storage
24. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher
25. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development
26. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Lamicellas authorizing the Borough to continue development on 6 Oak Drive
27. The variance to install a lower wall in the restricted deed areas of Lots 10 and 12
28. All expenses that the Borough Engineer billed Stanhope for reviewing, approving, inspecting, or any technical review of designs on two walls in the rear of Lots 10 and 12.

Request Made: December 18, 2005

Response Made: None

Custodian: Robin Kline³

GRC Complaint Filed: December 30, 2005

Background

April 25, 2007

Government Records Council's ("Council") Interim Order. At its April 25, 2007 public meeting, the Council considered the April 18, 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, found that:

1. Based on the Custodian's certification dated March 1, 2007, the Custodian has provided the Complainant with all the requested records that exist, or certified that the requested records do not exist, with the exception of "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development" as the Custodian certifies that to date, she has not received a response from the Borough Administrator regarding the record. As such, the Custodian has complied with the Council's December 14, 2006 Interim Order except that such compliance was not completed within the required time frame. It should be noted, however, that on February 9, 2007, after the Custodian's compliance due date, the Complainant requested to meet with the Custodian regarding the records subject of this complaint.
2. As it has been more than twenty four (24) business days following the Custodian's compliance due date, and the Custodian certifies that she has

³ At the time of the Complainant's request, the Custodian of Records was Antoinette Battaglia.
Thomas Caggiano v. Borough of Stanhope, 2006-02 – Supplemental Findings and Recommendations of the Executive Director

responded to all of the Complainant's requests with the exception of the request in which the Borough Administrator agreed she would respond and the Custodian also certifies that to date, she has not received a response from the Borough Administrator regarding said request, it is possible that the Borough Administrator's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

April 28, 2007

Council's Interim Order distributed to the parties.

July 24, 2007

Complaint referred to the Office of Administrative Law.

April 17, 2008

Administrative Law Judge's ("ALJ") Initial Decision. Regarding the original Custodian's actions, the ALJ concluded that:

"...there was a knowing and willful act because [the original Custodian's] refusal was purposeful, intentional and deliberate...However, in addition to the elements of knowing and willful, OPRA requires that the denial of access must be unreasonable under the totality of the circumstances. N.J.S.A. 47:1A-11a...While I have **CONCLUDED** that the custodian's refusal to provide copies of records previously requested until the GRC ruled on [the Complainant's] prior complaints was knowing and willful, nevertheless, I further **CONCLUDE** that under the totality of the circumstances, the other prong for the imposition of a penalty, the denial was not unreasonable in light of the extraordinary amount of requests made, some of which requested documents previously furnished."

Additionally, regarding the Borough Administrator's actions, the ALJ concluded that:

"...there was no knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances since the information was supplied to the custodian. In light of the overwhelming number of requests made by the complainant, it is entirely possible that [the Custodian] did not recall receiving the memorandum from [the Borough Administrator] when she issued her certification to the GRC."

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated April 17, 2008. No further adjudication is required.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
ACTING COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

April 25, 2007 Government Records Council Meeting

Thomas Caggiano
Complainant

Complaint No. 2006-2

v.

Borough of Stanhope
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council ("Council") considered the April 18, 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. Based on the Custodian's certification dated March 1, 2007, the Custodian has provided the Complainant with all the requested records that exist, or certified that the requested records do not exist, with the exception of "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development" as the Custodian certifies that to date, she has not received a response from the Borough Administrator regarding the record. As such, the Custodian has complied with the Council's December 14, 2006 Interim Order except that such compliance was not completed within the required time frame. It should be noted, however, that on February 9, 2007, after the Custodian's compliance due date, the Complainant requested to meet with the Custodian regarding the records subject of this complaint.
2. As it has been more than twenty four (24) business days following the Custodian's compliance due date, and the Custodian certifies that she has responded to all of the Complainant's requests with the exception of the request in which the Borough Administrator agreed she would respond and the Custodian also certifies that to date, she has not received a response from the Borough Administrator regarding said request, it is possible that the Borough Administrator's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be



referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: April 28, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Thomas Caggiano¹
Complainant**

GRC Complaint No. 2006-2

v.

**Borough of Stanhope²
Custodian of Records**

Records Relevant to Complaint:

