



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### FINAL DECISION

#### October 31, 2007 Government Records Council Meeting

Linda Seiler  
Complainant

Complaint No. 2006-69

v.

Old Bridge Economic Development Corporation  
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 24, 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 the complaint be dismissed because the Complainant withdrew the matter from the Office of Administrative Law.

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 31<sup>st</sup> Day of October, 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, Vice Chairman  
Government Records Council

**Decision Distribution Date: November 16, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 31, 2007 Council Meeting**

**Linda Seiler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-69**

v.

**Old Bridge Economic Development  
Corp.<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Executive session minutes of the Old Bridge Economic Development Corporation (“OBEDC”) from September 25, 2002, with minimal redactions.

**Request Made:** February 16, 2006

**Response Made:** March 8, 2006

**Custodian:** Victoria DeMarco<sup>3</sup>

**GRC Complaint Filed:** March 28, 2006

**Background**

**April 25, 2007**

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 2007 *In Camera* 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 OBEDC is a public agency subject to OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Custodian failed to respond to Complainant within seven (7) business days of receiving Complainant’s OPRA request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Thomas Downs, Esq. (Old Bridge NJ).

<sup>3</sup> The Denial of Access Complaint lists Rose Marie Saracino, Township Clerk of Old Bridge Township, as Custodian. Victoria DeMarco is the Custodian for Old Bridge Economic Development Corporation.

3. Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.
4. The Custodian's actions, most notably the thirteen (13) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.
5. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope six copies of the requested unredacted documents (see #3 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

**April 27, 2007**

Council's Interim Order distributed to the parties.

**August 13, 2007**

GRC forwards complaint to the Office of Administrative Law for a determination of a knowing and willful violation of OPRA under the totality of the circumstances.

**October 3, 2007**

The Complainant withdraws the complaint from the Office of Administrative Law.

**Analysis**

The Complainant withdrew the complaint from the Office of Administrative Law in writing on October 3, 2007. Therefore, the complaint should be dismissed because the Complainant withdrew the matter from the Office of Administrative Law.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the complaint be dismissed because the Complainant withdrew the matter from the Office of Administrative Law.

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<sup>4</sup> The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.  
Linda Seiler v. Old Bridge Economic Development Corp., 2006-69 – Supplemental Findings and Recommendations of the Executive Director 2

Prepared By:

Tiffany L. Mayers  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

October 24, 2007



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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Toll Free: 866-850-0511  
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VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER CHARLES RICHMAN  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### INTERIM ORDER

#### July 25, 2007 Government Records Council Meeting

Linda Seiler  
Complainant

Complaint No. 2006-69

v.

Old Bridge Economic Development Corp.  
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council ("Council") considered the July 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, finds that the complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. the Custodian did not comply with the provisions of the Council's April 25, 2007 Interim Order by failing to deliver to the Council the redaction index within five (5) business days of receiving the Order; and
2. the Custodian did not respond to the Complainant's OPRA request for approximately sixteen (16) months following receipt of the Complainant's request and failed to provide a lawful basis for the delay in access to the requested records; and
3. the Custodian by not citing the legal basis for refusing to disclose the requested record has failed to meet the burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of July, 2007



Robin Berg Tabakin, Vice 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: July 31, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Linda Seiler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-69**

v.

**Old Bridge Economic Development  
Corporation<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Executive session minutes of the Old Bridge Economic Development Corporation (“OBEDC”) from September 25, 2002, with minimal redactions.

**Request Made:** February 16, 2006

**Response Made:** March 8, 2006

**Custodian:** Victoria DeMarco<sup>3</sup>

**GRC Complaint Filed:** March 28, 2006

**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 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 OBEDC is a public agency subject to OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Custodian failed to respond to the Complainant within seven (7) business days of receiving the Complainant’s OPRA request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contain

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Thomas Downs, Esq. (Old Bridge, NJ).

