



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

FINAL DECISION

March 26, 2008 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2007-124

v.

Township of Livingston Library (Essex)
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 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 The Council, therefore, finds that this complaint should be dismissed because the Complainant has voluntarily withdrawn this complaint in a letter to the GRC dated March 3, 2008.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**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2007-124

v.

**Township of Livingston Library (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. Any documentation confirming that the fundraising campaign was anticipated at the time grant appeal to the State was filed (i.e. Library Board resolution, appropriation in budget, etc.)
2. Records indicating the funds raised to date
3. Records showing purchases/commitments against funds raised to date
4. Specifications, model number, quality, etc. for items/services that will be purchased, if any, when funds are raised
5. Accounting of status of \$650,985 commitment of June 9, 2004 from Building Reserve Fund (i.e. amount spent, outstanding purchase orders, Board of Library approvals, remaining balance)
6. Accounting of status of \$300,000 commitment of June 9, 2004 from Special Projects Fund (i.e. amount spent, outstanding purchase orders, Library Board approvals, remaining balance)
7. Analysis/accounting which shows current balance of Board Reserve Fund and Special Projects Fund that has not been committed to Library Construction Project

Request Made: March 19, 2007

Response Made: April 2, 2007, April 20, 2007, May 31, 2007 and June 28, 2006

Custodian: Glenn Turteltaub, Township Clerk

GRC Complaint Filed: May 21, 2007

Background

October 31, 2007

Government Records Council's ("Council") Interim Order. At its October 31, 2007 public meeting, the Council considered the October 24, 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 No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq. (Lyndhurst, NJ).

1. The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records. Additionally, the Accountant’s alleged hectic tax season schedule is not a lawful basis for a delay in access to requested records, and as such, the Custodian has not carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The GRC does not have jurisdiction over the accuracy of the records’ content pursuant to N.J.S.A. 47:1A-7.b. and Chaka Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).
4. Because the Custodian violated N.J.S.A. 47:1A-5.i. and because the Custodian did not provide the Complainant with all of the records responsive until forty eight (48) business days following the date on which the Custodian stated the records would be provided, and because the Custodian has not carried his burden of proving a lawful denial of access to the requested records, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

November 15, 2007

Council’s Interim Order distributed to the parties.

November 20, 2007

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

March 3, 2008

Letter from Complainant to GRC and OAL. The Complainant states that he is satisfied with the GRC’s finding that the Custodian’s actions in response to the OPRA request subject of this complaint were improper under OPRA. The Complainant states that he does not require a finding that the Custodian knowingly and willfully violated OPRA and thus withdraws his complaint.

Analysis

The Complainant voluntarily withdrew his complaint in a letter to the GRC dated March 3, 2008, therefore no analysis is needed.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant has voluntarily withdrawn this complaint in a letter to the GRC dated March 3, 2008.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 19, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

October 31, 2007 Government Records Council Meeting

Larry Kohn
Complainant

Complaint No. 2007-124

v.

Township of Livingston Library (Essex)
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council (“Council”) considered the October 24, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council unanimously adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records. Additionally, the Accountant’s alleged hectic tax season schedule is not a lawful basis for a delay in access to requested records, and as such, the Custodian has not carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The GRC does not have jurisdiction over the accuracy of the records’ content pursuant to N.J.S.A. 47:1A-7.b. and Chaka Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).
4. Because the Custodian violated N.J.S.A. 47:1A-5.i. and because the Custodian did not provide the Complainant with all of the records responsive until forty eight (48) business days following the date on which the Custodian stated the records would be provided, and because the Custodian has not carried his burden of proving a lawful denial of access to the requested records, it is possible that the Custodian’s actions were intentional and deliberate, with



knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 31st Day of October, 2007

Vincent Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman
Government Records Council

Decision Distribution Date: November 15, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2007-124

v.