1. Site Plan/Soil Erosion and Sediment Control Plan (“SESCP”) for Block 10902, Lots 10 and 12
2. SH#44 approved for Block 10902, Lot 10
3. All certification letters received from the Sussex County Soil Conversation District (“SCSCD”) concerning a SESCO regarding Block 10902, Lots 10 and 12
4. Certificate of Occupancy for Lot 12, 6 Oak Drive
5. The deed from E.N.F. Development Co. LLC to the Lamicellas dated July 12, 2002
6. Petition signed by adjacent property owners dated July 26, 2002
7. Report prepared by Mr. Cilo, Jr. dated July 27, 2002
8. All e-mails sent to the Borough Engineer from Thomas Caggiano regarding the preservation of trees
9. Letter from Mr. Cilo, Jr. to the Town Administrator regarding Thomas Caggiano’s e-mails
10. Letter from Thomas Caggiano to the Code Enforcement Official
11. Report prepared by the Code Enforcement Official, the Shade Tree Commission, and the Chief of Police regarding Thomas Caggiano’s letters
12. Franklin Dawalt, Jr. letter with attached memorandum signed by Judith Keith
13. Board of Adjustment Resolution dated November 1, 2000
14. Letter signed by Mr. Sadley, the Executive Secretary of the State Soil Conservation Committee (“SSCC”), that was provided to the Town Council by Thomas Caggiano
15. Certificate of Occupancy, Borough Engineer’s letter, and a SESCO approved for Lot 10 or 12 or the minor subdivision
16. All the Borough Engineer’s photos and inspection reports
17. Letter dated May 8, 2000 from John Cilo, Jr. Associates, Inc.
18. Letter dated November 24, 2002 from Wendell Inhoffer to Wini Straub regarding Lot 10
19. Certification by SCSCD of SH#44 on October 8, 2002
20. Minutes of the Land Use Board in which SH#44 was reviewed and approved

¹ No legal representation listed on record.

² Represented by Richard Stein, Esq. (Sparta, NJ).

21. Invoices paid by E.N.F. Development Co. LLC for review of SH#44
22. Notification to the public of a variance on the site plan or SH#44
23. All the Borough Engineer's inspection reports and billings on the Oak Drive development and Paramount Self Storage
24. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher
25. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development
26. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Lamicellas authorizing the Borough to continue development on 6 Oak Drive
27. The variance to install a lower wall in the restricted deed areas of Lots 10 and 12
28. All expenses that the Borough Engineer billed Stanhope for reviewing, approving, inspecting, or any technical review of designs on two walls in the rear of Lots 10 and 12.

Request Made: December 18, 2005

Response Made: None

Custodian: Robin Kline³

GRC Complaint Filed: December 30, 2005

Background

December 14, 2006

Government Records Council's ("Council") Interim Order. At its December 14, 2006 public meeting, the Council considered the December 7, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian is in violation of 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 request within the statutorily mandated seven (7) business days, therefore resulting in a "deemed" denial.
2. The Custodian is also in violation of N.J.S.A. 47:1A-5.e. for not providing immediate access to the requested bills.
3. The Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as changes in personnel and stating that the records had previously been provided are not lawful reasons for a denial of access pursuant to Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006.)
4. If the Custodian required clarity regarding the requests, she should have sought clarification, within the statutorily mandated seven (7) business days required to respond, from the Complainant pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005.)

³ At the time of the Complainant's request, the Custodian of Records was Antoinette Battaglia.
Thomas Caggiano v. Borough of Stanhope, 2006-2 – Supplemental Findings and Recommendations of the Executive Director

5. The Custodian shall release the requested records to the Complainant with appropriate redactions, if any, and a legal justification for each redacted part thereof, and/or seek clarification of the portions of the Complainant's request which are unclear.
6. The Custodian should comply with (5) above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.
7. Based on the fact that the original Custodian informed the Complainant via two separate letters dated November 22, 2005 and December 12, 2005 that the Borough would not respond to any future OPRA requests until the GRC had ruled on the eleven (11) denial of access complaints pending before the Council, it is possible that the original Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

December 19, 2006

Council's Interim Order distributed to the parties.

January 8, 2007

E-mail from Custodian to GRC. The Custodian states that she received the Council's Interim Order on December 26, 2006 via certified mail. The Custodian asserts that due to closing out the 2006 fiscal year and preparing for the reorganization meeting of the Borough Council in January 2007, responding to the Council's Interim Order within five (5) business days from receipt of such would have substantially disrupted agency operations. As such, the Custodian requests an extension of ten (10) business days to comply with the Council's Interim Order.

January 9, 2007

E-mail from GRC to Custodian. The GRC grants the Custodian's extension to comply with the Council's Interim Order until January 24, 2007. The GRC states that the Complainant has also agreed to such extension via correspondence dated January 8, 2007.

January 18, 2007

Custodian's response to the Council's Interim Order with the following attachments:

- Memorandum from Scarlett Doyle, P.P., Borough Planner to Custodian dated January 10, 2007
- Letter from Teri Massood, Borough Administrator to Custodian dated January 16, 2007
- Letter from Margaret Driscoll, Accounts Payable Clerk to Custodian dated January 16, 2007

The Custodian states that she has included all records and responses to the Complainant regarding his December 18, 2005 request. A summary of the Complainant's requests and the Custodian's responses are detailed in the table below:

Complainant's Request	Custodian's Response/Record(s) Provided
Site Plan/Soil Erosion and Sediment Control Plan ("SESCP") for Block 10902, Lots 10 and 12	SESCP for Block 10902, Lot 10
SH#44 approved for Block 10902, Lot 10	The Custodian requests further clarification, specifically the date and agency/individual approving SH#44.
All certification letters received from the Sussex County Soil Conversation District ("SCSCD") concerning a SESCO regarding Block 10902, Lots 10 and 12	SESCP Certification Status Report dated October 8, 2002
Certificate of Occupancy for Lot 12, 6 Oak Drive	Certificate of Occupancy Permit No. 01-0154 dated July 10, 2002
The deed from E.N.F. Development Co. LLC to the Lamicellas dated July 12, 2002	Deed between E.N.F. Development Co. L.L.C. and the Lamicellas dated July 12, 2002
Petition signed by adjacent property owners dated July 26, 2002	Petition regarding Block 10902, Lot 10 dated July 25, 2002
Report prepared by Mr. Cilo, Jr. dated July 27, 2002	<ol style="list-style-type: none"> 1. Notes of various meetings held on July 27, 2002 prepared by John Cilo, Jr. Associates, Inc. 2. Letter from John Cilo, Jr., Borough Engineer to Teri Massood, Borough Administrator dated July 29, 2002
All e-mails sent to the Borough Engineer from Thomas Caggiano regarding the preservation of trees	<ol style="list-style-type: none"> 1. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated July 12, 2002 2. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated July 13, 2002 3. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated July 15, 2002 4. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated July 17, 2002 5. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated July 22, 2002 6. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated July 22, 2002 7. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated August 1, 2002 8. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated

	<p>August 4, 2002</p> <p>9. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated August 4, 2002</p> <p>10. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated August 4, 2002</p> <p>11. E-mail from Complainant to John Cilo, Jr. Borough Engineer dated August 4, 2002</p>
Letter from Mr. Cilo, Jr. to the Town Administrator regarding Thomas Caggiano's e-mails	<p>1. Letter from Scarlett Doyle, P.P. to Clerk dated July 22, 2002</p> <p>2. Letter from John Cilo, Jr., Borough Engineer to Teri Massood, Borough Administrator dated September 4, 2002</p>
Letter from Thomas Caggiano to the Code Enforcement Official	<p>1. Letter from Complainant to Zoning/Code Enforcement Official dated July 21, 2002</p> <p>2. Letter from Complainant to Zoning/Code Enforcement Official dated July 23, 2002</p>
Report prepared by the Code Enforcement Official, the Shade Tree Commission, and the Chief of Police regarding Thomas Caggiano's letters	The Custodian requests clarification regarding this request, specifically the date of the requested report.
Franklin Dawalt, Jr. letter with attached memorandum signed by Judith Keith	Letter from Judith Keith, LLS, PP to Frank Dawalt dated August 6, 2002
Board of Adjustment Resolution dated November 1, 2000	Board of Adjustment Resolution Case No. 00-005 dated November 1, 2000
Letter signed by Mr. Sadley, the Executive Secretary of the SSCC, that was provided to the Town Council by Thomas Caggiano	The Custodian requests clarification regarding this request, specifically, the date of the letter signed by Mr. Sadley and/or the date said letter was provided to the Town Council by the Complainant
Certificate of Occupancy, Borough Engineer's letter, and a SESCO approved for Lot 10 or 12 or the minor subdivision	<p>1. Certificate of Occupancy Permit No. 01-0154 dated July 10, 2002</p> <p>2. SESCO Certificate Status Report dated October 8, 2002</p>
All the Borough Engineer's photos and inspection reports	<p>1. Letter from John Cilo, Jr., Borough Engineer to Construction Code Official dated January 8, 2002</p> <p>2. Letter from John Cilo, Jr., Borough Engineer to Construction Code Official dated February 19, 2002</p> <p>3. Memo to File from John Cilo, Jr., Borough Engineer dated August 5, 2002</p>

	4. Letter from John Cilo, Jr., Borough Engineer to Clerk dated August 19, 2002
Letter dated May 8, 2000 from John Cilo, Jr. Associates, Inc.	Board of Adjustment meeting minutes dated June 7, 2000
Letter dated November 24, 2002 from Wendell Inhoffer to Wini Straub regarding Lot 10	The Custodian states that after an extensive search of the Borough's files, it is determined that this record does not exist.
Certification by SCSCD of SH#44 on October 8, 2002	The Custodian states that after an extensive search of the Borough's files, it is determined that this record does not exist.
Minutes of the Land Use Board in which SH#44 was reviewed and approved	The Land Use Board Secretary states that she was unable to locate the requested records following an extensive search of the Land Use Board files.
Invoices paid by E.N.F. Development Co. LLC for review of SH#44	As per Margaret Driscoll, Accounts Payable Clerk, the Custodian requests dates for both E.N.F. and Paramount Self Storage. Margaret Driscoll, Accounts Payable Clerk asserts that these records are part of the Borough's escrow accounts and are in storage in the Municipal Storage facility off premise.
Notification to the public of a variance on the site plan or SH#44	The Custodian requests clarification regarding this request, specifically, the Custodian requests that the Complainant specify the date and identify the variance, site plan, or SH #44 being sought.
All the Borough Engineer's inspection reports and billings on the Oak Drive development and Paramount Self Storage	As per Margaret Driscoll, Accounts Payable Clerk, the Custodian requests dates for both E.N.F. and Paramount Self Storage. Margaret Driscoll, Accounts Payable Clerk asserts that these records are part of the Borough's escrow accounts and are in storage in the Municipal Storage facility off premise.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher	The Custodian requests clarification as to the date(s) or period of time and the subject matter
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development	The Custodian requests clarification as to the date(s) or period of time and the subject matter
Any correspondence or record of telephone conversation between any employee of the	The Custodian requests clarification as to the date(s) or period of time and the subject