<sup>3</sup> The Denial of Access Complaint lists Rose Marie Saracino, Township Clerk of Old Bridge Township, as the Custodian. Victoria DeMarco is the Custodian for Old Bridge Economic Development Corporation. Linda Seiler v. Old Bridge Economic Development Corporation, 2006-69 – Supplemental Findings and Recommendations of the Executive Director



privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.

4. The Custodian's actions, most notably the thirteen (13) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.
5. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope six copies of the requested unredacted documents (see #3 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

#### **April 30, 2007**

Interim Order and *in camera* letter requesting documents sent to both parties.

#### **May 2, 2007<sup>5</sup>**

Certification of the Custodian with six copies of the unredacted records for *in camera* examination. No documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted was enclosed with the records.

#### **May 16, 2007**

E-mail from the Complainant to the GRC. The Complainant requested a copy of the documents or redactions index.

#### **May 16, 2007**

E-mail from the GRC to the Complainant. The GRC advised the Complainant she would receive a copy of the Custodian's submission to the GRC (except for the unredacted records).

#### **June 7, 2007**

Letter from the GRC to the Custodian's Counsel. The GRC inquired about the status of the missing redaction index.

#### **June 8, 2007**

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<sup>4</sup> The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

<sup>5</sup> The GRC time stamped this correspondence received on May 9, 2007 at 7:28 a.m. The GRC secretary stated that such an early morning time stamp would indicate the correspondence arrived in the previous day's mail.

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel advised the GRC that the Custodian intended to release to the Complainant a copy of the requested record in unredacted form. The Custodian's Counsel stated that the record was previously withheld because of an asserted privilege concerning an employee personnel matter. The Custodian's Counsel said the record could now be released because the employee whose matter was considered privileged recently left the employ of OBEDC.

**June 8, 2007**

Letter from the GRC to the Custodian. The GRC informed the Custodian to provide the GRC with a legal certification memorializing release of the minimally redacted or unredacted record to the Complainant as soon as that transaction occurred.

**June 12, 2007**

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel requested and was provided with the Complainant's address so the Custodian could forward the requested record to the Complainant.<sup>6</sup>

**June 27, 2007**

Letter from the GRC to the Custodian. The GRC inquired about the status of the Custodian's Certification of Mailing.

**June 27, 2007**

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel stated that a certification from the Custodian should have been received by the GRC but that a duplicate will be faxed.

**June 28, 2007**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwarded correspondence from the Custodian to the GRC and the Complainant, but did not include the Custodian's Certification of Mailing.

**June 28, 2007**

Letter from the GRC to the Custodian's Counsel. The GRC requested the Custodian's Certification of Mailing.

**June 29, 2007**

Custodian's Certification of Mailing. The Custodian certifies that on June 13, 2007 she released an unredacted copy of the requested record to the Complainant.

## **Analysis**

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<sup>6</sup> A subsequent review of the case file revealed that the Complainant did not write her address on the request form, and despite the recommendation of the GRC, apparently did not provide the Custodian with a copy of the Denial of Access Complaint which does contain her address.

**Whether the Custodian’s delay in releasing 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.

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 Complainant’s OPRA request was dated February 16, 2006. The Custodian certifies receiving the Complainant’s OPRA request “sometime before February 27, 2006.” The Complainant’s request was denied but no reason was given for the denial. Subsequently, in the Custodian’s Statement of Information, the Custodian asserts that the records were denied because “[they] are privileged and deal with the performance rating of the employee.” The Custodian provided no further lawful basis for the denial.

The Complainant filed a Denial of Access Complaint with the GRC on March 28, 2006. The complaint was investigated and the Council entered an Interim Order dated April 25, 2007. Pursuant to Council’s Interim Order, the Custodian was directed to deliver to the Council six (6) copies of the requested unredacted documents, a legal certification and a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted within five (5) business days from receipt of the Council’s Interim Order.

