



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

March 26, 2008 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2006-72

v.

Union County Utilities Authority
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 24, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge's Initial Decision dated February 26, 2008.

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 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach



Government Records Council

Decision Distribution Date: March 28, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Tina Renna¹
Complainant**

GRC Complaint No. 2006-72

v.

**Union County Utilities Authority²
Custodian of Records**

Records Relevant to Complaint: All executive meeting minutes for the years 2004 and 2005.

Request Made: January 3, 2006

Response Made: January 5, 2006

Custodian: Joseph Spatola

GRC Complaint Filed: April 1, 2006

Background

March 28, 2007

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

1. The Custodian has unlawfully violated OPRA because he stated that the records would be sent to the Complainant on Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail, and did not send them until Friday, April 7, 2006, which resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
2. In prior GRC decision, Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006), the Council decided that awaiting legal advice is not a lawful reason for a delay in access, and the Custodian did not bear their burden of providing a lawful reason for the denial of access to the Complainant's request pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian in this case did not bear his burden of providing a lawful reason for a delay in access pursuant to N.J.S.A. 47:1A-6.

¹ No legal representation listed on file.

² Represented by Kraig M. Dowd, Esq. (Union City, NJ).

3. While the Custodian has provided the Complainant with the 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 based on the totality of this complaint. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

April 2, 2007

Council's Interim Order distributed to the parties.

July 26, 2007

Complaint transmitted to the Office of Administrative Law ("OAL").

February 26, 2008

OAL's Initial Decision. The Administrative Law Judge concluded the following:

"[t]here can be no presumption of 'willful' misconduct simply because of the failure of a public official to respond to an OPRA request in a timely manner. Had the Legislature intended to impose a civil monetary penalty merely for failing to respond within the statutory timeframe, there would have been no need to include the 'willful' standard. I **CONCLUDE** that the Custodian has not committed a knowing and willful violation of OPRA and did not unreasonably deny access under the totality of the circumstances...I have presented a detailed and extensive recitation of the findings of facts...in order to provide emphatic support for the conclusion that the conduct of Custodian Spatola and his representatives for whom he bears responsibility, despite resulting in a last submission of the requested records, was not intentional and deliberate. The conduct did not exhibit a positive element of conscious wrongdoing...The intent of the Legislature was to provide prompt access to government records through OPRA. Although such promptness was lacking here, the Legislature set the bar very high for the imposition of monetary penalties where delay occurs."

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated February 26, 2008.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 24, 2008



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

INTERIM ORDER

March 28, 2007 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2006-72

v.

Union County Utilities Authority
Custodian of Record

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

1. The Custodian has unlawfully violated OPRA because he stated that the records would be sent to the Complainant on Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail, and did not send them until Friday, April 7, 2006, which resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
2. In prior GRC decision, Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006), the Council decided that awaiting legal advice is not a lawful reason for a delay in access, and the Custodian did not bear their burden of providing a lawful reason for the denial of access to the Complainant's request pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian in this case did not bear his burden of providing a lawful reason for a delay in access pursuant to N.J.S.A. 47:1A-6.
3. While the Custodian has provided the Complainant with the 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 based on the totality of this complaint. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 2007



Vincent P. Maltese, Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: April 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Tina Renna¹
Complainant**

GRC Complaint No. 2006-72

v.

**Union County Utilities Authority²
Custodian of Records**

Records Relevant to Complaint:

All executive meeting minutes for the years 2004 and 2005.

Request Made: January 3, 2006

Response Made: January 5, 2006

Custodian: Joseph Spatola

GRC Complaint Filed: April 1, 2006

Background

January 3, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests all executive meeting minutes for the years 2004 and 2005.

January 5, 2006

Custodian's response to the Complainant requesting an extension. In the Custodian's response to the OPRA request two (2) business days following the date the request was received, the Custodian stated that the Union County Utilities Authority ("UCUA") is presently reviewing the records to determine whether the public release of any of the material at this time will jeopardize the UCUA with regards to its litigation, contracts and personnel matters. The Custodian also states that because of the extent and nature of the review requested, the UCUA will need approximately three (3) weeks to complete this process, and will contact the Complainant at that time.

