



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**FINAL DECISION**

**January 26, 2010 Government Records Council Meeting**

Cristina Kumka (Northern Valley Suburbanite)  
Complainant

Complaint No. 2007-07

v.

City of Englewood (Bergen)  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 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 because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, and because Administrative Law Judge Leslie Celentano approved the Stipulation of Settlement and Dismissal on July 31, 2009, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of January, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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



Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: January 29, 2010**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 26, 2010 Council Meeting**

**Cristina Kumka (Northern Valley Suburbanite)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-07**

v.

**City of Englewood (Bergen)<sup>2</sup>  
Custodian of Records**

July 12, 2006 Request:

Minutes of two budget hearings for the City of Englewood Department of Health held in May, 2006.

August 10, 2006 Request:

1. Executive and regular Council meeting minutes dated July 11 and July 24, 2006.
2. Monetary donations and contributions from current development corporations and companies building in Englewood from January 1, 2006 to the present.

October 2, 2006 Request:

Minutes of the September 27, 2006 Englewood Economic Development Corporation meeting

October 11, 2006 Request:

1. Handex report following removal of fire department fuel tanks.
2. Any and all correspondence or reports between the City of Englewood and Handex.

**Request Made:** July 12, 2006; August 10, 2006; October 2, 2006; October 11, 2006

**Response Made:** August 4, 2006<sup>3</sup>

**Custodian:** Lenore Schiavelli and Cheryl Fuller<sup>4</sup>

**GRC Complaint Filed:** November 17, 2006

**Background**

**July 25, 2007**

Government Records Council's ("Council") Interim Order. At its July 25, 2007 public meeting, the Council considered the July 18, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The

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<sup>1</sup> Represented by Dina L. Sforza, Esq. (Cresskill, NJ).

<sup>2</sup> Represented by William J. Bailey, Esq., of Huntington Bailey, L.L.P. (Westwood, NJ).

<sup>3</sup> The Custodian responded to the Complainant's July 12, 2006 request on August 4, 2006 and failed to respond to the Complainant's three (3) additional requests.

<sup>4</sup> Ms. Schiavelli is the Custodian of Records for Englewood and Ms. Fuller is the City Manager. Cristina Kumka (Northern Valley Suburbanite) v. City of Englewood (Bergen), 2007-07 – Supplemental Findings and Recommendations of the Executive Director

Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, the Custodian failed to respond in writing to OPRA request No. 1 within seven (7) business days, and completely failed to respond to OPRA requests No. 2 and No. 4, resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Complainant's requests No. 1, No. 2 and No. 4.
3. Based on the New Jersey Superior Court's holding in The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004), the Council's decision in Joseph Haelig v. Seaside Heights Business Improvement District, GRC Complaint No. 2005-50 (December 2006), and the evidence provided in the Englewood Economic Development Corporation's Certification of Incorporation and Ordinance 86-20, the EEDC is a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the EEDC is subject to the provisions of OPRA and is required to respond to OPRA requests for records.
4. The Custodian has failed to bear her burden of proving that the denial of access to request No. 3 was authorized by law. N.J.S.A. 47:1A-6.
5. Because the Custodian failed to respond to the Complainant either directing the Complainant to the proper custodian of record or forwarding the OPRA request to the EEDC, the Custodian has violated N.J.S.A. 47:1A-5.h.
6. Because the Custodian failed to respond in writing to request No. 1 within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, failed to bear the burden of proving that the EEDC was not a public agency subject to OPRA, failed to direct the Complainant to the EEDC or forward the request pursuant to N.J.S.A. 47:1A-5.h and completely failed to respond to requests No. 2, No. 3 and No. 4, 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 a knowing and willful violation of OPRA under the totality of the circumstances.

**July 30, 2007**

Council's Interim Order distributed to the parties.

**August 3, 2007**

Complaint transmitted to the Office of Administrative Law.

**August 10, 2009**

Stipulation of Settlement and Dismissal signed by both parties. The parties have agreed to settle the Denial of Access Complaint as follows:

1. The Township agrees to honor the Complainant's OPRA requests for the tax search export file twice weekly electronically, without charge.
2. The Township agrees to pay \$2,814.72 to the law firm of Lumurro, Davison, Eastman & Munoz, P.A. towards the Complainant's attorney's fees and costs of suit in this matter.
3. The Complaint is dismissed with prejudice.

