



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

**JON S. CORZINE**  
*Governor*

**CHARLES A. RICHMAN**  
*Acting Commissioner*

**FINAL DECISION**

**November 4, 2009 Government Records Council Meeting**

Carolyn James  
Complainant

Complaint No. 2007-242

v.

Holmdel Township Board of Education (Monmouth)  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009 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:

1. Because the Custodian failed to simultaneously provide certified confirmation of his compliance with the Council's August 11, 2009 Interim Order to the GRC, the Custodian has not fully complied with the Council's August 11, 2009 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Although the Custodian failed to fully comply with the Council's August 11, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4<sup>1</sup> to the Executive Director, and previously failed to disclose the requested record at the advice of legal counsel, the Custodian provided access to the records responsive to request to the Complainant within the five (5) business days after receipt of the Council's August 11, 2009 Interim Order. 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 he is vested with the legal responsibility of granting and denying access in accordance with the law.

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



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 4<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: November 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

**Carolyn James<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-242**

v.

**Holmdel Township Board of Education  
(Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the most recent lawsuit filed against the Holmdel Board of Education and its former Superintendent, Dr. Maureen Flaherty.

**Request Made:** August 29, 2007

**Response Made:** August 30, 2007

**Custodian:** Michael Petrizzo

**GRC Complaint Filed:** September 28, 2007<sup>3</sup>

**Background**

**August 11, 2009**

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the June 17, 2009 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. Because the agency received the record in the ordinary course of business and maintained a copy of the record, the record is a government record pursuant to N.J.S.A. 47:1A-1.1. Therefore, pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6., the Custodian has unlawfully denied the Complainant access to the record requested because the record requested is a government record as defined by OPRA.
2. Because the record requested is a government record pursuant to N.J.S.A. 47:1A-1.1., the Custodian must disclose the requested record to the Complainant.

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

<sup>2</sup> Represented by Martin Barger, Esq. (Red Bank, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.**
  
4. Although the basis for denying the Complainant’s OPRA request was unlawful, the Custodian’s actions do not rise to a level of a knowing and willful violation of OPRA because the Custodian sought and relied on the legal advice of counsel in denying the Complainant access to the record requested, although that advice was erroneous. See Bart v. City of Patterson Housing Authority, 403 N.J. Super. 609, (App. Div. 2008) (holding that there is no knowing and willful violation of OPRA where the custodian has sought legal counsel). Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

**August 13, 2009**

Council’s Interim Order distributed to the parties.

**August 13, 2009<sup>5</sup>**

Custodian’s response to the Council’s Interim Order. The Custodian Counsel responds on behalf of the Custodian stating that he has provided the Complainant with a copy of the complaint in the matter of William Baranowsky v. Holmdel Township Board of Education, et al.<sup>6</sup>

**Analysis**

**Whether the Custodian complied with the Council’s August 11, 2009 Interim Order?**

On August 11, 2009, the Council ordered the Custodian to disclose the record in question and to provide certified compliance of same. The Custodian’s Counsel has submitted a letter stating that he has provided a copy of the record in question to the Complainant.

However, the Council’s Interim Order also required the Custodian to “provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the

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<sup>4</sup> Pursuant to N.J. Court Rule 1:4-4, the required certifications language is as follows: “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

<sup>5</sup> The GRC received the Custodian’s response on August 17, 2009.

<sup>6</sup> Neither party provided the docket number for the lawsuit in question.

Executive Director.” Although the Custodian has disclosed the record as ordered, the Custodian has failed to provide certified compliance with the Council’s Order.

In Jung & O’Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009), the Council’s December 18, 2008 Interim Order ordered the Custodian to comply with the Administrative Law Judge’s (“ALJ”) decision to provide records responsive:

“within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.”

The Custodian complied with the ALJ’s order, but failed to provide certified confirmation to the GRC within five (5) business days. The GRC held that the Custodian failed to fully comply with the Council’s Interim Order.

Therefore, because the Custodian failed to simultaneously provide certified confirmation of his compliance with the Council’s August 11, 2009 Interim Order to the GRC, the Custodian has not fully complied with the Council’s August 11, 2009 Interim Order pursuant to Jung & O’Halloran, *supra*.