January 30, 2006

E-mail from the Custodian's Counsel to the Complainant requesting 2nd extension. The Custodian's Counsel states that the Complainant's OPRA request for the executive session meeting minutes had been forwarded to his office for review prior to distribution approximately twenty (20) days ago. The Custodian's Counsel also stated that his office does not maintain all the matters discussed in executive session. As such, the Custodian's Counsel attests to requesting assistance from the respective counsel

¹ No legal representation listed.

² Represented by Allan C. Roth, Esq. (Springfield, NJ).

handling individual matters and anticipates completing the review and gathering the reports no later than Friday, February 3, 2006.

March 31, 2006

E-mail from the Complainant to the Custodian's Counsel. The Complainant states that she would like an update on when the executive session meeting minutes from the UCUA will be released.

March 31, 2006

E-mail from the Custodian's Counsel to the Complainant. The Custodian's Counsel informs the Complainant that some of the minutes were missing, but have been recently found. The Custodian's Counsel also informs the Complainant of the birth of his daughter and that the minutes have yet to be reviewed, but that he will have them for the Complainant on Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail.

April 6, 2006

E-mail from the Custodian to the Complainant. The Custodian asserts attaching the approved executive meeting minutes of 2004 and 2005 of the UCUA. The Custodian informs the Complainant to be advised that the UCUA has redacted some portions of the minutes pursuant to OPRA and the GRC's rulings, and that the UCUA has indicated on the documents the reasons for the redactions.³

April 7, 2006⁴

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

- Complainant's OPRA Request dated January 3, 2006
- Custodian's response to the Complainant dated January 5, 2006
- E-mail from the Custodian's Counsel to the Complainant dated January 30, 2006
- E-mail from the Complainant to the Custodian's Counsel dated March 31, 2006
- E-mail from the Custodian's Counsel to the Complainant dated March 31, 2006

The Complainant asserts submitting the OPRA request on January 3, 2006, and receiving a response from the Custodian on January 5, 2006. The Complainant asserts that the Custodian's response was that the minutes are being reviewed by the Custodian's Counsel to determine whether the public release of any of the material at this time will jeopardize the UCUA with regards to its litigation, contracts or personnel matters.

The Complainant asserts receiving an e-mail on January 30, 2006, from the Custodian's Counsel informing the Complainant that the request had been forwarded to him for review. The Complainant also asserts e-mailing the Custodian's Counsel and copying Lisa Miskiewicz, an employee of the UCUA on March 31, 2006, asking for an update on when the request would be completed. The Complainant further asserts receiving an e-mail on March 31, 2006 from the Custodian's Counsel informing the

³ The Custodian certifies that the records were not sent to the Complainant until April 7, 2006, and the Custodian includes the read receipt showing that the Complainant read the e-mail at 12:25 p.m. on April 7, 2006.

⁴ The Custodian includes e-mails that are not relevant to this complaint.

Complainant that some minutes were missing which were recently found and that the Custodian's Counsel would have the minutes for the Complainant by Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail.

The Complainant states that it is now Thursday, April 6, 2006 and it has been forty-one (41) business days since the OPRA request was submitted. The Complainant also states that OPRA provides that unless a shorter time period is otherwise provided by statute, a regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven (7) business days after receiving the request, provided that the record is currently available and not in storage or archived.

The Complainant requests that the GRC declare that the UCUA has violated OPRA, require the Custodian to provide all records responsive to the request, find that UCUA's denial of access was knowing, willful and unreasonable under the circumstances, and impose the civil penalties upon the UCUA as provided for by OPRA.

April 11, 2006

Offer of Mediation sent to both parties. Complainant declined mediation.

April 13, 2006

Request for Statement of Information sent to the Custodian.

April 21, 2006

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

- Complainant's OPRA request dated January 3, 2006
- Custodian's response to the Complainant dated January 5, 2006
- E-mail from the Custodian's Counsel to the Complainant dated January 30, 2006
- E-mail from the Complainant to the Custodian's Counsel dated March 31, 2006
- E-mail from the Custodian's Counsel to the Complainant dated March 31, 2006
- E-mail from the Custodian to the Complainant dated April 6, 2007

The Custodian asserts that the following executive session minutes are maintained by the UCUA:

1. January 21, 2004 (6 pages)
2. February 11, 2004 (5 pages)
3. March 17, 2004 (4 pages)
4. April 21, 2004 (4 pages)
5. May 19, 2004 (6 pages)
6. June 16, 2004 (3 pages)
7. July 21, 2004 (6 pages)
8. August 18, 2004 (5 pages)
9. September 15, 2004 (6 pages)
10. October 20, 2004 (3 pages)
11. November 11, 2004 (5 pages)
12. December 15, 2004 (3 pages)
13. January 19, 2005 (3 pages)

14. February 9, 2005 (2 pages)
15. March 16, 2005 (4 pages)
16. April 20, 2005 (5 pages)
17. May 18, 2005 (4 pages)
18. June 15, 2005 (4 pages)
19. July 20, 2005 (3 pages)
20. August 18, 2005 (6 pages)
21. September 21, 2005 (7 pages)
22. October 19, 2005 (5 pages)
23. November 2, 2005 (4 pages)
24. December 21, 2005 (7 pages)

The Custodian asserts that after compiling the executive session minutes, reviewing them for privileged information, redacting the documents with notations explaining the redactions where appropriate, the minutes were provided to the Complainant.

The Custodian asserts that the executive session minutes were not immediately accessible, but as soon as they were made available, they were provided to the Complainant on April 7, 2006. The Custodian asserts that this took place three (3) days after the Custodian's Counsel indicated in his March 31, 2006 e-mail to the Complainant that some of the minutes were missing, but have been retrieved, and the birth of his daughter. The Custodian states that N.J.S.A. 47:1A-5.i. provides that documents should be provided in seven days from the date of receipt of the request unless the documents are unavailable, and that the statute further provides that the public agency must give notice to the requestor within seven (7) days if the documents are unavailable for immediate review. The Custodian attests that in Pontus v. N.J. School Construction Corporation, GRC Complaint No. 2004-34 (June 2004), the GRC determined that the documents requested were not immediately provided upon the first request; the documents, however, were produced after a second search for the records. The Custodian states that in that matter, the GRC determined that the custodian of records was required to file a certification as to the reasons why the records were not immediately provided.

The Custodian asserts that the UCUA provided all executive session minutes from the UCUA during the time period of January 2004 through December 2005. The Custodian also asserts that the UCUA redacted certain paragraphs or pages from a few of the minutes for either on-going litigation or matters of attorney-client privilege, and that it should be noted that the UCUA has not received any requests from the Complainant for clarification or questions regarding any of the redactions.

The Custodian further asserts that the UCUA categorically denies that it is in violation of OPRA and that the records needed to be reviewed by several different attorneys to determine if the information could be provided to the Complainant. The Custodian attests that the Complainant was kept abreast as to the status of the documentation; the two times the Complainant requested to know the status of the request, the Custodian's Counsel provided information to the Complainant on an immediate basis. The Custodian also attests that the Custodian's Counsel was not in the

office on Monday, April 3, 2006 or Tuesday, April 4, 2006, therefore, was not available to coordinate the final revisions with the Custodian's staff.

The Custodian states that on Wednesday, April 5, 2006, the Custodian's Counsel reviewed the GRC's decisions on the proper method for notifying the Complainant of the documents to be redacted. The Custodian attests to not being in the office on Thursday, April 6, 2006, but the Custodian's Counsel contacted the Custodian via cell phone to request permission to forward the documents to the Complainant. The Custodian also attests to giving the Custodian's Counsel the authority to instruct the Custodian's staff to release the documentation.

The Custodian asserts that on Friday, April 7, 2006, Lisa Miskiewicz, Deputy Clerk, forwarded the documents listed above at 9:02 am., the Complainant opened the e-mail at 12:25 p.m., and that it appears that the Complainant filed the denial of access complaint that same day.

The Custodian asserts that at no time did either the Custodian or the Custodian's staff delay the release of the documents. The Custodian asserts that the UCUA provided all the documentation requested by the Complainant prior to the complaint being filed. The Custodian also asserts that the Complainant requests records monthly from the UCUA, and that the UCUA either provides the Complainant with the documents, or if the documents are not yet available, the UCUA advises the Complainant that the documents will be produced when they become available to the public. The Custodian attests that the same is true in this matter, and that the documents were provided after review and as soon as they could be made available.