### **Analysis**

Because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, and because Administrative Law Judge Leslie Celentano approved the Stipulation of Settlement and Dismissal on July 31, 2009, no further adjudication is required.<sup>5</sup>

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, and because Administrative Law Judge Leslie Celentano approved the Stipulation of Settlement and Dismissal on July 31, 2009, no further adjudication is required.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 19, 2010

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<sup>5</sup> The GRC contacted the Administrative Law Judge because the Judge did not sign the Stipulation Settlement and Dismissal. The Judge's clerk indicated that the Judge did not believe her signature was necessary.



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

VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER CHARLES RICHMAN  
COMMISSIONER LUCILLE DAVY  
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**INTERIM ORDER**

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

Cristina Kumka  
Complainant  
v.  
City of Englewood  
Custodian of Record

Complaint No. 2007-7

At the July 25, 2007 public meeting, the Government Records Council (“Council”) considered the July 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 as amended. The Council, therefore, finds that:

1. Pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, the Custodian failed to respond in writing to OPRA request No. 1 within seven (7) business days, and completely failed to respond to OPRA requests No. 2 and No. 4, resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Complainant’s requests No. 1, No. 2 and No. 4.
3. Based on the New Jersey Superior Court’s holding in The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004), the Council’s decision in Joseph Haelig v. Seaside Heights Business Improvement District, GRC Complaint No. 2005-50 (December 2006), and the evidence provided in the Englewood Economic Development Corporation’s Certification of Incorporation and Ordinance 86-20, the EEDC is a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the EEDC is subject to the provisions of OPRA and is required to respond to OPRA requests for records.
4. The Custodian has failed to bear her burden of proving that the denial of access to request No. 3 was authorized by law. N.J.S.A. 47:1A-6.



5. Because the Custodian failed to respond to the Complainant either directing the Complainant to the proper custodian of record or forwarding the OPRA request to the EEDC, the Custodian has violated N.J.S.A. 47:1A-5.h.
6. Because the Custodian failed to respond in writing to request No. 1 within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., failed to bear the burden of proving that the EEDC was not a public agency subject to OPRA, failed to direct the Complainant to the EEDC or forward the request pursuant to N.J.S.A. 47:1A-5.h. and completely failed to respond to requests No. 2, No. 3 and No. 4, 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 a knowing and willful violation of OPRA under the totality of the circumstances.

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

Vincent P. Maltese, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: July 30, 2007**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Cristina Kumka (Northern Valley Suburbanite)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-07**

v.

**City of Englewood (Bergen)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. July 12, 2006 Request: Minutes of two budget hearings for the City of Englewood Department of Health held in May, 2006.
2. August 10, 2006 Request:
  - a. Executive and regular Council meeting minutes dated July 11 and July 24, 2006 and
  - b. Monetary donations and contributions from current development corporations and companies building in Englewood from January 1, 2006 to the present.
3. October 2, 2006 Request: Minutes of the September 27, 2006 Englewood Economic Development Corporation meeting
4. October 11, 2006 Request:
  - a. Handex report following removal of fire department fuel tanks and
  - b. Any and all correspondence or reports between the City of Englewood and Handex.

**Request Made:** July 12, 2006; August 10, 2006; October 2, 2006; October 11, 2006

**Response Made:** August 4, 2006<sup>3</sup>

**Custodian:** Lenore Schiavelli and Cheryl Fuller<sup>4</sup>

**GRC Complaint Filed:** November 17, 2006

**Background**

**July 12, 2006**

Complainant's 1<sup>st</sup> Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed at No. 1 above on an official OPRA request form.

**July 28, 2006**

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<sup>1</sup> Represented by Dina L. Sforza, Esq. (Cresskill, NJ).

<sup>2</sup> Represented by William J. Bailey, Esq. of Huntington Bailey, L.L.P. (Westwood, NJ).

<sup>3</sup> The Custodian responded to the Complainant's July 12, 2006 request on August 4, 2006 and failed to respond to the Complainant's three (3) additional requests.

<sup>4</sup> Ms. Schiavelli is the Custodian of Records for Englewood and Ms. Fuller is the City Manager.

