



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

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

Allan Johnson  
Complainant

Complaint No. 2007-201

v.

Borough of Oceanport (Monmouth)  
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 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 granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days even though no records responsive to the request existed, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (October 2007).
2. Although the Custodian did respond on the fifth (5<sup>th</sup>) business day following receipt of the Complainant’s request, she failed to do so in writing as required by OPRA. However, because the Custodian certifies that no records responsive to the Complainant’s request exist, 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 actions appear to be 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 26<sup>th</sup> 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 31, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2007-201**

v.

**Borough of Oceanport<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All internal and external correspondence of Councilwoman Ellynn Kahle, including all e-mails regarding the Building Department, the Front Office staff and Business Administrators, conducting Borough business from March 9, 2007 to March 27, 2007.

**Request Made:** March 26, 2007

**Response Made:** April 2, 2007

**Custodian:** Kimberly Jungfer

**GRC Complaint Filed:** August 25, 2007

**Background**

**March 26, 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.

**March 26, 2007**

Memo from the Custodian to Councilwoman Ellynn Kahle. The Custodian states that she received the Complainant's OPRA request and has no records responsive. The Custodian requests that Councilwoman Kahle provide any records responsive to the Complainant's request by April 2, 2007. The Custodian finally states that Councilwoman Kahle should also notify the Custodian if she is unable to locate any records responsive.

**April 2, 2007**

Custodian's Response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that no records responsive to the Complainant's request exist.

---

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

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

**August 25, 2007**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated March 26, 2007.

The Complainant states that he submitted an OPRA request to the Custodian on March 26, 2007. The Complainant asserts that Councilwoman Kahle had spoken about such correspondence with the Building Department and Long Branch Building Department at a public meeting.

The Complainant states that the Custodian contacted Councilwoman Kahle who asserted that she had no records responsive to the Complainant’s request.

**September 19, 2007**

Offer of Mediation sent to both parties. The Complainant declines mediation.<sup>3</sup>

**September 25, 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 March 26, 2007.
- Memo from the Custodian to Councilwoman Kahle dated March 26, 2007.

The Custodian certifies that her search for the requested records included a search of the Borough records followed by a memo request to Councilwoman Kahle requesting that Councilwoman Kahle provide any records responsive.

The Custodian states that she received the Complainant’s OPRA request on March 26, 2007. The Custodian states that she searched her files and found no records responsive. The Custodian states that she composed a memo requesting that Councilwoman Kahle provide any records responsive by April 2, 2007 and sent it to Councilwoman Kahle on March 26, 2007. The Custodian states that Councilwoman Kahle verbally responded to the Custodian asserting that no records responsive were located.<sup>4</sup>

The Custodian asserts that she verbally notified the Complainant that no records responsive exist.

**December 13, 2007**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian certify to the following:

- What date did the Custodian verbally respond to the Complainant?

---

<sup>3</sup> The Custodian returns a signed “Agreement to Mediate” on September 20, 2007.

<sup>4</sup> The Custodian does not identify a specific date on which Councilwoman Kahle verbally responded to the Custodian regarding this request.

- Did Councilwoman Kahle later discover and provide any records responsive to the Complainant’s request?

**December 19, 2007**

Legal Certification from the Custodian to the GRC. The Custodian certifies that she responded verbally to the Complainant on April 2, 2007. The Custodian further certifies that Councilwoman Kahle has no records regarding the Complainant’s OPRA request.

**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 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 Custodian responded verbally to the Complainant’s OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request stating that no records responsive to the Complainant’s request exist. 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, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days even though no records responsive to the request existed, as required by N.J.S.A. 47:1A-5.g, and N.J.S.A. 47:1A-5.i, results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (October 2007).

**Whether the Custodian’s deemed denial 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).

Although the Custodian did respond on the fifth (5<sup>th</sup>) business day following receipt of the Complainant’s request, she failed to do so in writing as required by OPRA. However, because the Custodian certifies that no records responsive to the Complainant’s request exist, 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 actions appear to be 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 granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days even though no records responsive to the request existed, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (October 2007).
2. Although the Custodian did respond on the fifth (5<sup>th</sup>) business day following receipt of the Complainant’s request, she failed to do so in writing as required by OPRA. However, because the Custodian certifies that no records responsive to the Complainant’s request exist, 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 actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

March 19, 2008