Borough of Stanhope and the Lamicellas authorizing the Borough to continue development on 6 Oak Drive	matter
The variance to install a lower wall in the restricted deed areas of Lots 10 and 12	Zoning Board of Adjustment meeting minutes dated August 2, 2000
All expenses that the Borough Engineer billed Stanhope for reviewing, approving, inspecting, or any technical review of designs on two walls in the rear of Lots 10 and 12.	As per Margaret Driscoll, Accounts Payable, the Custodian requests dates for both E.N.F. and Paramount Self Storage. Margaret Driscoll, Accounts Payable asserts that these records are part of the Borough's escrow accounts and are in storage in the Municipal Storage facility off premise.

January 22, 2007

E-mail from Complainant to GRC and Custodian. The Complainant takes issue with a few of the Borough's responses. First, the Complainant takes issue with the Borough's response to # 25 of the Complainant's request – "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development." The Custodian requests clarification as to the date(s) or period of time and the subject matter. The Complainant asserts that it is very clear that the subject of his OPRA request was Block 10902, Lots 10 and 12. The Complainant requests that the GRC contact the Sussex County Prosecutor's Office to obtain copies of all records pertaining to Block 10902, Lots 10 and 12 as the Complainant claims the Borough Administrator is unwilling to do same.

Regarding item # 24, "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher", the Complainant suggests that the GRC contact the Division of Local Government Services, the Ethics Department, and the Codes and Standards Department to copy all records in their possession and forward to the Borough. Additionally, the Complainant claims that as the Borough does not maintain a list of the documents maintained off-site or on-site, it is not possible to provide the exact date of the document requested.

Regarding item # 19, "Certification by SCSCD of SH#44 on October 8, 2002", the Custodian states that after an extensive search of the Borough's files, it is determined that this record does not exist. The Complainant contends that the Borough should contact the Department of Agriculture or the Sussex County Soil Conservation District to obtain the requested certification.

Further, regarding item # 25, "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development", the Custodian requests clarification as to the date(s) or period of time and the subject matter. The Complainant claims that the subject matter is very defined as he believed that the Borough should have called the Sussex County Prosecutor's Office in response to the GRC's Interim Order.

February 2, 2007

Letter from Custodian to Complainant. The Custodian seeks clarification on the following requested records:

Complainant's Request	Custodian's Request for Clarification
SH #44 approved for Block 10902, Lot 10	Define what SH # 44 refers to and specify the date, or approximate date SH # 44 was approved
Report prepared by the Code Enforcement Official, the Shade Tree Commission, and the Chief of Police regarding Thomas Caggiano's letters	Specify the date of the report sought and clarify or confirm that the report being requested was collectively prepared by the Code Enforcement Official, Shade Tree Commission and Chief of Police
Letter signed by Mr. Sadley, the Executive Secretary of the SSCC, that was provided to the Town Council by Thomas Caggiano	Specify the date of letter, or approximate date, signed by Mr. Sadley, or specify the date said letter was provided to the Town Council by Thomas Caggiano
Notification to the public of a variance on the site plan or SH#44	Specify the date or approximate date of the notification to the public regarding a variance on the site plan or SH # 44 being sought. Also specify the block and lot of the site plan and type of variance.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher	Specify the subject matter of any correspondence, record of telephone conversation concerning DCA Construction Code Official John Maher. Also specify the approximate period of time for same.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development	Specify the subject matter of any correspondence, record of telephone conversation concerning the Sussex County Prosecutor's Office regarding the Oak Drive development. Also specify the approximate period of time for same.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Lamicellas authorizing the Borough to continue development on 6 Oak Drive	Specify the date(s) or period of time for the records being sought.

February 2, 2007

Letter from Complainant to Custodian. The Complainant attempts to clarify his records request.

February 9, 2007

E-mail from Complainant to Custodian and GRC. The Complainant states that he has provided the GRC and the Borough with very detailed and lengthy responses to the Borough's recent request for clarification. Additionally, the Complainant states that he

offered to sit down with the Custodian, rather than to write back and forth in order to clarify his requests.

February 16, 2007

E-mail from Complainant to GRC. The Complainant states that he met with the Custodian and the Borough Administrator on this date in order to clarify his requests subject of this complaint.