The Custodian states that the UCUA has never acted with malice toward any member of the public nor has it attempted to stall or disenfranchise any member of the public. The Custodian also states that the documents requested were produced within one (1) day of their availability, and that it must be noted that the GRC has determined that prospective documents request need not to be produced as OPRA does not comprehend prospective records requests. See Hetton v. Montclair Board of Education, GRC Complaint No. 2004-02 (February 2004). The Custodian states however, the UCUA continuously notified the Complainant that certain records were unavailable, and would be forwarded to the Complainant when the records became available. The Custodian further states that either the UCUA or its Counsel responded to every inquiry of the Complainant as to the status of the request, and respectfully requests that this matter be dismissed.

April 26, 2006

Complainant's response to the Custodian's SOI. The Complainant asserts that the day after filing the complaint, the Complainant received records⁵ from the Custodian that purported to fulfill the request. The Complainant asserts that accordingly she withdraws

⁵The Complainant asserts taking no position now as to whether the redactions made to the records furnished in response to the request were too extensive or otherwise improper, and if the Complainant determines later that those redactions were improper, the Complainant reserves the right to file a separate complaint on that issue.

the part of the complaint that requests the GRC to order the Custodian to provide all records responsive to the request.

The Complainant states that she still believes that the roughly four (4) months that it took for the Custodian to fulfill the requests warrants a) a declaration that the custodian violated OPRA and b) imposition of the civil penalties provided by OPRA.

The Complainant asserts that in the Custodian's response to "item 10" of the SOI, the Custodian argues that the GRC lacks jurisdiction over the present matter because the records requested by the Complainant were released as they became available. The Complainant asserts that the GRC does not lose jurisdiction over a complaint simply because the requested records were disclosed. The Custodian states that in Paff v. Cumberland County Sheriff, GRC Complaint No. 2005-159 (January 2006), the Council ruled that while the Custodian did ultimately grant access to all requested records, the response to the request came after the seven (7) business days allowed for a response pursuant to OPRA in violation of N.J.S.A. 47:1A-5.i. and resulted in an unlawful denial of access. The Complainant states that accordingly, she is entitled to a declaration as to whether the Custodian violated OPRA and a determination as to whether that violation was knowing, willful and unreasonable enough to warrant the imposition of civil penalties.

The Complainant attests that N.J.S.A. 47:1A-5.g. states in part that if a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. The Complainant attests to realizing when filing the request that it would probably take more than seven (7) business days to fulfill. For that reason, the Complainant states that she agreed to the Custodian's position stating that it would take approximately three weeks to review the records and make any necessary redactions. The Complainant states that she then agreed to a second extension to February 3, 2006, as requested by the Custodian's Counsel in an e-mail dated January 30, 2006.

The Complainant attests that after the promised February 3, 2006 date passed, the Complainant did not hear anything from the Custodian or the Custodian's Counsel for approximately two (2) months. The Complainant asserts to sending an e-mail to the Custodian's Counsel on March 31, 2006, and receiving a response the same day stating that some missing meeting minutes were recently found and some personal issues prevented the reviewing of these minutes. The Complainant also asserts that in the Custodian's Counsel's response he indicated that the Complainant would receive the requested minutes on Monday, April 3, 2006 or Tuesday, April 4, 2006. The Complainant further asserts that despite the Custodian's Counsel's promise, the Complainant still did not receive the requested minutes and therefore she filed a complaint with the GRC.

The Complaint further asserts that the purpose of OPRA is to make government records readily accessible for inspection, copying, or examination by the citizens of this State pursuant to N.J.S.A. 47:1A-1. The Complainant states that while agreeing that fulfilling of the request would have legitimately taken more than seven (7) business days

as normally allowed, it should not have taken as long as it did to fulfill the request. The Complainant also states that the Custodian and the Custodian's Counsel made and broke three promises, and accordingly they should be found to have violated OPRA, and a determination should be made by the GRC as to whether civil penalties should be imposed.

Analysis

Whether the Custodian unlawfully denied access to all executive meeting minutes for the years of 2004 and 2005?