**Whether the Custodian’s failure to fully comply with the Council’s August 11, 2009 Interim Order 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 failed to fully comply with the Council's August 11, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4<sup>7</sup> to the Executive Director, and previously failed to disclose the requested record at the advice of legal counsel, the Custodian did provide access to the records responsive to request to the Complainant within the five (5) business days after receipt of the Council's August 11, 2009 Interim Order. 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 he 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. Because the Custodian failed to simultaneously provide certified confirmation of his compliance with the Council's August 11, 2009 Interim Order to the GRC, the Custodian has not fully complied with the Council's August 11, 2009 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Although the Custodian failed to fully comply with the Council's August 11, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4<sup>8</sup> to the Executive Director, and previously failed to disclose the requested record at the advice of legal counsel, the Custodian provided access to the records responsive to request to the Complainant within the five (5) business days after receipt of the Council's August 11, 2009 Interim Order. 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 he is vested with the legal responsibility of granting and denying access in accordance with the law.

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

INTERIM ORDER

August 11, 2009 Government Records Council Meeting

Carolyn James  
Complainant

Complaint No. 2007-242

v.

Holmdel Township Board of Education (Monmouth)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the June 17, 2009 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 agency received the record in the ordinary course of business and maintained a copy of the record, the record is a government record pursuant to N.J.S.A. 47:1A-1.1. Therefore, pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6., the Custodian has unlawfully denied the Complainant access to the record requested because the record requested is a government record as defined by OPRA.
2. Because the record requested is a government record pursuant to N.J.S.A. 47:1A-1.1., the Custodian must disclose the requested record to the Complainant.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.**
4. Although the basis for denying the Complainant's OPRA request was unlawful, the Custodian's actions do not rise to a level of a knowing and willful violation of OPRA because the Custodian sought and relied on the legal advice of counsel in denying the Complainant access to the record requested, although that advice was erroneous. See

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."





Bart v. City of Patterson Housing Authority, 403 N.J. Super. 609, (App. Div. 2008) (holding that there is no knowing and willful violation of OPRA where the custodian has sought legal counsel). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Interim Order Rendered by the  
Government Records Council  
On The 11<sup>th</sup> Day of August, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: August 13, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**Carolyn James<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-242**

v.

**Holmdel Township Board of Education (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the most recent lawsuit filed against the Holmdel Board of Education and its former Superintendent, Dr. Maureen Flaherty.

**Request Made:** August 29, 2007<sup>3</sup>

**Response Made:** August 30, 2007

**Custodian:** Michael Petrizzo

**GRC Complaint Filed:** September 28, 2007<sup>4</sup>

**Background**

**August 29, 2007**

Complainant's letter request. The Complainant requests the record relevant to this complaint listed above in a letter addressed to the Public Information Officer.<sup>5</sup> The Complainant states that although she does not know the name of the plaintiff in the case, the lawsuit involves a claim of defamation of character. The Complainant states that the plaintiff is or was a school district employee who believed that his rights were violated when he was accused of writing a derogatory note and leaving it on a car parked in the school parking lot. The Complainant requests that she be advised via telephone of the copying cost.

**August 30, 2007**

Custodian's response to the letter request. The Custodian's Counsel responds in writing to the Complainant's request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian's Counsel states that under the circumstances, the Complainant's request falls under the Freedom of Information Act. The Custodian's

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

<sup>2</sup> Represented by Martin Barger, Esq. (Red Bank, NJ).

<sup>3</sup> There is a discrepancy between the date alleged by the Complainant and the date on the documentation received by the GRC. The Complainant alleges that her request was sent on August 17, 2007. However, the fax header on the OPRA request received by the Custodian indicates a date of August 29, 2007.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian also addresses this letter to the District Clerk/Freedom of Information Officer. The Complainant's letter request was forwarded to Michael Petrizzo, the custodian of records for the Holmdel Board of Education and the Township's Attorney.

Counsel also states that access to the requested record is denied because the record requested is not a government record. The Custodian's Counsel suggests that the Complainant request a copy of the lawsuit from the plaintiff's attorney or the Clerk of the Superior Court of New Jersey in Freehold.

