



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

September 27, 2011 Government Records Council Meeting

Stephen Jung
Complainant

Complaint No. 2007-299

v.

Borough of Roselle (Union)
Custodian of Record

Joseph O'Halloran
Complainant

Complaint No. 2007-307

v.

Borough of Roselle (Union)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the August 23, 2011 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 these consolidated complaints should be dismissed because Complainant Stephen Jung withdrew his complaint from the Office of Administrative Law on September 29, 2010 and Complainant Joseph O'Halloran withdrew his complaint from the Office of Administrative Law on April 20, 2011. No further adjudication is required.

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 27th Day of September, 2011



Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

**Stephen Jung¹
Complainant**

GRC Complaint No. 2007-299

v.

**Borough of Roselle (Union)²
Custodian of Records**

**Joseph O'Halloran³
Complainant**

GRC Complaint No. 2007-307⁵

v.

**Borough of Roselle (Union)⁴
Custodian of Records**

Records Relevant to Complaints:

1. Minutes from regular Council meetings held from January 1, 2007 until September 30, 2007
2. Minutes from Council workshops held from January 1, 2007 until September 30, 2007
3. Minutes from all special Council meetings held from January 1, 2007 until September 30, 2007
4. All minutes of the Board of Adjustment meetings held from January 1, 2007 until September 30, 2007
5. All Borough records that relate to the cost of attorney fees and related costs to the Borough that have been generated as a result of the 2006-2007 firing of: the former Borough Administrator Dave Brown, Head of the Department of Public Works Carl Bolles, and UEZ coordinator Cherron Roundtree
6. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of the demotion of the two police officers in 2007
7. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of Mayor

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Weber Dowd Law (West Paterson, NJ).

³ No legal representation listed on record.

⁴ Represented by Kraig M. Dowd, Esq., of Weber Dowd Law (West Paterson, NJ).

⁵ These complaints were combined at the Office of Administrative Law at the request of all parties. Said complaints are identical.

- Smith's refusal to pay various vendors in 2007, including but not limited to M and A Tree
8. All Borough records that pertain to the Summer Camp that was run during the summer 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency
 9. All budget records related to all expenditures of Borough money, including but not limited to any grant dollars and tax dollars spent on the Summer Camp of 2007, including final itemized budget and total expenditures
 10. All budget records related to all expenditures by the Borough, including but not limited to grant money, tax dollars, and money generated by the sale of tickets from the circus that was run during the summer of 2007. Records of what happened to profits made from this event, including the final itemized budget and total final expenditures, incomes and disbursement of profits
 11. Copy of the reorganization plan that was mentioned by Mayor Smith at various Council meetings when he discussed the reason for the firing of the Borough Administrator, and which was referenced in the Dan Burns news article, and given as the reason for the firing of Cherron Roundtree in the letter of termination that she received
 12. Copy of resolution memorializing the "reorganization plan" referenced above
 13. Current bond for Borough Clerk
 14. All Borough records that pertain to the Summer Camp that was run during the summer of 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency⁶

Requests Made: November 1, 2007

Responses Made: November 13, 2007

Custodian: Rhona Bluestein

GRC Complaints Filed: December 3, 2007

Background

August 11, 2009

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the August 4, 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, found that:

1. Because the Chief Financial Officer certified that the Finance Department does not maintain any records responsive to the Complainants' requests and because the Chief Financial Officer provided said certification to the GRC within the extended deadline date, the Chief Financial Officer has complied with the Council's April 29, 2009 Interim Order.

⁶ This request is repetitive of request #8. Additionally, the Complainants specifically request immediate onsite inspection of all of the records relevant to this complaint.
Stephen Jung and Joseph O'Halloran v. Borough of Roselle (Union), 2007-299 and 2007-307 – Supplemental Findings and Recommendations of the Executive Director

2. Although the Borough Administrator certified that she does not maintain any records responsive to the Complainants' requests, the Borough Administrator failed to provide said certification to the GRC within the extended deadline date. As such, the Borough Administrator has not fully complied with the Council's April 29, 2009 Interim Order.
3. Because the GRC has not received any response from the Zoning Officer, the Zoning Officer has not complied with the Council's April 29, 2009 Interim Order.
4. Because the Zoning Officer failed to respond to the Custodian's January 27, 2009 and January 30, 2009 requests for records responsive to request item # 4, and because the Zoning Officer failed to comply with the Council's Interim Order (after receiving said Order with the GRC's contact information on three (3) separate occasions and received an extension from the GRC to comply with said Order), it is possible that the Zoning Officer's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, these complaints should be referred to the Office of Administrative Law for determination of whether the Zoning Officer knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

August 14, 2009

Council's Interim Order distributed to the parties.