March 1, 2007

Letter from Custodian to Complainant and GRC with the Custodian’s certification dated March 1, 2007 attached. The Custodian certifies that on February 16, 2007, she met with the Complainant and the Borough Administrator in order to clarify the Complainant’s request subject of this complaint. As a result of said meeting, the Custodian offers the following responses to the items in which the Borough required clarification from the Complainant:

Complainant’s Request	Custodian’s Response
SH #44 approved for Block 10902, Lot 10	The Borough does not have a sealed or certified copy of the documents referenced as SH #44
Report prepared by the Code Enforcement Official, the Shade Tree Commission, and the Chief of Police regarding Thomas Caggiano’s letters	Upon a diligent search of agency files, a report from the Zoning Officer dated January 6, 2003 is being provided. Additionally, any requests for information or reports concerning enforcement of Shade Tree Commission matters should be made to the Stanhope Police Department.
Letter signed by Mr. Sadley, the Executive Secretary of the SSCC, that was provided to the Town Council by Thomas Caggiano	Letter from Mr. Sadley to Complainant dated June 16, 2003 is provided under cover memo dated June 25, 2003 from Teri Massood, Borough Administrator.
Notification to the public of a variance on the site plan or SH#44	Upon a diligent search of the Board of Adjustment’s files dated August 13, 1999 through October 16, 2002, the requested records could not be located. The Custodian concludes the requested records do not exist.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher	Upon a diligent search of the Borough’s Building Department and Board of Adjustment files, the requested records could not be located. The Custodian concludes the requested records do not exist.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor’s Office regarding the Oak Drive development	At the February 16, 2007 meeting with the Complainant, the Borough Administrator stated she would inquire with the Borough Attorney regarding this request. To date, the Custodian has not been provided with a

	response to this request.
Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Lamicellas authorizing the Borough to continue development on 6 Oak Drive	Upon clarification from the Complainant, notes of various meetings held on July 27, 2002 is provided.

Analysis

Whether the Custodian complied with the Council’s December 14, 2006 Interim Order?

On January 8, 2007, the Custodian e-mailed the GRC requesting a ten (10) business day extension in order to comply with the Council’s December 14, 2006 Interim Order. On January 9, 2007, the GRC granted such extension until January 24, 2007. The Custodian states that she released some of the requested records to the Complainant on January 18, 2007 and requested clarification for the remaining records. The Complainant states that he attempted to clarify his requests via e-mail to the Custodian dated January 22, 2007. Via letter dated February 2, 2007, the Custodian states she again sought clarification from the Complainant regarding several of the requested records. In an e-mail from the Complainant to the Custodian dated February 9, 2007, the Complainant states that he has offered to meet with the Custodian in order to clarify the records being sought.

The Custodian certifies that on February 16, 2007, she met with the Complainant and the Borough Administrator regarding the records subject of this complaint. As a result of said meeting, the Custodian certifies that via letter dated March 1, 2007 she either provided the Complainant with the additional requested records, certified that the records do not exist, or certifies that she has not received a response from the Borough Administrator regarding the requested record.

Therefore, based on the Custodian’s certification dated March 1, 2007, the Custodian has provided the Complainant with all the requested records that exist, or certified that the requested records do not exist, with the exception of “any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor’s Office regarding the Oak Drive development” as the Custodian certifies that to date, she has not received a response from the Borough Administrator regarding the record. As such, the Custodian has complied with the Council’s December 14, 2006 Interim Order except that such compliance was not completed within the required time frame. It should be noted, however, that on February 9, 2007, after the Custodian’s compliance due date, the Complainant requested to meet with the Custodian regarding the records subject of this complaint.

Whether the Borough Administrator’s delay in access to the requested records 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 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 Custodian certifies that on February 16, 2007, she met with the Complainant and the Borough Administrator, at the Complainant’s request, regarding the records subject of this complaint. The Custodian certifies that at said meeting, the Borough Administrator stated that she would inquire with the Borough Attorney regarding the Complainant’s request for any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor’s Office regarding the Oak Drive development. The Custodian certifies that to date, the Borough Administrator has not provided the Custodian or the Complainant with a response to this request. The Custodian also certifies that she has provided the Complainant with all other requested records that exist, or certified that the records do not exist.

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).

Following a meeting on February 16, 2007 with the Complainant, Custodian and Borough Administrator, which was requested by the Complainant after the Custodian’s compliance deadline, the Custodian certifies that via letter dated March 1, 2007 she either provided the Complainant with additional requested records or certified that the records do not exist. As it has been more than twenty four (24) business days following the Custodian’s compliance due date, and the Custodian certifies that she has responded to all of the Complainant’s request with the exception of the request in which the Borough

Administrator agreed she would respond and the Custodian also certifies that to date, she has not received a response from the Borough Administrator regarding said request, it is possible that the Borough Administrator's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the Custodian's certification dated March 1, 2007, the Custodian has provided the Complainant with all the requested records that exist, or certified that the requested records do not exist, with the exception of "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development" as the Custodian certifies that to date, she has not received a response from the Borough Administrator regarding the record. As such, the Custodian has complied with the Council's December 14, 2006 Interim Order except that such compliance was not completed within the required time frame. It should be noted, however, that on February 9, 2007, after the Custodian's compliance due date, the Complainant requested to meet with the Custodian regarding the records subject of this complaint.
2. As it has been more than twenty four (24) business days following the Custodian's compliance due date, and the Custodian certifies that she has responded to all of the Complainant's requests with the exception of the request in which the Borough Administrator agreed she would respond and the Custodian also certifies that to date, she has not received a response from the Borough Administrator regarding said request, it is possible that the Borough Administrator's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007

INTERIM ORDER
December 14, 2006 Government Records Council Meeting

Thomas Caggiano
Complainant

Complaint No. 2006-2

v.