Complainant's Counsel telephones Custodian to inquire about the status of the Complainant's July 12, 2006 OPRA request. The Custodian states that the OPRA request has been forwarded to the City Manager and that the Custodian will contact the City Manager to determine the status of the request. The Custodian provided the name and telephone number of the City's attorney to the Complainant's Counsel.

**July 28, 2006**

Complainant's Counsel telephones the City's attorney to discuss the status of the Complainant's July 12, 2006 OPRA request. The Complainant's Counsel left a message which was not returned.

**July 28, 2006**

Letter from the Complainant to the Custodian's Counsel. The Complainant asserts that during a telephone conversation with the Custodian on July 27, 2006, the Complainant was informed that the Custodian had no information for her at the time and that the request had been forwarded on to the City Manager for review. The Complainant asserts that the Custodian agreed to fax the request to the Custodian's Counsel. The Complainant further asserts that her telephone message on July 27, 2006 to the Custodian's Counsel was not returned.

The Complainant states that the seven (7) business day deadline for a response under OPRA passed on July 21, 2006. The Complainant also asserts that even after repeated telephone calls, the Custodian still failed to respond. The Complainant states that the failure to reply within the statutorily mandated seven (7) business time frame is considered by the Complainant to be a knowing and willful violation of OPRA.

**August 3, 2006**

Custodian telephones Complainant and leaves a message advising that because no formal meetings occurred in May, 2006, no minutes of such meetings exist, but individual notes exist which are exempt under OPRA.

**August 4, 2006**

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian provide a written response pursuant to a telephone message on August 3, 2006 in which the Complainant was advised that since no formal meeting occurred in May 2006, only individual notes exist which are exempt under OPRA.

**August 4, 2006**

Custodian's letter response to the July 12, 2006 OPRA request. The Custodian responds to the Complainant's OPRA request on the eighteenth (18<sup>th</sup>) business day following receipt of such request. The Custodian states that the requested records are denied because no records relevant to the request exist.

**August 10, 2006**

Complainant's 2<sup>nd</sup> OPRA request for records listed at No. 2 above on an official OPRA request form.

**October 2, 2006**

Complainant's 3<sup>rd</sup> OPRA request for records listed at No. 3 above on an official OPRA request form.

**October 11, 2006**

Complainant's 4<sup>th</sup> OPRA request for records listed at No. 4 above on an official OPRA request form.

**November 11, 2006**

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

- Complainant's OPRA request dated July 12, 2006.
- Letter from the Complainant to the Custodian's Counsel dated July 28, 2006.
- E-mail from the Complainant to the Custodian dated August 4, 2006.
- Letter from the Custodian to the Complainant dated August 4, 2006.
- Complainant's OPRA request dated August 10, 2006.
- Complainant's OPRA request dated October 2, 2006.
- Complainant's OPRA request dated October 11, 2006.

The Complainant states that she made her first OPRA request on July 12, 2006. The Complainant further states that the Custodian failed to respond within seven (7) business days. The Complainant states that she contacted the Custodian and received no information as to the status of OPRA request No. 1. The Complainant asserts that on July 27, 2006 she was informed by the Custodian that the OPRA request was being reviewed by the City Manager and that the Complainant would have to contact the City Manager's office for further information. The Complainant asserts that she was also provided with contact information for the Custodian's Counsel.

The Complainant states that she immediately contacted the Custodian's Counsel on July 27, 2006 and left a message to which Complainant received no response. The Complainant further states she sent a letter to the Custodian's Counsel on July 28, 2006 advising him that the Complainant would consider the City of Englewood's failure to respond to OPRA request No. 1 as a knowing and willful violation of OPRA and that the Complainant would file a complaint by day's end if she received no response from the Custodian or Custodian's Counsel. The Complainant asserts that she received no response to her July 28, 2006 telephone call.

The Complainant further asserts that she made one final telephone call to the Custodian's Counsel early during the week of August 1, 2006 to which Complainant again received no response. The Complainant states that she received a telephone message from the Custodian on August 3, 2006 in which the Custodian informed her that because no formal meetings took place in May, 2006, only individual notes exist and those notes are not subject to OPRA. The Complainant asserts that she advised the Custodian via e-mail to provide a written response to the OPRA request. The Complainant also asserts that the Custodian e-mailed a denial letter to the Complainant on August 4, 2006, eighteen (18) business days after OPRA request No. 1 was submitted.