On May 8, 2007, the Council received from the Custodian the unredacted records and certification per the Interim Order, but the Custodian failed to include a redaction index detailing the lawful basis for denying access to the record or redacted portions thereof. The redaction index was a required submission pursuant to the Interim Order. When the GRC requested the redaction index on June 7, 2007, the Custodian's Counsel in a reply telephone call stated that the Custodian would release the record because the employee whose personnel information was contained in the record had recently left the employ of OBEDC. The Custodian certified that on June 13, 2007 she mailed the unredacted minutes of the September 25, 2002 executive session to the Complainant. This is the record which the Complainant requested on February 16, 2006.

Because the redaction index was never provided, the GRC can only look to the Custodian's assertion in the Statement of Information that the records were denied because "[they] are privileged and deal with the performance rating of the employee." OPRA provides that personnel and pension records are not considered public documents with certain exceptions; however, in the instant complaint personnel and pension *records* are not at issue (emphasis added). See N.J.S.A. 47:1A-10. Here, the record responsive to the Complainants' request is a copy of executive session minutes.

The Open Public Meetings Act [N.J.S.A. 10:4-6 et seq.] permits executive session for discussion of specifically enumerated subjects, and discussion of personnel matters is one such subject. See N.J.S.A. 10:4-12b(8). The law is well-settled, however, that minutes from such sessions are government records available to the public with any lawful redactions. As the New Jersey Supreme Court explained in a case holding that the Open Public Meetings Act requires disclosure of executive session minutes in which personnel matters were discussed, "... the [N.J.S.A. 10:4-12b(8)] exemption is designed to enable the public body to determine the appropriate action to be taken, not to withhold from the public either the public body's determination or the reason on which its determination was based." See South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478, (1991).

Accordingly, the minutes could have been disclosed with redaction of any confidential or privileged information in accord with the holding in South Jersey Publishing, *Id* at 484. An examination of a copy of the record, however, reveals there is no information contained in it with respect to any employee's performance rating which would comport with the Custodian's assertion of exemption in her Statement of Information. Further, even if the record did contain confidential privileged information, the subject employee's separation from employment with OBEDC would not then trigger release of the otherwise privileged material.

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

" .... The public agency shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6.

In this complaint, there is insufficient evidence to indicate the Custodian has met that burden. Without presenting a redaction index or other statement citing the lawful basis for denial, the Custodian has failed to convey a legal reason for denying the Complainant access to the record for approximately sixteen (16) months following receipt of the request.

Because the Custodian did not comply with Council's April 25, 2007 Interim Order by failing to deliver to the GRC a redaction index within five (5) business days of receiving the Order, and by not releasing the record responsive to the Complainant's OPRA request until approximately sixteen (16) months following receipt of the request, and by failing to provide a lawful basis for the delay in access to the requested records, 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 complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that the complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. the Custodian did not comply with the provisions of the Council's April 25, 2007 Interim Order by failing to deliver to the Council the redaction index within five (5) business days of receiving the Order; and
2. the Custodian did not respond to the Complainant's OPRA request for approximately sixteen (16) months following receipt of the Complainant's request and failed to provide a lawful basis for the delay in access to the requested records; and
3. the Custodian by not citing the legal basis for refusing to disclose the requested record has failed to meet the burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Prepared By:

John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.  
Executive Director

July 18, 2007



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**  
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VINCENT P. MALTESE, Chairman  
COMMISSIONER SUSAN BASS LEVIN  
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Toll Free: 866-850-0511  
Fax: 609-633-6337  
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**INTERIM ORDER**

**April 25, 2007 Government Records Council Meeting**

Linda Seiler  
Complainant  
v.

Complaint No. 2006-69

Old Bridge Economic Development Corp.  
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council ("Council") considered the April 18, 2007 *In Camera* 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 OBEDC is a public agency subject to OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Custodian failed to respond to Complainant within seven (7) business days of receiving Complainant's OPRA request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.
4. The Custodian's actions, most notably the thirteen (13) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.



5. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope six copies of the requested unredacted documents (see #3 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> 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 27, 2007**

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<sup>1</sup> The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Linda Seiler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-69**

v.