Borough of Stanhope
Custodian of Record

At the December 14, 2006 public meeting, the Government Records Council (“Council”) considered the December 7, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian is in violation of 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 request within the statutorily mandated seven (7) business days, therefore resulting in a “deemed” denial.
2. The Custodian is also in violation of N.J.S.A. 47:1A-5.e. for not providing immediate access to the requested bills.
3. The Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as changes in personnel and stating that the records had previously been provided are not lawful reasons for a denial of access pursuant to Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006.)
4. If the Custodian required clarity regarding the requests, she should have sought clarification, within the statutorily mandated seven (7) business days required to respond, from the Complainant pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005.)
5. The Custodian shall release the requested records to the Complainant with appropriate redactions, if any, and a legal justification for each redacted part thereof, and/or seek clarification of the portions of the Complainant’s request which are unclear.
6. The Custodian should comply with (5) above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.
7. Based on the fact that the original Custodian informed the Complainant via two separate letters dated November 22, 2005 and December 12, 2005 that the Borough would not respond to any future OPRA requests until the GRC had ruled on the eleven (11) denial of access complaints pending before the Council, it is possible that the original Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: December 19, 2006

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

**Thomas Caggiano¹
Complainant**

GRC Complaint No. 2006-2

v.

**Borough of Stanhope²
Custodian of Records**

Records Relevant to Complaint:

1. Site Plan/Soil Erosion and Sediment Control Plan (“SESCP”) for Block 10902 Lots 10 and 12
2. SH#44 approved for Block 10902 Lot 10
3. All certification letters received from the Sussex County Soil Conservation District (“SCSCD”) concerning a SESCO regarding Block 10902 Lots 10 and 12
4. Certificate of Occupancy for Lot 12, 6 Oak Drive
5. The deed from E.N.F. Development Co. LLC to the Lamicellas dated July 12, 2002
6. Petition signed by adjacent property owners dated July 26, 2002
7. Report prepared by Mr. Cilo, Jr. dated July 27, 2002
8. All e-mails sent to the Borough Engineer from Thomas Caggiano regarding the preservation of trees
9. Letter from Mr. Cilo, Jr. to the Town Administrator regarding Thomas Caggiano’s e-mails
10. Letter from Thomas Caggiano to the Code Enforcement Official
11. Report prepared by the Code Enforcement Official, the Shade Tree Commission, and the Chief of Police regarding Thomas Caggiano’s letters
12. Franklin Dawalt, Jr. letter with attached memorandum signed by Judith Keith
13. Board of Adjustment Resolution dated November 1, 2000
14. Letter signed by Mr. Sadley, the Executive Secretary of the SSCC, that was provided to the Town Council by Thomas Caggiano
15. Certificate of Occupancy, Borough Engineer’s letter, and a SESCO approved for Lot 10 or 12 or the minor subdivision
16. All the Borough Engineer’s photos and inspection reports
17. Letter dated May 8, 2000 from John Cilo, Jr. Associates, Inc.
18. Letter dated November 24, 2002 from Wendell Inhoffer to Wini Straub regarding Lot 10
19. Certification by SCSCD of SH#44 on October 8, 2002
20. Minutes of the Land Use Board in which SH#44 was reviewed and approved
21. Invoices paid by E.N.F. Development Co. LLC for review of SH#44
22. Notification to the public of a variance on the site plan or SH#44

¹ No legal representation on record.

² Custodian is represented by Richard Stein, Esq. (Sparta, NJ.)

23. All the Borough Engineer's inspection reports and billings on the Oak Drive development and Paramount Self Storage
24. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and Department of Community Affairs Construction Code Official John Maher
25. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development
26. Any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Lamicellas authorizing the Borough to continue development on 6 Oak Drive
27. The variance to install a lower wall in the restricted deed areas of Lots 10 and 12
28. All expenses that the Borough Engineer billed Stanhope for reviewing, approving, inspecting, or any technical review of designs on two walls in the rear of Lots 10 and 12.

Request Made: December 18, 2005

Response Made: None

Custodian: Robin Kline³

GRC Complaint Filed: December 30, 2005

Background

December 18, 2005

Complainant's Open Public Records Act ("OPRA") request for the documents listed above.

December 30, 2005

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Complainant's December 18, 2005 OPRA request attached. The Complainant states that he has not received any response from the Custodian regarding this request and therefore has been denied access to records.

January 3, 2006

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

February 10, 2006

Request for Statement of Information sent to the Custodian.

February 16, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Letter from Custodian to Complainant dated November 22, 2005
- Letter from Custodian to Complainant dated December 12, 2005
- Complainant's December 18, 2005 OPRA request

The Custodian certifies that the Borough received the Complainant's OPRA request on December 19, 2005. She certifies that she did not provide the Complainant

³ At the time of the Complainant's request, the Custodian of Records was Antoinette Battaglia.
Thomas Caggiano v. Borough of Stanhope, 2006-2 – Findings and Recommendations of the Executive Director

with any of the requested records as his request is overbroad, non-specific, and the Custodian would have to conduct research in response to said request.