**Township of Livingston Library (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. Any documentation confirming that the fundraising campaign was anticipated at the time grant appeal to the State was filed (i.e. Library Board resolution, appropriation in budget, etc.)
2. Records indicating the funds raised to date
3. Records showing purchases/commitments against funds raised to date
4. Specifications, model number, quality, etc. for items/services that will be purchased, if any, when funds are raised
5. Accounting of status of \$650,985 commitment of June 9, 2004 from Building Reserve Fund (i.e. amount spent, outstanding purchase orders, Board of Library approvals, remaining balance)
6. Accounting of status of \$300,000 commitment of June 9, 2004 from Special Projects Fund (i.e. amount spent, outstanding purchase orders, Library Board approvals, remaining balance)
7. Analysis/accounting which shows current balance of Board Reserve Fund and Special Projects Fund that has not been committed to Library Construction Project

Request Made: March 19, 2007

Response Made: April 2, 2007, April 20, 2007, May 31, 2007 and June 28, 2006

Custodian: Glenn Turteltaub, Township Clerk

GRC Complaint Filed: May 21, 2007

Background

March 19, 2007

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

March 22, 2007

Library staff receives Complainant's OPRA request.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner (Lyndhurst, NJ).

March 26, 2007

Custodian receives Complainant's OPRA request.

April 2, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that additional time is needed to research the Complainant's request. The Custodian states that the records responsive are anticipated to be available by April 20, 2007. Additionally, the Custodian states that all OPRA requests should be submitted to the Township Clerk's office as he is the Custodian of records. [The Complainant's OPRA request was submitted to the Library].

April 9, 2007

Letter from Complainant to Custodian. The Complainant states that he will wait to review the requested records until everything is assembled. The Complainant requests that the Custodian identify if additional time is needed to locate each record or create the information requested.

April 20, 2007

Letter from Custodian to Complainant. The Custodian states that the Township will advise the Complainant when the assembled records are available for review. The Custodian states that the Township only provides existing records and does not create information in response to a request, which the Custodian asserts is consistent with the Township's obligations under OPRA. Additionally, the Custodian states that the library records could not be obtained from the Township's Accountant due to his tax season schedule and that additional time is needed to meet with the Accountant (said meeting is scheduled for April 26, 2007). The Custodian states that the Township anticipates responding to the Complainant's request the following week.

May 21, 2007

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

- Complainant's OPRA request dated March 19, 2007
- Custodian's response to the OPRA request dated April 2, 2007
- Letter from Complainant to Custodian dated April 9, 2007
- Letter from Custodian to Complainant dated April 20, 2007³

The Complainant states that he submitted his OPRA request on March 19, 2007 to the Livingston Library via regular mail. The Complainant states that he received a response from the Clerk's Office dated April 2, 2007 indicating that the Township needed additional time to respond to the request and that all OPRA requests should be submitted to the Township Clerk. The Complainant states that via letter dated April 9, 2007 he asked the Custodian if additional time was needed to locate the requested records or

³ An additional record was submitted with the Complainant's Denial of Access Complaint; however, said record is not relevant to this complaint.
Larry A. Kohn v. Township of Livingston Library (Essex), 2007-124 – Findings and Recommendations of the Executive Director 2

create such records. The Complainant states that he received a response from the Clerk's office dated April 20, 2007 indicating that the Custodian only provides existing records and does not create records in response to OPRA requests. The Complainant also states that said response from the Clerk's Office also indicated that additional time was needed to fulfill the request because a meeting was scheduled with the Accountant on April 26, 2007. The Complainant states that on April 23, 2007 he had a conversation with the Custodian in which the Custodian confirmed that the requested records would not be available until after his meeting with the Accountant on April 26, 2007. The Complainant states that he does not understand why the Accountant is necessary to fulfill his request. Further, the Complainant states that to date, he has received no information or communication from the Custodian. The Custodian also states that two (2) months have passed since he submitted his OPRA request.

May 31, 2007

Custodian's subsequent response to the Complainant's OPRA request. The Custodian states that the documents responsive to the Complainant's request are available for review and if requested, photocopying, with the exception of the Complainant's request for records showing purchases/commitments against funds raised to date; the Custodian states that there are no records responsive to this portion of the request. The Custodian also states that the cost for duplication of the sixteen (16) pages responsive to the request is \$10.50.