September 28, 2009

Complaints transmitted to the Office of Administrative Law ("OAL").

September 29, 2010

Letter from Complainant Stephen Jung to Administrative Law Judge ("ALJ").⁷
The Complainant states that he wishes to withdraw his complaint no. "GRC 11431-09."⁸

April 20, 2011

Letter from Custodian's Counsel to Complainant Joseph O'Halloran. The Custodian's Counsel states that during the Complainant's telephone conversation on February 22, 2011 with Michael DeSantis, Esq., of Counsel's law firm, the Complainant indicated that he was no longer interested in pursuing this complaint and would consent to dismissal. As such, Counsel asks the Complainant to review the following statement, and if said statement accurately expresses the Complainant's intentions, to input his signature at the bottom of the form. Counsel states he will submit said withdrawal to OAL as Complainant Jung has already submitted a similar statement.

The statement prepared for Complainant O'Halloran's signature reads:

⁷ The GRC did not receive said correspondence until provided by the Custodian's Counsel on May 26, 2011.

⁸ GRC 11431-09 is the Docket Number assigned by OAL to GRC Complaint Nos. 2007-299 and 2007-307. Stephen Jung and Joseph O'Halloran v. Borough of Roselle (Union), 2007-299 and 2007-307 – Supplemental Findings and Recommendations of the Executive Director

“I, Joseph O’Halloran, am the complainant in the matter entitled O’Halloran v. Borough of Roselle (GRC Complaint No 2007-307, OAL Docket Number GRC 11431-2009N). I am no longer interested in pursuing this matter and wish to withdraw my complaint. I do not wish for the Office of Administrative Law to conduct a hearing related to the conduct of Rodney Smith nor do I wish for any penalties to be imposed upon Mr. Smith.”

Complainant O’Halloran signed said withdrawal statement.

May 26, 2011

Letter from Custodian’s Counsel to GRC. The Custodian’s Counsel requests that the GRC dismiss these consolidated Denial of Access Complaints. Counsel states that he is in receipt of, and has attached to this letter, a copy of Complainant Stephen Jung’s withdrawal letter dated September 29, 2010 addressed to the ALJ. Additionally, Counsel states that after multiple telephone conversations with Complainant Joseph O’Halloran wherein the Complainant verbally expressed his interest in withdrawing his complaint, Counsel is in receipt of Complainant O’Halloran’s written withdrawal letter dated April 20, 2011 and has attached said withdrawal to this correspondence.

July 28, 2011

Complaints referred back to the GRC from OAL since the Complainants have withdrawn said complaints.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that these consolidated complaints should be dismissed because Complainant Stephen Jung withdrew his complaint from the Office of Administrative Law on September 29, 2010 and Complainant Joseph O’Halloran withdrew his complaint from the Office of Administrative Law on April 20, 2011. No further adjudication is required.

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 2011



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

Stephen Jung
Complainant

Complaint No. 2007-299

v.

Borough of Roselle (Union)
Custodian of Record

Joseph O'Halloran
Complainant

Complaint No. 2007-307

v.

Borough of Roselle (Union)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 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 Chief Financial Officer certified that the Finance Department does not maintain any records responsive to the Complainants' requests and because the Chief Financial Officer provided said certification to the GRC within the extended deadline date, the Chief Financial Officer has complied with the Council's April 29, 2009 Interim Order.
2. Although the Borough Administrator certified that she does not maintain any records responsive to the Complainants' requests, the Borough Administrator failed to provide said certification to the GRC within the extended deadline date. As such, the Borough Administrator has not fully complied with the Council's April 29, 2009 Interim Order.
3. Because the GRC has not received any response from the Zoning Officer, the Zoning Officer has not complied with the Council's April 29, 2009 Interim Order.



4. Because the Zoning Officer failed to respond to the Custodian's January 27, 2009 and January 30, 2009 requests for records responsive to request item # 4, and because the Zoning Officer failed to comply with the Council's Interim Order (after receiving said Order with the GRC's contact information on three (3) separate occasions and received an extension from the GRC to comply with said Order), it is possible that the Zoning Officer's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, these complaints should be referred to the Office of Administrative Law for determination of whether the Zoning Officer 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 11th 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 14, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stephen Jung¹
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¹ No legal representation listed on record.

² Represented by John G. Hudak, Esq. (Linden, NJ).

³ No legal representation listed on record.