### **September 28, 2007**

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

- Complainant's letter request (date is disputed);
- Custodian's response to the letter request dated August 30, 2007.

The Complainant states that on or about August 17, 2007, she requested a copy of a lawsuit filed against the Holmdel Township School District ("Township") and its Superintendent, Dr. Maureen Flaherty. The Complainant states that she was instructed to provide an official written OPRA request. The Complainant contends that although she lacked the name of the plaintiff in the lawsuit she sought, the record she requested was sufficiently identifiable from the description provided. The Complainant further contends that the request was forwarded to the Township Attorney, Martin Barger. The Complainant alleges that in a telephone conversation with Mr. Barger, the Complainant was told that because the record was not generated by the Township, it was not a government record subject to OPRA and it would not be released to the Complainant. The Complainant also states that she received a written response to her request denying access to the requested record for the reason stated above.

The Complainant contends that if the Township has the record or the record is in the possession of one of its legal representatives and the record is not otherwise exempt from disclosure, the record should be released. The Complainant requests that if the Custodian wrongfully denied the Complainant access to the requested record, the GRC use this incident to educate the Township regarding its OPRA responsibilities.

### **October 25, 2007**

Letter from the GRC to the Custodian. The GRC states that it has received a Denial of Access Complaint filed against the Custodian. The GRC states that the Complainant is able to approximate the date of the OPRA request as August 17, 2007. Additionally, the GRC states that in the August 30, 2007 response, the Custodian stated that the record sought by the Complainant is not an official record of the Township and provided the Complainant with the contact information for acquiring a copy of the requested record from Charles Uliano, Esq. (the plaintiff's attorney). The GRC requests that the Custodian provide the GRC with a legal certification by Wednesday, October 31, 2007, stating the date the OPRA request was received and whether any records responsive to the Complainant's OPRA request exist.

### **October 25, 2007**

Letter certification from the Custodian's Counsel to the GRC. The Custodian's Counsel acknowledges receipt of the letter dated October 25, 2007. The Custodian's Counsel certifies that his files do not indicate when the Complainant's OPRA request was

received but he does not object to the August 17, 2007 date proffered by the Complainant.

The Custodian's Counsel also certifies that it is his opinion that the lawsuit is not a record of the Township. The Custodian's Counsel further certifies that this lawsuit is a record of the plaintiff and the Superior Court of New Jersey, where it was filed. The Custodian's Counsel certifies that he did not accept the lawsuit and thus did not make it an official Township record.

**November 14, 2007**

Request for the Statement of Information sent to the Custodian.

**November 20, 2007**

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

- Complainant's letter request (date disputed);
- Custodian's response to the letter request dated August 30, 2007.

The Custodian certifies that the Complainant was denied access to the record requested because it is not a government record subject to OPRA. The Custodian also certifies that the Custodian did not receive an OPRA request form from the Complainant. The Custodian states that he received the definition of a government record from the Township Attorney. The Custodian states that the original record was sent to the Township's insurance carrier for defense purposes and a copy of the record was maintained by the Township solely for informational purposes. The Custodian further states that a copy of the record was also forwarded to the Township Attorney. The Custodian asserts that the record in question is not confidential but is readily available to the public through the Superior Court of New Jersey. The Custodian states that it was suggested to the Complainant that she petition the court clerk for a copy of the record. The Custodian contends that the Complainant insisted that the Custodian provide the Complainant with a copy of the lawsuit even though the record is not a government record.

**November 27, 2007**

The Complainant's response to the Custodian's SOI. The Complainant states that she does not question the Township's legal right to withhold the record. The Complainant states that she objects to the Township's definition of a government record. In particular, the Complainant disputes the Township's position that a record not generated by the Township is not a government record. The Complainant states that she believes the Custodian's position to be legally erroneous. The Complainant further states that it is her understanding of the statute that if the Custodian had the record he would be required to release it regardless of whether the record was generated by the agency. The Complainant also states that she did not insist that the Custodian provide her with a copy of the record. The Complainant states that she accepted the Custodian's decision and obtained the record elsewhere. The Complainant states that as an advocate for freedom of information legislation nationwide, the Complainant hopes to strengthen the spirit and substance of OPRA by allowing the Township the opportunity to learn from its mistakes.