**Old Bridge Economic Development Corp.<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Executive session minutes of the Old Bridge Economic Development Corporation (“OBEDC”) from September 25, 2002, with minimal redactions.

**Request Made:** February 16, 2006

**Response Made:** March 8, 2006

**Custodian:** Victoria DeMarco<sup>3</sup>

**GRC Complaint Filed:** March 28, 2006

**Background**

**February 16, 2006**

Complainant files an Open Public Records Act (“OPRA”) request for the records listed above.

**March 8, 2006**

Complainant receives a copy of an OBEDC memorandum dated February 27, 2006 from Vicki DeMarco to Rose-Marie Saracino, Old Bridge Township Clerk. The memo states that DeMarco had “[s]poken to Thomas Downs, Esq., the Economic Development Corporation’s attorney. Mr. Downs is of the opinion that the EDC is not required to release the executive minutes of September 25, 2005 [sic] as requested by Ms. Seiler.” Complainant receives this response 13 business days from the date of her OPRA request.

**March 28, 2006**

Complainant files a Denial of Access Complaint with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated February 16, 2006

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<sup>1</sup> No legal representation listed.

<sup>2</sup> Represented by Thomas Downs, Esq. (Old Bridge NJ).

<sup>3</sup> The Denial of Access Complaint lists Rose Marie Saracino, Township Clerk of Old Bridge Township, as Custodian. Victoria DeMarco is the Custodian for Old Bridge Economic Development Corporation.



- A copy of the February 27, 2006 memo from OBEDC to the Township Clerk, bearing the handwritten notation “copy to L. Seiler 3/8/06”
- Copy of the minutes of the September 25, 2002 public meeting of OBEDC released to Complainant.

**April 3, 2006**

Offer of Mediation sent to both parties. Neither party responds to the mediation agreement.

**April 3, 2006**

GRC receives a letter dated April 3, 2006 from Rose-Marie Saracino advising that she received the denial of access complaint filed by Complainant and alleging that OBEDC is a separate entity from the Township of Old Bridge. Saracino also states that as Clerk, Saracino is not required to attend the meetings of OBEDC. Finally, Saracino states that OBEDC is represented by its own counsel and staff; counsel for OBEDC is Thomas Downs, Esquire.

**October 2, 2006**

GRC sends request for Statement of Information (“SOI”) to Township Clerk Rose-Marie Saracino.

**October 2, 2006**

Letter from GRC to Township Clerk. The GRC restates the contents of the Clerk’s April 3, 2006 letter, where the Clerk stated that the OBEDC is a separate entity from the Township of Old Bridge. The GRC requests a legal certification from the Clerk asking:

- 1) whether or not the Clerk’s office was in receipt of the Complainant’s February 16, 2006 OPRA request,
- 2) whether or not the Township of Old Bridge maintains the requested September 25, 2002 executive session minutes of the OBEDC,
- 3) if the Clerk indeed was in receipt of the request and does not maintain copies of the requested documents, whether she made the Complainant aware in writing that the township does not maintain the requested records,
- 4) if the Clerk indeed was in receipt of the request and does not maintain copies of the requested documents, whether she forwarded the request to the Custodian of the record or directed the requestor to the Custodian of the record, and
- 5) the name and contact information of the officer or employee officially designated as the Records Custodian of the OBEDC.

**October 5, 2006**

Letter from Township Clerk to GRC in response to the latter’s October 2, 2006 request for a legal certification. The Clerk states that her office was in receipt of the Complainant’s February 16, 2006 OPRA request. The Clerk states that the OBEDC does routinely provide the Township with copies of its records, but that she is not the Custodian for the OBEDC. The Clerk also states that the Township received the OPRA request and forwarded it to the OBEDC for a response. The Clerk states that the OBEDC then forwarded the Township a memo stating that the OBEDC’s attorney found the requested minutes to be non-disclosable. The Clerk states that a copy of this memo was

sent to the Complainant on March 8, 2006. The Clerk provides the contact information for the OBEDC's attorney.