⁴ Represented by John G. Hudak, Esq. (Linden, NJ).

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11. Copy of the reorganization plan that was mentioned by Mayor Smith at various Council meetings when he discussed the reason for the firing of the Borough Administrator, and which was referenced in the Dan Burns news article, and given as the reason for the firing of Cherron Roundtree in the letter of termination that she received
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Requests Made: November 1, 2007

Responses Made: November 13, 2007

Custodian: Rhona Bluestein

GRC Complaints Filed: December 3, 2007

Background

April 29, 2009

Government Records Council's ("Council") Interim Order. At its April 29, 2009 public meeting, the Council considered the April 22, 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, found that:

1. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested meeting minutes which have not yet been approved by the governing body because said minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v.

⁶ This request is repetitive of request #8. Additionally, the Complainants specifically request immediate onsite inspection of all of the records relevant to this complaint.
Stephen Jung and Joseph O'Halloran v. Borough of Roselle (Union), 2007-299 and 2007-307 – Supplemental Findings and Recommendations of the Executive Director 2

- Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). However, the Custodian's failure to provide the Complainants with an itemized list of the minutes withheld from disclosure results in an insufficient response to the request pursuant to N.J.S.A. 47:1A-5.g.
2. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the fingerprint cards responsive the Complainants' requests because said cards are exempt from public access pursuant to Executive Order No. 69 (Whitman 1997).
 3. The Custodian has borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested criminal background checks because said records are exempt from public access as personnel records pursuant to N.J.S.A. 47:1A-10.
 4. Pursuant to Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), because the Zoning Board of Adjustment, Finance Department and Administration Department maintain physical custody of the records responsive to items # 6-7 of the Complainants' OPRA requests, said departments must release the records responsive to the Complainants, or provide a certification that no records responsive exist.
 5. **The Zoning Board of Adjustment, Finance Department and Administration Department shall comply with item # 4 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, to the Executive Director.**
 6. Although the Custodian paid the \$1,000.00 civil penalty, released records responsive to the Complainants' requests, provided evidence of her multiple attempts to obtain the records responsive from various departments, carried her burden of proving a lawful denial of access to the records withheld from disclosure, or certified that the records requested do not exist, the Custodian failed to provide certified confirmation of compliance to the Executive Director within the ordered five (5) business days. As such, the Custodian has not fully complied with the Council's Interim Order dated December 18, 2008.

May 1, 2009

Council's Interim Order distributed to the parties.

May 4, 2009

E-mail from Custodian to Zoning Officer, Chief Financial Officer and Borough Administrator. The Custodian encloses the Council's Interim Order dated April 29, 2009 and states that the Zoning, Finance & Administration Departments are required to respond in writing no later than the close of business on May 11, 2009, as stated in the Order. The Custodian states that she is also providing a hard copy of said Order in each

department's mailbox. Additionally, the Custodian includes the GRC's contact information should anyone have any questions.

May 5, 2009

Letter from Adrian O. Mapp, Chief Financial Officer, to Custodian. The Chief Financial Officer states that to the best of his knowledge and research, no records responsive exist in the Finance Department which are responsive to request items # 6-7. The Chief Financial Officer claims that he communicated such to the Custodian on several occasions. The Chief Financial Officer states that if anyone can provide names of attorneys who might have been involved in the matters subject of request items # 6-7, he will search again for records responsive. The Chief Financial Officer states that he has no information that suggests the existence of any Borough records that would allow for compliance with said requests.

Additionally, the Chief Financial Officer encloses a memorandum dated January 29, 2009 which he addressed to the Custodian. In said memorandum, the Chief Financial Officer states that to the best of his knowledge, the Finance Department does not maintain any records pertaining to the demotion of police officers in 2007 or expenses association with "Mayor Smith's refusal to pay various vendors in 2007, including but not limited to M and A Tree." The Chief Financial Officer states that if the Custodian can provide names of attorneys involved in said matters, he will conduct a vendor search for the requested records.

May 8, 2009

E-mail from Custodian to Rodney Smith, Zoning Officer, and Cheryl Fuller, Borough Administrator. The Custodian reminds said employees that their response to the Council's Interim Order is due to the GRC by the close of business on May 11, 2009.

May 13, 2009

E-mail from GRC to Borough Administrator, Zoning Officer, and Chief Financial Officer. The GRC states that the Council's Interim Order dated April 29, 2009 directed the Zoning Board of Adjustment, Finance Department, and Administration Department to provide the Complainants with records responsive to request items # 6-7, or provide a certification that no records responsive exist, within five (5) business days from receipt of said Order. The GRC states that while the text of the analysis on page 15 of the "Findings and Recommendations of the Executive Director" indicates that request item # 4 is still outstanding, said request item was inadvertently omitted from the Interim Order.