The Complainant states that additional OPRA records requests filed on August 10, 2006, October 2, 2006 and October 11, 2006 have gone unanswered to date.

The Complainant asserts that the Custodian's failure to provide a reason for the failure to respond within seven (7) business days to Complainant's July 12, 2006 OPRA request and for the failure to respond to the three subsequent OPRA requests is a violation of N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., and thus constitutes a knowing and willful violation of OPRA. The Complainant cites Fielder v. Stonack, 141 N.J. 101, 124 (1995) and Pitts v. N.J. Department of Corrections, GRC Complaint No. 2005-71 (April 2006) as two cases where the definition of knowing and willful violations is explained in detail. The Complainant further asserts that because the Custodian failed to perform under N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the actions of the Custodian in regard to these OPRA records requests constitutes a knowing and violation of OPRA.

**January 8, 2007**

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

**January 19, 2007**

Request for the Statement of Information sent to the Custodian.

**January 29, 2006**

E-mail from the Custodian to the GRC. The Custodian requests an extension of the deadline to file the Statement of Information.

**January 29, 2006**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until February 2, 2007 to file the Statement of Information.

**February 2, 2007**

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

- Complainant's OPRA request dated July 12, 2006.
- Complainant's OPRA request dated August 10, 2006.
- Complainant's OPRA request dated October 2, 2006.
- Complainant's OPRA request dated October 11, 2006.

The Custodian states that four (4) separate OPRA requests were received from the Complainant on the dates listed. The Custodian states that records relevant to OPRA request No. 1 do not exist because no official minutes are currently taken at Board of Health meetings and that the issue of official minutes is the subject of pending litigation. The Custodian also asserts that no records exist for OPRA requests No. 2 and No. 4. Finally, the Custodian asserts that the records relevant to OPRA request No. 3 are maintained by the Englewood Economic Development Corporation ("EEDC"), which is not under the control of the City because it is an independent non-profit.

### **March 12, 2007**

Letter from the GRC to the Custodian. The GRC requests that the Custodian provide the GRC with additional information pertaining to whether any written responses were provided for requests No. 2 and No. 3. The GRC received no response to this request.

### **June 14, 2007**

Letter from the GRC to the Custodian. The GRC requests that the Custodian provide additional information about EEDC in order to determine whether or not the Custodian's assertion that the EEDC is not under control of the city is lawful.

### **June 15, 2007**

Letter from the Custodian to the GRC. The Custodian provides the GRC with the following attachments:

- Certificate of Incorporation for the EEDC.
- Bylaws of the EEDC.
- Ordinance No. 79-65 authorizing a lease agreement between the City of Englewood and the EEDC.
- Ordinance No. 86-20 establishing a Special Improvement District.
- Ordinance No. 99-10 creating the Downtown Business Improvement Zone.
- A Resolution dated June 7, 2000, approving a sub-lease agreement.
- A Resolution dated July 11, 2006, approving a management agreement for the South Dean Street Parking Garage.

The Custodian states that to the best of her knowledge, these records are the only ones pertaining to the EEDC in the city's possession.

### **Analysis**

### **Whether the Custodian unlawfully denied access to records requests No. 1, No. 2 and No. 4?**

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 also 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, 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 ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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.g. and N.J.S.A. 47:1A-5.i., a custodian must respond in writing to an OPRA request and either grant access, deny access, seek clarification or ask for an extension of the statutorily mandated time within seven (7) business days following receipt of the request. See Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007) and Paff v. Bergen County Prosecutors Office, GRC Complaint No. 2005-115 (March 2006).

In this complaint, the Custodian responded eighteen (18) business days following receipt of OPRA request No. 1. Further, the Custodian failed to respond to OPRA requests No. 2 and No. 4. In the SOI, the Custodian certified that no records responsive to OPRA requests No. 2 and No. 4 exist. Notwithstanding the existence of responsive records or custody of records requested, however, the Custodian still bears the responsibility of responding in writing to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time within seven (7) business days and failed to do so results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has therefore failed to support her burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

## Whether the Englewood Economic Development Corporation is a public agency subject to OPRA?

OPRA defines a public agency as:

“...[a]ny 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 asserts that the EEDC is not a public agency but rather an independent non-profit organization that is not controlled by the city.