### **October 12, 2006**

Letter from GRC to the Custodian of OBEDC. The GRC states that it provided the Custodian with a request for a SOI on October 2, 2006 and that records indicate the Custodian's agency received this request on October 3, 2006. The GRC states that the Custodian's SOI was due on October 10, 2006, and that to date, the Custodian has not provided the GRC with the requested information. The GRC further asserts that if the Custodian does not submit a SOI by October 17, 2006, the case will proceed to adjudication with the documents the GRC has in the file.

### **October 17, 2006**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 16, 2006;
- Custodian's response to OPRA request dated February 27, 2006;
- Custodian's certification dated October 17, 2006.

The Custodian asserts that the Complainant requested executive session minutes that discuss a specific personnel matter regarding an employee of the OBEDC. The Custodian states that these minutes are privileged and concern the performance rating of an employee. The Custodian states that the Custodian cannot release the requested minutes because there is pending litigation regarding this employee. The Custodian further certifies that the OBEDC is a 501(3)(c) corporation acting as an advisory body.

### **October 31, 2006**

The Complainant's Response to the Custodian's SOI. The Complainant disagrees with the Custodian's assertion that the OBEDC is not a public agency. The Complainant states that she has included documents with her response to Custodian's SOI that support the Complainant's position that the OBEDC is a public agency.<sup>4</sup> The Complainant asserts that she would like these documents to be part of the record in this matter. The Complainant cites Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997) ("full disclosure would subvert the purpose of the particular [Open Public Meetings Act] exception...other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception") to assert that the Custodian's blanket claim of privilege fails. The Complainant asserts that the Custodian must disclose the requested minutes with the appropriate redactions. The Complainant states that the OBEDC is apparently confused by the notice requirements mandated by Rice v. Union County Regional High School Teachers Ass'n, 155 N.J. Super. 64 (App. Div. 1977), cert. denied, 76 N.J. 238 (1978). The Complainant states that the purpose of a Rice notice is to alert public employees whenever issues that could lead to their demotion or termination are going to be discussed by a public body during a closed or executive session. The Complainant states that the Rice notice provides these public employees with an opportunity, as mandated by N.J.S.A. 10:4-12(b)(8), to have their employment matters discussed in public rather than in private. The Complainant states that while the Rice holding prevents the OBEDC from discussing certain

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<sup>4</sup> The Complainant has submitted a thick packet of documents she received from the United States Internal Revenue Service in response to an information request.

employment matters in private without first notifying the affected employee, it does not confer a privilege upon the minutes of a non-public session in which an employee was discussed.

**March 15, 2007**

Letter from the GRC to Custodian's counsel requesting:

- 1) a copy of the Certificate of Incorporation of the OBEDC or other documentation that brought the organization into existence;
- 2) a copy of the bylaws for the OBEDC;
- 3) a legal certification stating if any ordinance, resolution or agreements exist which discuss the relationship between the OBEDC and any state or local government agency; and
- 4) a copy of the documents referenced in the immediately preceding point.

**March 29, 2007**

OBEDC fails to submit the documentation requested by the GRC.

**Analysis**

**Whether the OBEDC is a public agency subject to OPRA?**

OPRA defines a public agency as follows:

“any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.” N.J.S.A. 47:1A-1.1.

The Custodian claims that the OBEDC is not a “public agency” subject to OPRA because it is a 501(c)(3) corporation acting as an advisory body.<sup>5</sup> The Custodian failed, however, to provide documentation in support of this contention when requested to do so by the GRC.

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<sup>5</sup> 29 U.S.C. § 501(c), a provision of the United States Internal Revenue Code, lists types of non-profit organizations which are exempt from some Federal income taxes. Section 501(c)(3) exemptions apply to corporations and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. All 501(c)(3) organizations are also permitted to educate individuals about issues or fund research that supports their political position without overtly advocating for a position on a specific bill.