June 11, 2007

Letter from Complainant to Custodian. The Complainant states that he received the records responsive to his request on June 8, 2007. The Complainant states that the Custodian indicated that there are sixteen (16) pages responsive, but the Complainant asserts that he only received twelve (12) pages. The Complainant contends that the closed session minutes dated June 14, 2004 do not satisfy his request for documentation confirming that the fundraising campaign was anticipated at the time the grant appeal was filed because the grant application was filed in early 2001. The Complainant asks whether anything has been purchased to date since the records provided did not include any purchase orders. Additionally, the Complainant states that the Custodian did not provide any information regarding the account status of \$650,985 and \$300,000 per Library bid resolutions. Further, the Complainant states that management elected to omit substantially all the disclosures and statements of cash flows from the accounting of the building reserve fund and special projects fund.

June 12, 2007

Offer of Mediation sent to both parties.

June 14, 2007

The Complainant declines mediation. The Complainant asserts that the Township has not acted in good faith, has not provided the records responsive to the request, has not responded in a timely fashion and has not complied with OPRA's provisions. The Complainant points out that the Custodian stated that the Township would not create records in response to an OPRA request. However, the Complainant contends that it appears that the Custodian did create records in response to his request because the

Custodian provided an accounting statement for the period ending March 31, 2007, when the Complainant's request was dated March 19, 2007.

Additionally, the Complainant states that the Accountant's cover letter [dated March 9, 2007 addressed to the Library trustees] states that:

[m]anagement has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and the statement of cash flows were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

The Complainant asserts that the record provided was a deliberate attempt to deny a substantial amount of requested information, which the Complainant contends should be available.

June 20, 2007

Request for the Statement of Information sent to the Custodian.

June 28, 2007

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

- Livingston Library Current Fund Financial Statement for the period ending February 28, 2007
- Letter from Library Accountant to Library Trustees dated March 9, 2007
- Complainant's OPRA request dated March 19, 2007
- Custodian's response to the Complainant's OPRA request dated April 2, 2007
- Letter from Complainant to Custodian dated April 9, 2007
- Letter from Custodian to Complainant dated April 20, 2007
- Custodian's subsequent response to the Complainant's request dated May 31, 2007
- Livingston Public Library's New Jersey Construction Bond Library Grant Application

The Custodian certifies that the Library received the Complainant's OPRA request on March 22, 2007; however, the Custodian certifies that he did not receive said request until March 26, 2007 (two (2) business days following the Library's receipt of said request). The Custodian certifies that he provided a written response to the Complainant on April 2, 2007 (five (5) business days following the Custodian's receipt of the request) advising that he needed additional time to fulfill the request because the requested records are maintained by the Accountant, who has a hectic tax season schedule. The Custodian certifies that he estimated a target date for April 20, 2007 to have the requested records available. The Custodian certifies that he received a letter from the Complainant dated April 9, 2007 in which the Complainant agreed to wait to review the requested records until everything was assembled. The Custodian also

certifies that via letter dated April 23, 2007⁴ he notified the Complainant that the meeting with the Library Accountant was postponed until April 26, 2007 due to the Accountant's tax season schedule. The Custodian certifies that as soon as the Accountant provided the records to the Custodian, the Custodian advised the Complainant of the records' availability via letter dated May 31, 2007.

The Custodian asserts that he responded to the Complainant's request within seven (7) business days from receipt of such and explained the Township's need for additional time to the Complainant. The Custodian certifies that he has provided the Complainant with every responsive record in the Township's possession. The Custodian certifies that during the course of this complaint, the Custodian was made aware that the 2001 Livingston Public Library grant application anticipated fundraising and that said application is responsive to number one (1) of the records relevant to this complaint. The Custodian certifies that he has attached a copy to his SOI labeled "Exhibit A" (which was forwarded to the Complainant). Additionally, the Custodian states that the Complainant takes issue with the Livingston Public Library Current Fund Financial Statement ending March 31, 2007, which was provided in response to the Complainant's OPRA request. The Custodian certifies that said record was provided to the Complainant so as to provide the most up to date information at the time the records were provided. However, the Custodian certifies that he has attached the February 28, 2007 statement labeled "Exhibit B", which was the most up to date information at the time of the Complainant's request. Further, the Custodian states that the Complainant takes issue with the accountant's cautionary boilerplate language appearing in the Accountant's introductory letter (which is a record responsive to the Complainant's request, not a letter addressed to the Complainant himself). The Custodian certifies that said record is an internal record intended for ease of use by library staff and trustees and not a formal financial statement. The Custodian also certifies that the Complainant does not specifically identify any records he claims had not been provided, but rather raises questions about the implication of the words or numbers contained in the responsive records.