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 (Lafayette Yard, 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 Lafayette Yard case 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.

Lafayette Yard undertook the task of deciding whether or not an entity was a public agency under both OPRA and OPMA because the plaintiff requested access to both meetings and copies of meeting minutes of the Community Development Corporation. In this case, because access to records is the only issue herein, deciding whether or not the EEDC is a public agency will only be based on the provisions of OPRA.

The EEDC reserves the following powers for itself, among others:

“[t]o engage in *buying, selling, leasing and improving* lands and tenements in the City of Englewood, buying, selling, leasing *personal* property ... acquiring, holding, selling, hypothecating, assigning, *transferring* and conveying of its own obligation, or the obligation of any person or other



corporations ...” (Emphasis added.) Certificate of Incorporation of Englewood Economic Development Corporation, September 21, 1978. Section 2.d.

The EEDC is also limited in that the corporation:

“... shall have no power to bind or commit the City of Englewood to any *purchase, acquisition, sale, or transfer* of any property, real or *personal*, *without specific consent and approval* of the *City Council of the City of Englewood*, nor shall it have power to commit any funds of or the spending of any money by the City of Englewood *without such specific consent and approval* of the *City Council*.” (Emphasis added.) Certificate of Incorporation of Englewood Economic Development Corporation, September 21, 1978. Section 2.i.

Further, in Joseph Haelig v. Seaside Heights Business Improvement District, GRC Complaint No. 2005-50 (December 2006), the Council decided that Seaside Heights Business Improvement District (“SHBID”) was a public agency and therefore subject to OPRA based on Ordinance 99-36 dated December 6, 1999 that established SHBID pursuant to N.J.S.A. 40:55-65 et seq. along with its structure, funding and operational confines. In the matter before the Council, Ordinance No. 86-20 which was passed on May 8, 1986, established a special improvement district pursuant to N.J.S.A. 40:55-65 et seq. and provided as follows:

“ [t]he Englewood Economic Development Corporation ... is hereby designated as the District Management Corporation to receive funds collected from the special assessments and/or annual license fees and to assist in the management of the Special Improvement District designated herein.” Ordinance 86-20, May 8, 1986. Section 4.a.

The ordinance also states that “[i]n order to receive any funds or exercise any powers granted hereunder at least one member of the District Management Corporation shall be a member of the Council of the City of Englewood.” Id. Section 4.b. This provision of Ordinance 86-20 reflects provisions set forth under Section 4 of the EEDC Certificate of Incorporation regarding appointing members of the Board of Trustees.

Based on the Court’s holding in Lafayette Yard, the Council’s decision in Haelig, and the evidence provided in the EEDC’s Certification of Incorporation and Ordinance 86-20, the EEDC is an instrumentality created by a political subdivision of the State pursuant to N.J.S.A. 47:1A-1.1. The EEDC is, therefore, a public agency under OPRA and subject to the provisions of OPRA and is required to respond to OPRA requests for records. The Custodian has failed to bear her burden pursuant to N.J.S.A. 47:1A-6 of proving that the EEDC is not a public agency.

### **Whether the Custodian unlawfully denied access to records request No. 3?**

OPRA states that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

It is a custodian’s duty to either direct the Complainant to the proper custodian of record or forward the Complainant’s OPRA request to the proper custodian of record for another public agency when that agency’s files are not maintained by agency in receipt of the request. N.J.S.A. 47:1A-5.h.

Further, in Fallstick v. Haddon Township and Haddon Township Business Partnership, Inc., GRC Complaint No. 2004-73, the Complainant filed an OPRA request with the Haddon Township Custodian requesting to inspect minutes of the marketing committee meetings of the Haddon Township Business Partnership (“HTBP”) and copies of letters from property owners to business owners. The Complainant asserted that Haddon Township should have had the requested records on file because of an ordinance designating HTBP as the manager of services and programs in the Township’s Business District. The Custodian’s Counsel contended that the burden is placed on HTBP to file records with Haddon Township’s Custodian. The Custodian’s Counsel also states that HTBP is a public agency; therefore, a custodian of records should be designated pursuant to N.J.S.A. 47:1A-1.1.