Most definitions of "public agency" under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act ("OPMA") defines "public body" as a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, *and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds.* N.J.S.A. 10:4-8a. (Emphasis added.)

OPMA's definition of public body requires that an entity, "... (1) consist of 'two or more persons' and (2) be 'collectively empowered as a voting body' (3) 'to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.' N.J.S.A. 10:4-8a..." The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004). In that case, the court held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the city of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,
- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the "agency" and the corporation as the "redeveloper" pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and
- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a "public body" under OPMA. The court further held that the corporation was "an 'instrumentality' created by the City and a 'public agency' under the OPRA for essentially the same reasons that it is a 'public body' under the OPMA." *Id.* at 442, 670.

The decision of the Superior Court that Lafayette Yard Community Development Corp. qualifies as a "public body" was affirmed by the New Jersey Supreme Court (Times of Trenton, 183 N.J. 519 (2005)). See also Snyder v. American Association of Blood Banks, 144 N.J. 269 (1996) (finding that the legislature did not create or authorize the AABB to perform a specific governmental purpose); Williams v. National Car Rental System, Inc., 225 N.J. Super. 164 (Law Div. 1988) (finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corporation v. NJ Sports and Exposition Authority, 195 N.J. Super. 542 (Law Div. 1984) (citing Wade v. N.J. Turnpike Authority, 132 N.J. Super. 92 (Law Div.

1975), "The Court noted the official comment to N.J.S.A. 59:1-3: 'The definition of 'Public Entity' provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.'").

Additionally, two rules in the Administrative Code define "public agency" more precisely than other rules and statutes by adding the following language to the usual definition, "... agencies exercising sovereign powers of government." This language is very illustrative of the meaning of public agencies, as explained by the court in the Times of Trenton cases cited above. While other state statutes and rules do not include this language, it appears that the New Jersey Supreme Court confirms that "exercising sovereign powers of government" or performing a specific governmental function is required for an entity to be deemed a public body or agency under OPRA.

According to the OBEDC's Application for Recognition of Exemption under Section 501(a) filed with the United States Internal Revenue Service ("IRS") on or about October 29, 1999, the OBEDC states that it was established by municipal ordinance in 1973 and incorporated in 1982 "to promote commerce in the Township of Old Bridge." In its August 24, 1998, Amended and Restated Certificate of Incorporation the OBEDC notes that it was organized and shall be operated:

"with specific emphasis on lessening the burdens of the Township of Old Bridge ... by performing certain duties, as may be set forth by the Township Council of Old Bridge by resolution, ordinance or otherwise, in order to promote, encourage and assist the industrial, commercial and economic development in Old Bridge." Amended and Restated Certificate of Incorporation of Old Bridge Economic Development Corporation, August 24, 1998, ¶2.

The OBEDC reserved the following powers to itself, among others:

"[t]o accept, acquire, receive, take, and hold by bequest, devise, grant, purchase, gift, exchange, lease, transfer, judicial order or decree, or otherwise, for any of its objects and purposes, any property, both real and personal, of whatever, kind, nature or description and wherever situated..." Amended and Restated Certificate of Incorporation of Old Bridge Economic Development Corporation, August 24, 1998, ¶3.2.

Moreover, the By-Laws of the OBEDC state that "[t]he meetings of the Economic Development Corporation are considered open public meetings under the definition in the Open Public Meetings Act [N.J.S.A. 10:4-6 et seq.]." By-Laws for Economic Development Corporation, March 1, 1995, ¶2.

The Open Public Meetings Act defines a "meeting" as:

"any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body

present, to discuss or act as a unit upon the specific public business of that body....”. N.J.S.A. 10:4-8.b.

Thus, in considering the meaning of a public agency as explained by the court in the Lafayette Yard cases and the OBEDC’s Certificate of Incorporation and By-Laws, the OBEDC is a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the OBEDC is subject to the provisions of OPRA and is required to respond to OPRA requests for records.

