



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

December 18, 2008 Government Records Council Meeting

Steven Hyman
Complainant

Complaint No. 2007-117

v.

Jersey City Redevelopment Agency (Hudson)
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 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's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian certified that no financial records responsive to this complaint existed, but failed to do so immediately, as is required by N.J.S.A. 47:1A-5.e. and Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Therefore, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because the Custodian in this complaint responded in writing to the Complainant stating that no records responsive to the request relevant to this complaint exist and has certified that no records exists which are responsive to the request relevant to this complaint, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) had the Custodian responded in a timely manner.
4. Although the Complainant contends that the requested financial records should be maintained on file by the Jersey City Redevelopment Agency, the GRC has no authority over which records a government agency must maintain



pursuant to N.J.S.A. 47:1A-7.b. and Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008).

5. The Custodian failed to respond to the Complainant's October 25, 2006 OPRA request until the ninety-third (93rd) business day after receipt of the request. However, the Custodian certified that the delay took place as a result of the extensive search for responsive records. Moreover, following extensive and ongoing verbal communication between the Custodian and Complainant, some records responsive were provided and the Custodian certified that no additional records responsive exist. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the 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 18th Day of December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Steven Hyman¹
Complainant**

GRC Complaint No. 2007-117

v.

**Jersey City Redevelopment Agency (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Any and all records containing proposals, costs, invoices, charges, reimbursements, or payments of any sort related to the Sixth Street Embankment other than the limited number of records already provided.

Request Made: October 25, 2006³

Response Made: March 22, 2007

Custodian: Barbara Amato

GRC Complaint Filed: May 15, 2007⁴

Background

October 25, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 30, 2007

Letter from the Complainant's Counsel to the Custodian. The Complainant's Counsel states that the Custodian verbally acknowledged receipt of the Complainant's October 25, 2006 request on November 2, 2006. The Complainant's Counsel states that no written response has been received from the Custodian to date. The Complainant's Counsel states that the Custodian was required to respond to the Complainant in writing within seven (7) business days of receipt of the request.

The Complainant's Counsel states that the Complainant sought financial records regarding the costs incurred by Jersey City in connection with eight (8) specifically listed lots and blocks commonly known as "the Conrail Embankment" or "Sixth Street Embankment," as well as e-mail correspondence. The Complainant's Counsel states that N.J.S.A. 47:1A-5.e. provides that "immediate access ordinarily shall be granted to

¹ Represented by Michele R. Donato, Esq. (Lavallette, NJ).

² Represented by Joseph Kealy, Jr., Esq. (Jersey City, NJ).

³ The Custodian verbally acknowledged receipt of this request on November 2, 2006.

⁴ The GRC received the Denial of Access Complaint on said date.

budgets, bills, vouchers, contracts...” The Complainant’s Counsel contends that financial records such as legal fees, consulting fees and other costs are standard budgetary items that must be approved by City Council. The Complainant’s Counsel contends that it is surprising that the Custodian has refused to grant immediate access to these records as required by OPRA.

The Complainant’s Counsel further states that OPRA is very clear on the issue of attorney-client privilege in legal bills and invoices pursuant to N.J.S.A. 47:1A-1.1:

“[a] government record shall not include the following information which is deemed to be confidential...any record within the attorney-client privilege. *This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by attorney-client privilege.*” (Emphasis added) Id.

The Complainant’s Counsel states that the New Jersey Superior Court and the GRC have upheld this provision many times, including Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (App. Div. 2002), O’Shea v. Township of West Milford, GRC Complaint No. 2004-207 (September 2005), Fisher v. Township of Fairfield (Essex), GRC Complaint No. 2002-39 (September 2003), Shain v. Township of Lakewood, GRC Complaint No. 2002-112 (February 2004) and Wicks v. Bernards Township Board of Education, GRC Complaint No. 2002-107 (February 2004).

The Complainant’s Counsel states that the Complainant recognizes the Custodian’s obligation to redact certain information, but requests that the Custodian provide a general nature description of the redaction and a legal justification for the exemption from disclosure. The Complainant’s Counsel states that the GRC requires a municipality to provide the description of redacted material pursuant to Seibert v. Readington Township, GRC Complaint No. 2004-150 (February 2005).

Finally, the Complainant’s Counsel requests that the Custodian comply with OPRA and grant the Complainant immediate access to the requested records. The Complainant’s Counsel contends that any further delay of access will be viewed as a knowing and willful violation of OPRA. The Complainant’s Counsel finally contends that if the requested records are not received by February 6, 2007, the Complainant will file a Denial of Access Complaint with the GRC.