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 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 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... [i]f the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request...[t]he requestor shall be advised by the custodian when the record can be made available...[i]f the record is not made available by that time, access shall be deemed denied...*” (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 the OPRA request on January 3, 2006, and receiving a response from the Custodian on January 5, 2006. The Complainant also asserts that the Custodian's response was that the minutes are being reviewed by the

Custodian's Counsel to determine whether the public release of any of the material at this time will jeopardize the UCUA with regards to its litigation, contracts or personnel matters. The Complainant asserts receiving an e-mail on January 30, 2006, from the Custodian's Counsel informing the Complainant that the request had been forwarded to him for review.⁶

The Complainant attests to e-mailing the Custodian's Counsel and copying Lisa Miskiewicz, an employee of the UCUA on March 31, 2006, asking for an update on when the request would be completed. The Complainant also attests to receiving an e-mail on March 31, 2006 from the Custodian's Counsel informing the Complainant that some minutes were missing which were recently found and that the Custodian's Counsel would have the minutes for the Complainant by Monday or Tuesday via e-mail.

The Complainant states that as of Thursday, April 6, 2006, it had been forty-one (41) business days since the OPRA request was submitted. The Complainant also states that OPRA provides that unless a shorter time period is otherwise provided by statute, a regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven (7) business days after receiving the request, provided that the record is currently available and not in storage or archived. The Complainant further states that she requests that the GRC declare that the UCUA has violated OPRA, require the Custodian to provide all records responsive to the request, find that UCUA's denial of access was knowing, willful and unreasonable under the circumstances, and impose the civil penalties upon the UCUA as provided for by OPRA.

The Custodian asserts that the executive session minutes were not immediately accessible, but as soon as they were available, the minutes were provided to the Complainant on April 7, 2006. The Custodian asserts that this took place three (3) days after the Custodian's Counsel indicated in his March 31, 2006 e-mail to the Complainant that some of the minutes were missing, but have been retrieved, and of the birth of his daughter which also added to the delay in releasing the records. The Custodian states that N.J.S.A. 47:1A-5.i. provides that documents should be provided in seven days from the date of receipt of the request unless the documents are unavailable, and that the statute further provides that the public agency must give notice to the requestor within seven days if the documents are unavailable for immediate review.

The Custodian attests that the UCUA categorically denies that it is in violation of OPRA and that the records needed to be reviewed by several different attorneys to determine if the information could be provided to the Complainant. The Custodian also attests that the Complainant was kept abreast as to the status of the documentation; the two times the Complainant requested to know the status of the request, the Custodian's Counsel provided information to the Complainant on an immediate basis. The Custodian further attests that the Custodian's Counsel was not in the office on Monday, April 3, 2006 or Tuesday, April 4, 2006, and therefore was not available to coordinate the final revisions with the Custodian's staff.

⁶ The Custodian indicates to the GRC that the minutes were approved by the governing body prior to the time of the request.

The Custodian asserts that on Friday, April 7, 2006, Lisa Miskiewicz, Deputy Clerk, forwarded the documents listed above at 9:02 am., the Complainant opened the e-mail at 12:25 p.m., and that it appears that the Complainant filed the denial of access complaint that same day.

The Custodian further states that at no time did either the Custodian or the Custodian's staff delay the release of the documents. The Custodian also states that the documents requested were produced within one (1) day of their availability.

Following the Custodian's SOI, the Complainant asserts that accordingly she withdraws the part of the complaint that requests the GRC to order the Custodian to provide all records responsive to the request. The Complainant states that she still believes that the roughly four (4) months it took for the Custodian to fulfill the requests warrants a) a declaration that the custodian violated OPRA and b) imposition of the civil penalties provided by OPRA.

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.

Pursuant to N.J.S.A. 47:1A-5.i., 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. If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

Considering the nature of the Complainant's request for all executive session minutes for the years 2004 and 2005, which resulted in ninety-nine (99) pages of redacted meeting minutes, and the continuing periodic conversations between the Complainant and Custodian, the two (2) months it took to release the records seemed to be within reason. However, the Custodian stated in his March 31, 2006 e-mail to the Complainant that he would provide the records to the Complainant on Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail. The records were not sent to the Complainant until Friday, April 7, 2006. Therefore, the Custodian has unlawfully violated OPRA because he stated that the records would be sent to the Complainant on Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail, and did not send them until Friday, April 7, 2006, which resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.