At the time of the Complainant's December 18, 2005 request, the Custodian states that the Complainant had eleven (11) other complaints pending before the GRC concerning requests for the same information on an Oak Drive property. As a result, the Custodian certifies that via letters dated November 22, 2005 and December 12, 2005, the Borough advised the Complainant that it would not respond to his repetitive OPRA requests for information until the Council renders a decision regarding the other eleven (11) complaints, since said documents have been provided to the Complainant on several occasions.

The Custodian indicates that on January 27, 2006, the Council issued its final decision indicating that the Custodian's response, whereby the Custodian stated that the records had been previously provided to the Complainant, was not a lawful basis for a denial of access. However, the Council also found that the Custodian did not unlawfully deny access to records as the requests were overbroad or unclear.

In regard to the complaint at issue here, the Custodian asserts that the Complainant's OPRA request dated December 18, 2005 is confusing, not specific, and would require research on the part of the Custodian. She claims that the Complainant was attempting to request records by asking for any and all documents that the Borough had related to a particular subject. She contends that as his requests were not specific, they are not valid OPRA requests and should be denied by the GRC.

Additionally, the Custodian asserts that the Complainant's request was made in bad faith and in an attempt to harass the Borough and the Custodian of Records.

February 18, 2006

Complainant's response to the Custodian's SOI. The Complainant states that in his December 18, 2005 OPRA request, he used the words "any or all." He asserts that this is because it is impossible to provide the dates of reports when the Borough denies him access to inspect the files to obtain said dates. The Complainant contends that his requests were as specific as possible. The Complainant also states that he was able to obtain \$45.00 worth of copies regarding Block 10902 Lots 10 and 12 from Mr. Smith, representing the Sussex County Soil Conservation District. Additionally, the Complainant requests that the statements made by the Borough in its SOI be evaluated individually.

April 5, 2006

E-mail from GRC staff to Custodian. Staff requests a legal certification addressing the following issues:

- Who was the Custodian of Records at the time of the Complainant's December 18, 2005 OPRA request?
- Explain the role of Ellen Horak, Deputy Clerk, as it pertains to this records request and denial of access.
- Who provided a response to the Complainant's December 18, 2005 OPRA request and when was said response sent? Include copies of written responses.
- Explain the reason for any delay or lack of response to the December 18, 2005 records request pursuant to N.J.S.A. 47:1A-5.

April 12, 2006

Certification of Robin Kline, Municipal Clerk in response to GRC staff's April 5, 2006 e-mail. The Custodian certifies that at the time of the Complainant's December 18, 2005 OPRA request, Antoinette Battaglia was the Custodian of Records. She also certifies that Ms. Battaglia has resigned from her position and her last day was December 30, 2005. Regarding Ellen Horak, Deputy Clerk, the Custodian certifies that during the period of January 1, 2006 through February 21, 2006, the position of Municipal Clerk was vacant and the governing body never appointed the Deputy Clerk as Acting Clerk. However, the Deputy Clerk handled the Borough's response to the Complainant's denial of access complaint.

Regarding the Borough's response to the Complainant's December 18, 2005 OPRA request, the Custodian certifies that due to surrounding circumstances, it seems as though the request went unanswered. She certifies that as the request was received on December 19, 2005, the seventh business day would have been December 30, 2005. The Custodian also certifies that Borough offices were closed for the holiday on December 23, 2005 and December 26, 2005. She concludes that as December 30, 2005 was Ms. Battaglia's last day at work, the matter was left unattended.

Further, the Custodian certifies that the Deputy Clerk informed her that during the month of December, the Complainant had filed numerous OPRA requests which overwhelmed the small staff as they worked on matters that needed to be addressed for the end of the year and the Reorganization Meeting in January 2006. She also certifies that the Deputy Clerk indicated that she was unaware the request went unanswered until the GRC forwarded the denial of access complaint to the Borough.

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]mmediate access ordinarily shall be granted to budgets, *bills*, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added) N.J.S.A. 47:1A-5.e.

Additionally, OPRA states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” 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 asserts submitting his OPRA request on December 18, 2005. He states that he received no response from the Custodian regarding this request. He contends that his requests were as specific as possible, since he has previously been denied access to inspect the Borough’s files, and therefore he cannot identify the specific dates of certain requested documents.

The Custodian certifies that the Borough received the Complainant’s OPRA request on December 18, 2005. She also certifies that at the time of this request, Antoinette Battaglia was the Custodian of Records. Additionally, the Custodian concludes that the Complainant’s request may have gone unanswered due to the fact that at the time the request was made, the Borough offices were closed for two (2) days and the Custodian had resigned from her position. Further, the Deputy Clerk certifies that via letters dated November 22, 2005 and December 12, 2005, the original Custodian informed the Complainant that the Borough would not respond to any future OPRA requests until the GRC had ruled on the eleven (11) denial of access complaints pending before the Council. In addition, the Deputy Clerk also asserts that the Complainant’s December 18, 2005 request was overbroad and would require research on the part of the Custodian.

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.