February 28, 2007

Letter from the Complainant’s Counsel to the Custodian. The Complainant’s Counsel states that she has previously written the Custodian urging the Custodian to comply with the Complainant’s OPRA request. The Complainant’s Counsel states that several extensions given to the Custodian yielded no response. The Complainant’s Counsel states that the Custodian has one additional week to comply with the Complainant’s request or a complaint will be filed with the GRC.

March 22, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninety-third (93rd) business day following receipt of such request. The Custodian states that enclosed are the resolutions of the Jersey City Redevelopment Agency ("JCRA") Board of Commissioners that pertain to the Sixth Street Embankment. The Custodian further states that, should she come across any additional records regarding costs or financing relating to the project, the Complainant's Counsel will be informed.

May 15, 2007

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

- Complainant's OPRA request dated October 25, 2006.
- Letter from the Complainant's Counsel to the Custodian dated January 30, 2007.
- Letter from the Complainant's Counsel to the Custodian dated February 28, 2007.
- Letter from the Custodian to the Complainant's Counsel dated March 22, 2007 (attaching a letter from John Curley, Esq., to the JCRA dated February 18, 2005).

The Complainant's Counsel states that the Complainant submitted an OPRA request to the Custodian on October 25, 2006. The Complainant's Counsel asserts that the Custodian acknowledged receipt of the request on November 2, 2006 in a telephone conversation with the Complainant. The Complainant's Counsel states that she requested a response to the OPRA request from the Custodian on January 30, 2007 and February 28, 2007. The Complainant's Counsel asserts that during a telephone conversation on March 9, 2007, the Custodian and Custodian's Counsel advised that a box containing contracts pertaining to the Complainant's request is missing. The Complainant's Counsel states that the Custodian responded to the OPRA request in writing on March 22, 2007 attaching resolutions responsive to the October 25, 2006 OPRA request.

The Complainant's Counsel contends that the Complainant never received the financial records requested, although the Custodian released sixteen (16) pages of records to the Complainant nearly five (5) months after receipt of the OPRA request relevant to this complaint. The Complainant's Counsel alleges that although public agencies are required to maintain financial information, the records provided to the Complainant contain little information as to the cost of the Sixth Street Embankment project.

The Complainant's Counsel states that N.J.S.A. 47:1A-5.e. provides that "immediate access ordinarily shall be granted to budgets, bills, vouchers, [and] contracts..." The Complainant's Counsel asserts that financial records such as legal fees, consulting fees, and other standard budgetary items that must be approved by a city and its agencies are routinely maintained and provided by public agencies to requestors.

The Complainant's Counsel further states that OPRA is very clear on the issue of attorney-client privilege in legal bills and invoices pursuant to N.J.S.A. 47:1A-1.1.:

“[a] government record shall not include the following information which is deemed to be confidential...any record within the attorney-client privilege. *This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by attorney-client privilege.*” (Emphasis added) Id.

The Complainant’s Counsel states that the New Jersey Superior Court and the GRC have upheld this provision many times, including Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (App. Div. 2002), O’Shea v. Township of West Milford, GRC Complaint No. 2004-207 (September 2005), Fisher v. Township of Fairfield (Essex), GRC Complaint No. 2002-39 (September 2003), Shain v. Township of Lakewood, GRC Complaint No. 2002-112 (February 2004) and Wicks v. Bernards Township Board of Education, GRC Complaint No. 2002-107 (February 2004).

The Complainant’s Counsel contends that she is surprised that after five (5) months, the Custodian has failed to provide the Complainant with any bills or invoices relating to the Sixth Street Embankment project. The Complainant’s Counsel asserts that the Custodian’s response that records pertaining to this request have been lost, aside from the sixteen (16) pages of records disclosed, is unsatisfactory. The Complainant’s Counsel alleges that the Sixth Street Embankment project is recent and ongoing and that the JCRA must have a process in place for the filing and maintaining of new information in regards to the project. The Complainant’s Counsel asserts that the project has also been the subject of several lawsuits, which increases the importance of maintaining and locating records relevant to the project.

The Complainant’s Counsel asserts that given the Custodian’s deliberate reluctance to comply with the Complainant’s request, signified by not providing any records until five (5) months after receipt of the request, the Complainant’s Counsel doubts that all of the requested financial records are actually missing. The Complainant’s Counsel contends that the Custodian’s March 22, 2007 response to the OPRA request virtually acknowledges that the JCRA did not perform a reasonably exhaustive search of its records based on the Custodian’s statement that she will provide any additional financial records she finds.

The Complainant’s Counsel requests that the GRC order the Custodian to locate and provide all records responsive that are discovered. The Complainant’s Counsel finally alleges that the Custodian’s actions of obstructing access to the requested records must rise to a level of a knowing and willful violation of OPRA.

May 21, 2007

Offer of Mediation sent to both parties.

May 24, 2007

The Custodian agreed to mediate this complaint.

May 29, 2007

The Complainant agreed to mediate this complaint.