In the matter of HTBP, the Council was faced with the question of whether HTBP was a public agency. The Council also had to consider whether or not it is the duty of the Haddon Township Municipal Clerk to respond to OPRA requests for records that are maintained by HTBP. The Council decided that HTBP is a public agency subject to OPRA and that the Haddon Township Custodian was not obligated to respond to an OPRA request for records maintained by HTBP.

In this complaint, the EEDC is a public agency for the purposes of OPRA. Further, as is held in Fallstick, a request for records maintained by the EEDC made to the City of Englewood’s Custodian should be handled pursuant to N.J.S.A. 47:1A-5.h. Because the Custodian failed to respond to the Complainant by directing the Complainant to the proper custodian of record or to forward the OPRA request to the EEDC, the Custodian has violated N.J.S.A. 47:1A-5.h.

### **Whether the Custodian’s delay in response to the 1<sup>st</sup> request and failure to respond to the other three (3) requests rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

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

In the complaint before the Council, the Custodian responded to the Complainant in writing eighteen (18) business days following receipt of request No. 1, failed to bear the burden of proving that the EEDC was not a public agency and completely failed to respond to requests No. 2, No. 3 and No. 4. The Custodian asserted that no records responsive to the Complainant’s requests existed, but she is nevertheless required to respond in writing to an OPRA request granting access, denying access, requesting clarification of the request or requesting an extension of time to respond within seven (7) business days of its receipt. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Additionally, in Thomas v. Plainsfield Board of Education, GRC Complaint No. 2006-185 (December 2006), the Custodian responded forty-five (45) business days after receipt of the request, resulting in a deemed denial violation pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i. The GRC also ruled that it was possible that the Custodian’s actions rose to the level of a knowing and willful violation of OPRA. In this case, the Custodian responded to the Complainant’s July 12<sup>th</sup> request eighteen (18) business days after her receipt of the request and completely failed to respond to the Complainant’s OPRA requests No. 2, No. 3 and No. 4.

Further, in DeMaio v. Jackson Township, GRC Complaint No. 2005-204 (January 2006), the Custodian was cited for failure to respond though no records responsive to the request existed. The GRC stated that “...there would not have been an unlawful denial of access except that the Custodian’s delay in properly responding to the Complainant’s request resulted in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.g. and

N.J.S.A. 47:1A-5.i.” *Id.* Although the Council decided in DeMaio that it was not possible that the Custodian had committed a knowing a willful violation of OPRA, the Custodian in this complaint failed to completely respond to requests No. 2, No. 3 and No. 4 within a short period of time compounded by responding in writing eighteen (18) business days after receipt of request No. 1.

Because the Custodian failed to respond in writing to request No. 1 within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., failed to bear the burden of proving that the EEDC was not a public agency subject to OPRA, failed to direct the Complainant to the EEDC or forward the request pursuant to N.J.S.A. 47:1A-5.h. and completely failed to respond to requests No. 2, No. 3 and No. 4, 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 a knowing and willful violation of OPRA under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, the Custodian failed to respond in writing to OPRA request No. 1 within seven (7) business days, and completely failed to respond to OPRA requests No. 2 and No. 4, resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Complainant’s requests No. 1, No. 2 and No. 4.
3. Based on the New Jersey Superior Court’s holding in The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004), the Council’s decision in Joseph Haelig v. Seaside Heights Business Improvement District, GRC Complaint No. 2005-50 (December 2006), and the evidence provided in the Englewood Economic Development Corporation’s Certification of Incorporation and Ordinance 86-20, the EEDC is a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, the EEDC is subject to the provisions of OPRA and is required to respond to OPRA requests for records.
4. The Custodian has failed to bear her burden of proving that the denial of access to request No. 3 was authorized by law. N.J.S.A. 47:1A-6.
5. Because the Custodian failed to respond to the Complainant either directing the Complainant to the proper custodian of record or forwarding the OPRA request to the EEDC, the Custodian has violated N.J.S.A. 47:1A-5.h.
6. Because the Custodian failed to respond in writing to request No. 1 within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., failed to bear the burden of proving that the EEDC was not a public agency subject to OPRA, failed to direct the Complainant to the EEDC or forward the request pursuant to N.J.S.A. 47:1A-5.h. and completely failed to respond to requests No. 2, No. 3 and No. 4, 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 a knowing and willful violation of OPRA under the totality of the circumstances.

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Executive Director

July 18, 2007