The Custodian asserts that the Complainant’s request was overbroad and would require research on the part of the Custodian. The New Jersey Superior Court has held

that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1." (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (March 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only "identifiable" government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)⁴, the Superior Court references Mag in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁵

In the GRC case Phillip Boggia v. Borough of Oakland, 2005-36 (October 2005), the Council found that OPRA was not intended to require a custodian to do research in providing access to government records. Also, in Michael Bent v. Stafford Township Police Department, 381 N.J. Super. 30, 884 A.2d 240 (October 21, 2005)⁶, the Court found that the general request for information neither identified nor described with any specificity the records sought. Therefore, there was no unlawful denial of access.

Thus, it may be concluded that when a complainant's request is overbroad and unclear, the burden is on the complainant to clarify the request because "agencies are required to disclose only "identifiable" government records." As portions of the Complainant's request are for "any and all" documents, these portions are considered overbroad and require clarification from the Complainant as to the specific documents being sought.

In Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Council found that, "...in the case of the records that needed clarification, there is no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response. Additionally, the Custodian did violate N.J.S.A. 47:1A-5.i and -5.g and N.J.S.A. 47:1A-6 by not providing a specific lawful basis for the denial of access to Records Requested "9," "29," "31," "34," and "36" within the statutorily prescribed seven (7) business days..."

Here, the Custodian asserts that the Complainant's request was not specific. In regards to these records, the Custodian should have sought clarification for any requests that were not specific. However, the Custodian failed to provide any response to the Complainant. The Custodian contends that the records had previously been provided and that the request went unanswered due to changeover in personnel.

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁵ As stated in Bent.

⁶ The Court affirmed the GRC decision in Michael Bent v. Stafford Police Department, Complaint No. 2004-78 (October 2004).

In a similar case, Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006),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 present case. Although the Complainant may have previously been provided with the requested documents on numerous occasions, OPRA does not limit the amount of times a requestor may seek the same documents. The Custodian must properly respond to each request.

Furthermore, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days of receipt of said request. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. As the Custodian failed to provide a written response to the Complainant’s December 18, 2005 OPRA request, either granting access, denying access, or seeking clarification of the request, she violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Additionally, a portion of the Complainant’s request was for bills. Pursuant to N.J.S.A. 47:1A-5.e., a custodian must provide immediate access to bills. As the Custodian did not provide any response to said request, she violated N.J.S.A. 47:1A-5.e.

Therefore, the Custodian is in violation of 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 request within the statutorily mandated seven (7) business days, therefore resulting in a “deemed” denial. The Custodian is also in violation of N.J.S.A. 47:1A-5.e. for not providing immediate access to the requested bills. Further, the Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as changes in personnel and stating that the records had previously been provided are not lawful reasons for a denial of access pursuant to Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006.) Additionally, if the Custodian required clarity regarding the requests, she should have sought clarification, within the statutorily mandated seven (7) business days required to respond, from the Complainant pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005.)

Whether the Custodian’s failure to respond to the Complainant’s December 18, 2005 request 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.

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, 2005-252. Thomas Caggiano v. Borough of Stanhope, 2006-2 – Findings and Recommendations of the Executive Director

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 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 asserts submitting his OPRA request on December 18, 2005. He states that he received no response from the Custodian regarding this request.

The Custodian certifies that the Borough received the Complainant’s OPRA request on December 18, 2005. She also certifies that at the time of this request, Antoinette Battaglia was the Custodian of Records. Additionally, the Custodian concludes that the Complainant’s request may have gone unanswered due to the fact that at the time the request was made, the Borough offices were closed for two (2) days and the Custodian had resigned from her position. Further, the Deputy Clerk certifies that via letters dated November 22, 2005 and December 12, 2005, the original Custodian informed the Complainant that the Borough would not respond to any future OPRA requests until the GRC had ruled on the eleven (11) denial of access complaints pending before the Council.

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

Based on the fact that the original Custodian informed the Complainant via two separate letters dated November 22, 2005 and December 12, 2005 that the Borough would not respond to any future OPRA requests until the GRC had ruled on the eleven (11) denial of access complaints pending before the Council, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

8. The Custodian is in violation of 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 request within the statutorily mandated seven (7) business days, therefore resulting in a “deemed” denial.
9. The Custodian is also in violation of N.J.S.A. 47:1A-5.e. for not providing immediate access to the requested bills.
10. The Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as changes in personnel and stating that the records had previously been provided are not lawful reasons for a denial of access pursuant to Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006.)
11. If the Custodian required clarity regarding the requests, she should have sought clarification, within the statutorily mandated seven (7) business days required to respond, from the Complainant pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005.)
12. The Custodian shall release the requested records to the Complainant with appropriate redactions, if any, and a legal justification for each redacted part thereof, and/or seek clarification of the portions of the Complainant’s request which are unclear.
13. The Custodian should comply with (5) above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.
14. Based on the fact that the original Custodian informed the Complainant via two separate letters dated November 22, 2005 and December 12, 2005 that the Borough would not respond to any future OPRA requests until the GRC had ruled on the eleven (11) denial of access complaints pending before the Council, it is possible that the original Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By:

Dara Lownie
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

December 7, 2006