May 31, 2007

Complaint sent to mediation.

May 20, 2008

Complaint referred back from mediation.

June 5, 2008

Letter from the GRC to the Complainant's Counsel. The GRC informs the Complainant's Counsel that she has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information from the Custodian. The GRC states that the Complainant Counsel's response is due by close of business on June 12, 2008.

June 11, 2008

Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel requests an extension of the deadline to amend this complaint.

June 11, 2008

Letter from the GRC to the Complainant's Counsel. The GRC grants the Complainant's Counsel an extension until June 19, 2008 to amend this complaint.

June 17, 2008

Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel states that upon review of this complaint, the Complainant's Counsel does not want to amend the current complaint.

July 10, 2008

Request for the Statement of Information sent to the Custodian.

July 17, 2008

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel states that the Denial of Access Complaint reflects that the Complainant is not a resident of the state of New Jersey. The Custodian's Counsel requests that this complaint be dismissed because the Complainant fails to satisfy N.J.S.A. 47:1A-1 which states that "government records shall be readily accessible for ... the citizens of this State, with certain exceptions."

The Custodian's Counsel requests that the GRC decide on this matter prior to the submission of the Statement of Information.

July 29, 2008

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel reiterates that this complaint should be dismissed because the Complainant is not a resident of the state of New Jersey.

July 29, 2008

Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel states that the Complainant is managing a group of limited liability corporations (LLC's)

which are New Jersey entities and is therefore entitled to request public records pursuant to OPRA in the capacity as managing member of the LLC's.

July 29, 2008

Letter from the GRC to the Custodian's Counsel. The GRC acknowledges receipt of the Custodian Counsel's letter dated July 17, 2008. The GRC states that this issue has been resolved based on formal legal advice from the New Jersey Office of the Attorney General. The GRC further states that the Attorney General does not interpret OPRA as applying only to requests made by citizens of New Jersey. The GRC states that although N.J.S.A. 47:1A-1 refers to "citizens of this State," the statute contains no such limitations on out-of-state requestors. The GRC states that, consistent with prior practice under OPRA's predecessor, the Right to Know Law, requestors from out of state are covered by OPRA.

The GRC states that the Custodian Counsel's request for this complaint to be dismissed is denied and that the Statement of Information is due by close of business on August 5, 2008.

August 4, 2008

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

- Complainant's OPRA request dated October 25, 2006.
- Letter from the Custodian to the Complainant dated March 22, 2007.
- Resolution of October 21, 1997 entering in license agreement with Conrail.
- Resolution of November 6, 1997 entering into a Professional Services Agreement ("PSA") with Dresdner for geotechnical investigation, attaching additional records relevant to resolution.
- Resolution of December 16, 1997 entering into a PSA with Cooney Valuation for appraisal services.
- Resolution of December 16, 1997 entering into a PSA with GEOD Corporation, attaching additional records relevant to resolution.
- Resolution of December 16, 1997 entering into a PSA with Hudson Realty for title services, attaching additional records relevant to resolution.
- Resolution of January 27, 1998.

The Custodian certifies that her search consisted of first locating two (2) staff members who were employed by the JCRA in 1997 and 1998 and asking them if they had any knowledge or information regarding the Sixth Street Embankment project. The Custodian further certifies that she searched through the JCRA operation files, which contain records pertaining to the agency's ongoing projects, and was unable to locate any records responsive to the request. The Custodian further certifies that she and the Custodian's Counsel physically searched through hundreds of boxes and file cabinets in the JCRA's storage room and were still unable to locate any records responsive.

The Custodian certifies that she received the Complainant's October 25, 2006 OPRA request on November 2, 2006. The Custodian asserts that several telephone conferences between both parties took place in the months after her receipt of the request.

The Custodian alleges that upon discovery of resolutions referring to the Sixth Street Embankment retained in the minutes of the JCRA, the Custodian notified the Complainant's Counsel about the resolutions and advised that remainder of the request could likely be acquired from the City of Jersey City.

The Custodian avers that JCRA had limited involvement with the Sixth Street Embankment project. The Custodian states that in 1997, the City of Jersey City Council declared the Sixth Street Embankment to be an "Area in Need of Redevelopment" which initiated JCRA jurisdiction pursuant to N.J.S.A. 40A:12A-1 *et seq.* (Local Redevelopment and Housing Law). The Custodian states that a license agreement between JCRA and Conrail, the property owner, was executed in order to conduct preliminary tests to ascertain the viability of redevelopment. The Custodian states that the Commissioners of JCRA adopted five (5) enabling resolutions and that shortly thereafter, in 1998, the JCRA's involvement was terminated when no redevelopment plan was adopted.