**Whether the Custodian responded to Complainant’s OPRA request within the statutorily mandated seven (7) business days?**

OPRA provides that:

Unless a shorter time period is provided...a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, *but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived. *In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request....* N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides 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 ...” N.J.S.A. 47:1A-5.g.

The Complainant filed her OPRA request seeking the September 25, 2002 executive session minutes of the OBEDC on February 16, 2006. On March 8, 2006, thirteen (13) business days after Complainant’s OPRA request was filed, Complainant received a copy of an OBEDC memorandum dated February 27, 2006 from Vicki DeMarco to Rose-Marie Saracino, Old Bridge Township Clerk, stating that DeMarco had “[s]poken to Thomas Downs, Esq., ... Mr. Downs is of the opinion that the EDC is not required to release the executive minutes of September 25, 2005 [sic] as requested by Ms. Seiler.”

In a prior GRC decision, Pincus v. Newark Police Department, GRC Complaint No. 2005-219 (April, 2006), the Council found that the Custodian unlawfully denied access to the requested records by not appropriately responding within the statutorily mandated seven (7) business day timeframe pursuant to N.J.S.A. 47:1A-5.i. Also, in a prior GRC decision, Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-63 (July, 2006), the Council found that the Custodian’s failure to provide the Complainant with a written response to her request within the statutorily mandated seven

(7) business days resulted in a “deemed” denial, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Because the Custodian failed to respond to Complainant within seven (7) business days of receiving Complainant’s OPRA request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

**Whether the Custodian unlawfully denied access to the requested record(s)?**

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 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 requested access to minimally redacted executive session minutes. The Custodian’s March 8, 2006 response merely states that “the EDC is not required to release” the minutes requested by Complainant. The Custodian asserted to the GRC that the minutes are privileged and concern the performance rating of an employee. Moreover, the Custodian asserts that it could not release the requested minutes because there is pending litigation regarding this employee. The executive session minutes were not released 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. OPRA allows the custodian to deny access to records under those circumstances in which the records requested are exempt from access, under OPRA or any other law. N.J.S.A. 47:1A-5.g. If a custodian asserts a privilege under the law, the custodian is required to notify the complainant in writing of the specific legal basis for the denial. *Id.*

Although N.J.S.A. 47:1A-10 generally exempts personnel records from the definition of a public record, certain information is to be made available for public access, including an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received. N.J.S.A. 47:1A-10.

To the extent that the September 25, 2005 executive session minutes contain information which must be made available pursuant to N.J.S.A. 47:1A-10, the Custodian should have granted access to such records, redacting confidential or privileged information as necessary. The Custodian has failed to bear his burden of proof that the denial of access to Complainant regarding the Status of Interview forms was authorized by law. N.J.S.A. 47:1A-6.

In a prior GRC decision, Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005), the Council found that the Custodian should redact exempt information contained in the requested executive session minutes, providing a detailed and lawful basis for each redacted part thereof and provide access to those redacted minutes that have not already been released.

Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.

### **Whether the delay in response to the records request rises to the level of a knowing and willful violation of OPRA?**

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 under the totality of the circumstances. Specifically OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Complainant filed her OPRA request seeking the September 25, 2002 executive session minutes of the OBEDC on February 16, 2006. On March 8, 2006, thirteen (13) business days after Complainant's OPRA request was filed, Complainant



received a copy of a memorandum dated February 27, 2006 which stated the position that the OBEDC is not required to release the requested records.

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

The evidence of record indicates that the Custodian violated OPRA by failing to provide a response to the Complainant's OPRA request within the statutorily mandated seven (7) business days. The Custodian's actions, most notably the thirteen (13) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The OBEDC is a public agency subject to OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Custodian failed to respond to Complainant within seven (7) business days of receiving Complainant's OPRA request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.
4. The Custodian's actions, most notably the thirteen (13) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a

knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

5. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope six copies of the requested unredacted documents (see #3 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

Prepared By:

Karyn Gordon  
In House Counsel

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 18, 2007

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<sup>6</sup> The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.