Additionally, in the recent Appellate Division decision NJ Builders Association v. NJ Council on Affordable Housing (App. Div. January 2007), while the requestor agreed to an extension of the statutory time frame required for an OPRA request and such an extension was lawful due to the volume and nature of the request, the Custodian violated the extension by one (1) day. This violation of the time extension did not result in an unlawful denial. This complaint by the GRC may be distinguished from the

circumstances in NJBA because this request is not as voluminous or so complex. Therefore, the Custodian's delay in releasing government records in this complaint results in an unlawful "deemed" denial of access.

Also, in prior GRC decision, Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006), the Council decided that awaiting legal advice is not a lawful reason for a delay in access, and the Custodian did not bear their burden of providing a lawful reason for the denial of access to the Complainant's request pursuant to N.J.S.A. 47:1A-6. While seeking legal advice when responding to OPRA requests is encouraged, it is not a lawful basis for a denial of access pursuant to N.J.S.A. 47:1A-6.

Whether the Custodian'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 Complainant asserts submitting the OPRA request on January 3, 2006, and receiving a response from the Custodian on January 5, 2006 stating that the UCUA is presently reviewing the records to determine whether the public release of any of the material will jeopardize the UCUA with regards to litigation, contracts and personnel matters, and requesting a three (3) week extension to do so. The Complainant also asserts communicating via e-mail with the Custodian's Counsel whom informed the Complainant that the minutes would be provided by Monday, April 3, 2006 or Tuesday, April 4, 2006.

The Complainant states that as of Thursday, April 6, 2006, it has been forty-one (41) business days since the OPRA request was placed. The Complainant also states that OPRA provides that unless a shorter time period is otherwise provided by statute, a regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as

possible, but not later than seven (7) business days after receiving the request, provided that the record is currently available and not in storage or archived. The Complainant further states that she requests that the GRC declare an order that the UCUA has violated OPRA, an order requiring the Custodian to provide all records responsive to the request, to find that UCUA's denial of access was knowing, willful and unreasonable under the circumstances, and to impose the civil penalties upon the UCUA as provided for by OPRA.

The Custodian asserts that the requested minutes were not immediately accessible, but as soon as the minutes were, they were provided to the Complainant on April 7, 2006. The Custodian states that the UCUA produced all executive session minutes from the UCUA during the time period of January 2004 through December 2005. The Custodian also states that the UCUA redacted certain paragraphs or pages from a few of the minutes for either on-going litigation or matters of attorney-client privilege, and that it should be noted that the UCUA has not received any requests from the Complainant for clarification or questions regarding any of the redactions.

The Custodian attests that the Complainant was kept abreast as to the status of the documentation; the two times the Complainant requested to know the status of the production, the Custodian's Counsel provided information to the Complainant on an immediate basis. The Custodian further attests that the Custodian's Counsel was not in the office on Monday, April 3, 2006 or Tuesday, April 4, 2006, therefore, was not available to coordinate the final revisions with the Custodian's staff.

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).

In this complaint, the Custodian and the Custodian's Counsel requested two (2) extensions from the Complainant. The first (1st) extension the Custodian requested was for three (3) weeks of January 5, 2006, so that the records could be reviewed by the Custodian's Counsel. Within the second (2nd) extension the Custodian's Counsel requested, it was indicated that the records would be reviewed by Friday, February 3, 2006.

Following the two (2) extensions, there was no communication between the Custodian or the Custodian's Counsel with the Complainant until the Complainant e-mailed the Custodian's Counsel requesting an update. The Custodian's Counsel replied

indicating that the records would be provided to the Complainant by Monday, April 3, 2006 or Tuesday, April 4, 2006. However, the records were not provided to the Complainant until Friday, April 7, 2006.

Therefore, while the Custodian has provided the Complainant with the records, based on the totality of this complaint, 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, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has unlawfully violated OPRA because he stated that the records would be sent to the Complainant on Monday, April 3, 2006 or Tuesday, April 4, 2006 via e-mail, and did not send them until Friday, April 7, 2006, which resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
2. In prior GRC decision, Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006), the Council decided that awaiting legal advice is not a lawful reason for a delay in access, and the Custodian did not bear their burden of providing a lawful reason for the denial of access to the Complainant's request pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian in this case did not bear his burden of providing a lawful reason for a delay in access pursuant to N.J.S.A. 47:1A-6.
3. While the Custodian has provided the Complainant with the 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 based on the totality of this complaint. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

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Approved By:

Catherine Starghill, Esq.
Executive Director

March 21, 2007