



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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**FINAL DECISION**

**April 30, 2008 Government Records Council Meeting**

Allan Johnson  
Complainant

Complaint No. 2007-200

v.

Borough of Oceanport (Monmouth)  
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council ("Council") considered the April 23, 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. Because the Custodian responded to the Complainant's July 3, 2007 OPRA request within the statutorily mandated seven (7) business days providing all records responsive, there is no unlawful denial of access. See Burns v. Borough of Collingswood, GRC Complaint No. 2004-190 (April 2005).
2. The e-mails provided by the Complainant contain four (4) separate e-mails between Councilwoman Kahle and Greg Schussler. Two (2) of these e-mails fall within the requested time period of May 3, 2007 to July 3, 2007, but merely discuss the arrangement of a lunch at which the newly hired borough engineer may meet Greg Schussler. Therefore, there is insufficient evidence to determine whether these e-mails are responsive to the Complainant's July 3, 2007, OPRA request.

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 30<sup>th</sup> Day of April, 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, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: May 13, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 30, 2008 Council Meeting**

**Allan Johnson<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-200**

v.

**Borough of Oceanport (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All correspondence of Councilwoman Elyn Kahle including all e-mails and personal e-mails conducting Borough business with anyone with:

1. New Jersey Department of Environmental Protection (“NJDEP”), including Greg Schussler.
2. Assemblywoman Jennifer Beck.
3. Individuals affiliated with Clean Ocean Action.
4. Oceanport Water Watch, Monmouth County Board of Health.
5. The New Jersey Sports and Exposition Authority (“NJSEA”), regarding water quality and testing, etc.
6. Asbury Park Press reporters regarding Oceanport business from May 1, 2007 to present (July 3, 2007).

**Request Made:** July 3, 2007

**Response Made:** July 5, 2007

**Custodian:** Kimberly Jungfer

**GRC Complaint Filed:** August 14, 2007

**Background**

**July 3, 2007**

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.

**July 3, 2007**

E-mail from the Custodian to Councilwoman Kahle. The Custodian informs Councilwoman Kahle that an OPRA request has been received. The Custodian further requests that Councilwoman Kahle review the request and advise the Custodian whether Councilwoman Kahle is in possession of any records.

**July 3, 2007**

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

<sup>2</sup> Represented by Scott C. Arnette, Esq. (Shrewsbury, NJ).

E-mail from Councilwoman Kahle to the Custodian. Councilwoman Kahle states that she copies the Custodian on all borough business. Councilwoman Kahle states that she has recently been conducting borough business mostly by telephone.

### **July 5, 2007**

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian grants access to three (3) records relevant to the Complainant's request:

- E-mail from Councilwoman Kahle to the Custodian dated May 14, 2007 pertaining to clean communities.
- E-mail from Councilwoman Kahle copying the Custodian dated June 9, 2007 pertaining to Monmouth Park.
- E-mail between Councilwoman Kahle to the Custodian dated July 3, 2007 pertaining to the Complainant's July 3, 2007 OPRA request.

### **August 14, 2007**

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

- Complainant's OPRA request dated July 3, 2007.
- Three (3) records responsive to the Complainant's July 3, 2007 OPRA request.
- Memo from Greg Schussler to the Complainant dated August 6, 2007 attaching an e-mail exchange between Greg Schussler and Councilwoman Kahle beginning on June 12, 2007 and ending on July 19, 2007.<sup>3</sup>

The Complainant states that he submitted an OPRA request on July 3, 2007. The Complainant states that this request was filed in response to a statement made by Councilwoman Kahle at two (2) separate meetings regarding correspondence with Oceanport Water Watch committee persons, NJDEP and Assemblywoman Jennifer Beck.

The Complainant states that the Custodian responded in writing on July 5, 2007 and provided three (3) e-mails responsive to the request. The Complainant also asserts that he was informed that Councilwoman Kahle copies the Custodian on all Borough business. The Complainant also states that, in response to a separate OPRA request to Greg Shussler, the Complainant received an e-mail between Councilwoman Kahle and Greg Shussler that was not provided by the Custodian in response to the request relevant to this complaint.

### **September 19, 2007**

Offer of Mediation sent to both parties. The Complainant declines mediation.<sup>4</sup>

### **September 25, 2007**

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<sup>3</sup> The e-mails pertained to a lunch meeting, but do not specifically identify Borough business until the July 19, 2007 e-mail.

<sup>4</sup> The Custodian returned a signed "Agreement to Mediate" on September 20, 2007.

Request for the Statement of Information sent to the Custodian.

**October 3, 2007**

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

- Complainant's OPRA request dated July 3, 2007.
- Three (3) records responsive to the Complainant's July 3, 2007 OPRA request.
  - E-mail from Councilwoman Kahle to the Custodian pertaining to clean communities, dated May 14, 2007.
  - E-mail from Councilwoman Kahle copying the Custodian pertaining to Monmouth Park, dated June 9, 2007.
  - E-mail from Councilwoman Kahle to the Custodian pertaining to the Complainant's July 3, 2007 OPRA request, dated July 3, 2007.