July 3, 2007

The Complainant's response to the Custodian's SOI. The Complainant asserts that he has not received records relating to the \$650,985 and \$300,000 commitments of June 9, 2004. The Complainant states that he notified the Custodian of said deficiency in a letter dated June 11, 2007. The Complainant asserts that the closed session minutes dated June 14, 2004 do not satisfy the Complainant's request for documentation about the fund raising campaign at the time the grant appeal was filed. The Complainant states that he notified the Custodian of such in the same letter dated June 11, 2007. Additionally, the Complainant states that Exhibit A of the Custodian's Statement of Information is responsive to the Complainant's request. The Complainant states that this record was only provided after filing a Denial of Access Complaint.

The Complainant contends that he never received a letter from the Custodian dated April 23, 2007, as asserted by the Custodian in his Statement of Information. The Complainant also contends that the Accountant's statement for the period ending February 28, 2007, which is included in the Custodian's Statement of Information as

⁴ Actual date of letter is April 20, 2007.

Exhibit B, was the most recent available statement at the time of the Complainant's request and was withheld because the Custodian suspected that the Complainant would be critical of said record.

Further, the Complainant states that the Custodian advised him on April 20, 2007 that the requested records could not be obtained until after a meeting with the Accountant on April 26, 2007. The Complainant states that he filed his Denial of Access Complaint after failing to hear from the Complainant within a reasonable period of time following the April 26, 2007 meeting. The Complainant states that the Custodian fails to explain the delay in the April 26, 2007 meeting to the Custodian's letter dated May 31, 2007 in which the Custodian makes the requested records available to the Complainant. The Complainant contends that such a time span is not reasonable. Additionally, the Complainant asserts that a delay in access to the requested records due to the alleged construction and tax season are not lawful reasons for a delay in access.

July 9, 2007

Letter from Custodian to Complainant. The Custodian states that he erroneously listed a letter dated April 23, 2007 in his Statement of Information. The Custodian states that the correct date of said letter is April 20, 2007. The Custodian encloses a copy of said letter.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA 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 ... If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall

make arrangements to promptly make available a copy of the record...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA also 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.

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*...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.” (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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

N.J.S.A. 47:1A-5.i. states that a custodian must grant or deny access to the requested record(s) as soon as possible but not later than seven (7) business days after receiving the request. As also prescribed under N.J.S.A. 47:1A-5.i., if the requested record is temporarily unavailable, the custodian must advise the requestor when the record can be made available. If the record is not made available by that time, access shall be deemed denied. Additionally, N.J.S.A. 47:1A-5.g. provides that if the requested record is temporarily unavailable because it is in use or in storage, the custodian must advise the requestor and make arrangements to promptly make a copy of the record available to the requestor.

The Complainant states that he submitted his OPRA request on March 19, 2007 to the Livingston Library via regular mail. The Custodian certifies that the Library received the Complainant’s OPRA request on March 22, 2007; however, the Custodian certifies that he did not receive said request until March 26, 2007 (two (2) business days following the Library’s receipt of said request). The Custodian certifies that he provided a written

response to the Complainant on April 2, 2007, the fifth (5th) business day following receipt of said request, advising that he needed additional time to fulfill the request because the requested records were maintained by the Accountant, who has a hectic tax season schedule. In said letter, the Custodian estimated that the requested records would be available by April 20, 2007. In a letter to the Custodian dated April 9, 2007, the Complainant agreed to wait for the requested records to be assembled.