The Custodian contends that when the JCRA received the Complainant's October 25, 2006 OPRA request pertaining to the Sixth Street Embankment, ten (10) years after the termination of the JCRA involvement in the Sixth Street Embankment project, the JCRA made every conceivable effort to locate whatever records may have existed. The Custodian asserts that foregoing details about the JCRA and its role in the Sixth Street Embankment project were explained in detail to the Complainant and Complainant's Counsel. The Custodian contends that every effort was made to accommodate this request and that on March 22, 2007, the Custodian sent copies of all resolutions to the Complainant and indicated that continuing efforts will be made to locate any other records if they exist.

Analysis

Whether the Custodian unlawfully denied access to the requested financial records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also states that:

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

OPRA further provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA also states 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.

Pursuant to N.J.S.A. 47:1A-7(b), which delineates the Council’s powers and duties, the Council shall:

“receive, hear, review and adjudicate a compliant filed by any person concerning a *denial of access to a government record* by a records custodian; issue advisory opinions; prepare guidelines and an informational pamphlet; prepare lists for use by records custodians; make training opportunities available for records custodians; and operate an informational website and a toll-free helpline....” (Emphasis added) N.J.S.A. 47:1A-7(b).

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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certifies that she received the Complainant's October 25, 2006 OPRA request on November 2, 2006. Both parties acknowledge that they had verbal interaction between the date of receipt and the Custodian's March 22, 2007 response. However, the evidence of record shows that the Custodian responded in writing ninety-three (93) business days after receipt of the Complainant's OPRA request.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. N.J.S.A. 47:1A-5.i. and Kelley, *supra*.

Additionally, the Complainant's Counsel contends that the Custodian only provided some resolutions responsive to the request, but failed to provide any financial records, which is a violation of N.J.S.A. 47:1A-5.e.

In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the Complainant requested an immediate access record. The Custodian responded stating that no record responsive existed, but failed to do so in the statutorily mandated response time afforded under OPRA. The GRC held that pursuant to N.J.S.A. 47:1A-5.e., while the Custodian certified that no record responsive existed, the immediate access language of OPRA suggests that the Custodian was still obligated to immediately notify the Complainant of such.

In this complaint, the Custodian certified that no financial records responsive to this complaint existed, but failed to do so immediately, as is required by N.J.S.A. 47:1A-5.e. and Herron, *supra*. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.e.

The Complainant's Counsel further avers that she doubts that all of the requested financial records are missing. The Custodian certifies that after a very thorough search including hundreds of boxes and filing cabinets of records, the Custodian was unable to identify any financial records responsive, but could only identify several resolutions pertaining to the Sixth Street Embankment.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that there was no unlawful denial of access to the requested record because the Custodian certified that no records responsive existed.

The Custodian in this complaint responded in writing to the Complainant stating that no records responsive to the request relevant to this complaint exist. The Custodian further certified in the SOI that no records exist which are responsive to the request relevant to this complaint. Therefore, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra* had the Custodian responded in a timely manner.

Additionally, in Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008), the Custodian certified that some of the requested records were never received by the Board of Education, therefore, no records responsive exist. The Complainant raised concerns about why the records were not held by the Board. The GRC held that it does not have authority over which records a government agency must maintain pursuant to N.J.S.A. 47:1A-7.b.

In this complaint, although the Complainant contends that the requested financial records should be maintained on file by the JCRA, the GRC has no authority over which records a government agency must maintain pursuant to N.J.S.A. 47:1A-7.b and Van Pelt, *supra*.

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.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v.

Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

The Custodian failed to respond to the Complainant's October 25, 2006 OPRA request until the ninety-third (93rd) business day after receipt of the request. However, the Custodian certified that the delay took place as a result of the extensive search for responsive records. Moreover, following extensive and ongoing verbal communication between the Custodian and Complainant, some records responsive were provided and the Custodian certified that no additional records responsive exist. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian certified that no financial records responsive to this complaint existed, but failed to do so immediately, as is required by N.J.S.A. 47:1A-5.e. and Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Therefore, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because the Custodian in this complaint responded in writing to the Complainant stating that no records responsive to the request relevant to this complaint exist and has certified that no records exists which are responsive to the request relevant to this complaint, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) had the Custodian responded in a timely manner.
4. Although the Complainant contends that the requested financial records should be maintained on file by the Jersey City Redevelopment Agency, the GRC has no authority over which records a government agency must maintain

pursuant to N.J.S.A. 47:1A-7.b. and Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008).

5. The Custodian failed to respond to the Complainant's October 25, 2006 OPRA request until the ninety-third (93rd) business day after receipt of the request. However, the Custodian certified that the delay took place as a result of the extensive search for responsive records. Moreover, following extensive and ongoing verbal communication between the Custodian and Complainant, some records responsive were provided and the Custodian certified that no additional records responsive exist. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008