**May 15, 2008**

Offer of Mediation sent to both parties. The Custodian accepts the Offer of Mediation.

**June 10, 2008**

Letter from the GRC to the Complainant. The GRC requests a response to the Offer of Mediation. The Complainant failed to respond to the Offer of Mediation.

**November 25, 2008<sup>6</sup>**

Letter certification from Martin Barger, Township Attorney. Mr. Barger certifies that the lawsuit he believes to be responsive to the Complainant's request is William Baranowsky v. Holmdel Township Board of Education & Maureen E. Flaherty and Laurie Cancalosi.<sup>7</sup> Mr. Barger further certifies that this lawsuit is related to other lawsuits involving the Township.

**April 8, 2009**

E-mail from the GRC to the Complainant. The GRC asks the Complainant if her request was made pursuant to OPRA.

**April 8, 2009**

E-mail from the GRC to the Custodian. The GRC asks the Custodian whether it was his understanding that the Complainant made her request pursuant to OPRA or to the Freedom of Information Act.

**April 14, 2009**

Letter certification from the Custodian to the GRC. The Custodian certifies that it was his understanding that the Complainant made her request pursuant to OPRA.

**Analysis**

**Whether the Custodian unlawfully denied access to the requested record?**

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*

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<sup>6</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

<sup>7</sup> This is the only information that was provided by the Township Attorney regarding the case caption. Carolyn James v. Holmdel Township Board of Education (Monmouth), 2007-242 – Findings and Recommendations of the Executive Director

*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 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 Complainant submitted a letter requesting a copy of a lawsuit filed against the Township and its former Superintendent, Maureen Flaherty. While the Complainant did not use the official OPRA request form to make her request, the Custodian certified on April 14, 2009 that it was his understanding that the Complainant made her record request pursuant to OPRA. The Custodian denied the Complainant access to the record requested stating that the record requested was not a government record subject to OPRA because it was not generated by the agency.

The Custodian’s assertion that the requested record is not a government record as defined in OPRA is incorrect. OPRA defines a government records as “any paper, written or printed book, document ... 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 ...” N.J.S.A 47:1A-1.1. In the SOI, the Custodian certified that when he received the record in question, he reviewed it, sent the original to the Township Attorney, and maintained a copy.

Because the agency received the record in the ordinary course of business and maintained a copy of the record, the record is a government record pursuant to N.J.S.A. 47:1A-1.1. Therefore, pursuant to N.J.S.A 47:1A-1.1. and N.J.S.A. 47:1A-6., the Custodian has unlawfully denied the Complainant access to the record requested because the record requested is a government record as defined by OPRA. Because the record requested is a government record pursuant to N.J.S.A 47:1A-1.1., the Custodian must disclose the requested record to the Complainant.

**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, 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).

Although the basis for denying the Complainant’s OPRA request was unlawful, the Custodian’s actions do not rise to a level of a knowing and willful violation of OPRA because the Custodian sought and relied on the legal advice of counsel in denying the Complainant access to the record requested, although that advice was erroneous. See Bart v. City of Patterson Housing Authority, 403 N.J. Super. 609, (App. Div. 2008) (holding that there is no knowing and willful violation of OPRA where the custodian has sought legal counsel). Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful denial of access appears negligent and heedless since he 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. Because the agency received the record in the ordinary course of business and maintained a copy of the record, the record is a government record pursuant to N.J.S.A. 47:1A-1.1. Therefore, pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-6., the Custodian has unlawfully denied the Complainant access to the record requested because the record requested is a government record as defined by OPRA.

2. Because the record requested is a government record pursuant to N.J.S.A. 47:1A-1.1., the Custodian must disclose the requested record to the Complainant.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director.**
4. Although the basis for denying the Complainant's OPRA request was unlawful, the Custodian's actions do not rise to a level of a knowing and willful violation of OPRA because the Custodian sought and relied on the legal advice of counsel in denying the Complainant access to the record requested, although that advice was erroneous. See Bart v. City of Patterson Housing Authority, 403 N.J. Super. 609, (App. Div. 2008) (holding that there is no knowing and willful violation of OPRA where the custodian has sought legal counsel). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

June 17, 2009

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<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."