Therefore, the Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

However, in a letter to the Complainant dated April 20, 2007, the Custodian advised the Complainant that the records would be provided the week following the Custodian's meeting with the Accountant on April 26, 2007 due to the Accountant's tax season schedule. Nevertheless, the Custodian did not provide the Complainant with any of the requested records until May 31, 2007.

Therefore, because the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of access to the records. Additionally, the Accountant's alleged hectic tax season schedule is not a lawful basis for a delay in access to requested records under OPRA, and as such, the Custodian has not carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Whether the Government Records Council has jurisdiction over the content of records disclosed pursuant to N.J.S.A. 47:1A-7.b.?

OPRA states that:

"[t]he Government Records Council shall...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian..." N.J.S.A. 47:1A-7.b.

The Complainant states that the Accountant's cover letter [dated March 9, 2007 addressed to the Library trustees] states that:

[m]anagement has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and the statement of cash flows were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

The Custodian certifies that he has provided the Complainant with every responsive record in the Township's possession. The Custodian made said records available to the Complainant on May 31, 2007 with the exception of two (2) records

responsive to the request. The Custodian certifies that during the course of this complaint, the Custodian was made aware that the 2001 Livingston Public Library grant application anticipated fundraising and that said application is responsive to number one (1) of the records relevant to this complaint. The Custodian certifies that he attached a copy of said record to his SOI (which was forwarded to the Complainant on June 28, 2007). Additionally, the Custodian certifies that he attached the Livingston Public Library Current Fund's February 28, 2007 statement to his SOI (which was forwarded to the Complainant on June 28, 2007), which was the most up to date information at the time of the Complainant's request.⁵

The Complainant asserts that the record provided was a deliberate attempt to deny a substantial amount of requested information, which the Complainant contends should be available. The Custodian certifies that said record is an internal record intended for ease of use by library staff and trustees and not a formal financial statement.

In Chaka Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that "...the Council does not oversee the content of documentation. The Council does oversee the disclosure and non-disclosure of documents. In this case, the Complainant has received the requested document and the Custodian has certified that the requested record has been released."

This instant complaint is similar to Kwanzaa in that the Custodian certifies that he provided the Complainant with all records responsive to the Complainant's request. As such, the GRC does not have jurisdiction over the accuracy of the records' content pursuant to N.J.S.A. 47:1A-7.b. and Chaka Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).

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

⁵ The Custodian certifies that the Livingston Public Library Current Fund Financial Statement ending March 31, 2007 was provided in response to the Complainant's OPRA request so as to provide the most current information at the time the records were provided.
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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, 107 (App. Div. 1996)).

The evidence of record indicates that the Custodian violated OPRA by failing to provide the Complainant with the requested records by the date established by the Custodian and agreed by the Complainant pursuant to N.J.S.A. 47:1A-5.i. The Custodian provided the Complainant with some records responsive to the request twenty eight (28) business days following the date established by the Custodian. Further, the Custodian provided the Complainant with two (2) additional records responsive to the request forty eight (48) business days following the date established by the Custodian.

Therefore, because the Custodian violated N.J.S.A. 47:1A-5.i. and because the Custodian did not provide the Complainant with all of the records responsive until forty eight (48) business days following the date on which the Custodian stated the records would be provided, and because the Custodian has not carried his burden of proving a lawful denial of access to the requested records, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of

access to the records. Additionally, the Accountant's alleged hectic tax season schedule is not a lawful basis for a delay in access to requested records, and as such, the Custodian has not carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

3. The GRC does not have jurisdiction over the accuracy of the records' content pursuant to N.J.S.A. 47:1A-7.b. and Chaka Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).
4. Because the Custodian violated N.J.S.A. 47:1A-5.i. and because the Custodian did not provide the Complainant with all of the records responsive until forty eight (48) business days following the date on which the Custodian stated the records would be provided, and because the Custodian has not carried his burden of proving a lawful denial of access to the requested records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

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Approved By:

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Executive Director

October 24, 2007