The Custodian certifies that her search for the requested records involved searching the Borough's records and also providing a copy of the Complainant's OPRA request to Councilwoman Kahle.

The Custodian states that she received the Complainant's OPRA request on July 3, 2007. The Custodian states that she initially searched the Borough files and provided a copy of the Complainant's OPRA request to Councilwoman Kahle. The Custodian states that she received an e-mail from Councilwoman Kahle dated July 3, 2007 on July 5, 2007 asserting that any Borough business is forwarded to the Custodian. The Custodian states that three (3) e-mails were provided to the Complainant and that the Complainant was advised that no other records responsive existed.

The Custodian asserts that based on Councilwoman Kahle's statement that she has recently been conducting business via telephone rather than e-mail, the Custodian contends that all records responsive were provided to the Complainant.

**February 28, 2008**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification from Councilwoman Kahle addressing the following:

1. The search Councilwoman Kahle undertook in order to identify if she possessed any records responsive to the Complainant's July 3, 2007 OPRA request.
2. Whether Councilwoman Kahle subsequently discovered any records responsive to the Complainant's July 3, 2007 OPRA request?

**March 5, 2008**

E-mail from the Custodian to the GRC attaching Councilwoman Kahle's legal certification.

Councilwoman Kahle certifies that she was made aware of the Complainant's OPRA request on July 3, 2007. Councilwoman Kahle further certifies that she conducted a search of e-mails on the computer at her residence. Councilwoman Kahle certifies that the computer check was for e-mails sent to the entities listed in the Complainant's request. Councilwoman Kahle certifies that she did not search all received mail to see if

any of the entities had sent e-mail to Councilwoman Kahle during the requested timeframe and, further, that she was not aware she could do so. Councilwoman Kahle certifies that she notified the Custodian upon completion of the computer search that no records were found.

Councilwoman Kahle further certifies that a majority of the communications with the requested entities generally do not take place using e-mail. Councilwoman Kahle certifies that she attempts to communicate with representatives of entities, including those listed in the Complainant's OPRA request, by telephone. Councilwoman Kahle also certifies that she believes her actions and those of the Custodian represent a good faith attempt to locate records responsive to the Complainant's OPRA request and that the response received by the Complainant was a complete response.

Finally, Councilwoman Kahle certifies that since the filing of this complaint with the GRC, no additional records responsive to the Complainant's July 3, 2007 OPRA request have been located.<sup>5</sup>

### 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 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

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<sup>5</sup> Councilwoman Kahle further certifies that records disclosed to the Complainant in separate requests, including records which may be the subject of Johnson v. Borough of Oceanport, GRC Complaint No. 2007-202, may have contained e-mails responsive to this complaint. The GRC cannot confirm this statement to be factual; moreover, this fact is not relevant to the complaint now before the GRC because OPRA provides that each complaint is individually adjudicated within the totality of the circumstances. N.J.S.A. 47:1A-7.e. See Hardwick v. NJ Dept. of Transportation, GRC # 2007-164 (February 2008).

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

In this complaint, the Complainant asserts that the e-mail he received from Greg Schussler should also have been disclosed by Councilwoman Kahle in response to the Complainant’s OPRA request. Conversely, the Custodian asserts, based on Councilwoman Kahle’s response, that the Custodian provided all records responsive to the Complainant’s OPRA request.

The Custodian responded in writing on the first (1<sup>st</sup>) day following receipt of the request disclosing three (3) records to the Complainant. Additionally, both Councilwoman Kahle and the Custodian certify that all records responsive were provided to the Complainant. Therefore, because the Custodian responded to the Complainant’s July 3, 2007 OPRA request within the statutorily mandated seven (7) business days providing all records responsive, there is no unlawful denial of access. See Burns v. Borough of Collingswood, GRC Complaint No. 2004-190 (April 2005).

Additionally, the e-mails provided by the Complainant as part of the Denial of Access Complaint contain four (4) separate e-mails between Councilwoman Kahle and Greg Schussler. Two (2) of these e-mails fall within the requested time period of May 3, 2007 to July 3, 2007, but merely discuss the arrangement of a lunch at which the newly hired borough engineer may meet Greg Schussler. Therefore, there is insufficient evidence to determine whether these e-mails are responsive to the Complainant’s July 3, 2007, OPRA request.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian responded to the Complainant's July 3, 2007 OPRA request within the statutorily mandated seven (7) business days providing all records responsive, there is no unlawful denial of access. See Burns v. Borough of Collingswood, GRC Complaint No. 2004-190 (April 2005).
2. The e-mails provided by the Complainant contain four (4) separate e-mails between Councilwoman Kahle and Greg Schussler. Two (2) of these e-mails fall within the requested time period of May 3, 2007 to July 3, 2007, but merely discuss the arrangement of a lunch at which the newly hired borough engineer may meet Greg Schussler. Therefore, there is insufficient evidence to determine whether these e-mails are responsive to the Complainant's July 3, 2007, OPRA request.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008