The GRC states that said request is still outstanding and requires a response from the Zoning Board of Adjustment – either by the release of said records with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, or by providing a legal certification that no records responsive exist. The GRC requests that the Zoning Officer, Borough Administrator and Chief Financial Officer provide certified confirmation of compliance with the Council's Interim Order dated April 29, 2009 to the GRC's Executive Director by the close of business on May 15, 2009.

May 14, 2009

Certification of Adrian O. Mapp, Chief Financial Officer. The Chief Financial Officer certifies that the Finance Department does not maintain any records responsive to request items # 6-7 of the Complainants' OPRA requests.

May 20, 2009

Certification of Cheryl G. Fuller, Borough Administrator. The Administrator certifies that she does not maintain any records responsive to request items # 6-7 of the Complainants' OPRA requests.

Analysis

Whether the Borough Administrator, Zoning Officer, and Chief Financial Officer complied with the Council's April 29, 2009 Interim Order?

In its April 29, 2009 Interim Order, the Council ordered the Zoning Board of Adjustment, Finance Department and Administration Department to release the records responsive to items # 6-7 of the Complainants' OPRA requests, or provide a certification that no records responsive exist, within five (5) business days from receipt of said Order. Via e-mail dated May 13, 2009, the GRC extended the compliance deadline to May 15, 2009. Specifically, the GRC indicated that while the analysis section of the "Findings and Recommendations of the Executive Director" indicates that request item # 4 is still outstanding, said request item was inadvertently omitted from the Interim Order. Thus, the actual Interim Order concerns request items # 4, 6-7.

The Custodian forwarded the Council's Order to the Borough Administrator, Zoning Officer and Chief Financial Officer via e-mail dated May 4, 2009. In said e-mail, the Custodian included the GRC's contact information in case anyone had any questions regarding the Interim Order. The Custodian also placed a hard copy of said Order in each department's mailbox. Additionally, the Custodian sent a follow-up e-mail dated May 8, 2009 in which she reminded the Borough Administrator, Zoning Officer, and Chief Financial Officer to submit their compliance to the GRC.

Via letter dated May 14, 2009, the Chief Financial Officer certified that the Finance Department does not maintain any records responsive to items # 6-7.

Therefore, because the Chief Financial Officer certified that the Finance Department does not maintain any records responsive to the Complainants' requests and because the Chief Financial Officer provided said certification to the GRC within the extended deadline date, the Chief Financial Officer has complied with the Council's April 29, 2009 Interim Order.

Via letter dated May 20, 2009, the Borough Administrator certified that she does not maintain any records responsive to items # 6-7.

Therefore, although the Borough Administrator certified that she does not maintain any records responsive to the Complainants' requests, the Borough Administrator failed to provide said certification to the GRC within the extended deadline

date. As such, the Borough Administrator has not fully complied with the Council's April 29, 2009 Interim Order.

The GRC has not received any response from the Zoning Officer. Therefore, the Zoning Officer has not complied with the Council's April 29, 2009 Interim Order.

Whether the Zoning Officer'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.

In the Council's December 18, 2008 Interim Order, the Council directed the Custodian to release all records responsive to the Complainants' OPRA requests, pursuant to the Administrative Law Judge's Initial Decision dated November 18, 2008. In an attempt to comply with the Council's Order, the Custodian reached out to several departments within the Borough because the Custodian does not maintain physical custody of all requested records. Specifically, the Custodian made attempts to gain access to the records responsive to request item # 4 from the Zoning Officer, Rodney Smith, via e-mail dated January 27, 2009 and January 30, 2009. The Custodian certified that she received no response from the Zoning Officer.

Because the Custodian received no response from the Zoning Officer, the Council issued a subsequent Interim Order dated April 29, 2009 in which the Council directed the Zoning Department, among others, to release records responsive to the Complainants' requests, or provide a certification that the records responsive do not exist. The Custodian e-mailed the Council's Interim Order to the Zoning Officer on May 4, 2009, indicated that the compliance deadline was May 11, 2009, and provided the GRC's contact information should the Zoning Officer have any questions. The Custodian also placed a hard copy of said Order in the Zoning Officer's mailbox. The Custodian again forwarded the Council's April 29, 2009 Interim Order to the Zoning Officer via e-mail dated May 8, 2009 in which the Custodian reminded him that the compliance deadline was May 11, 2009. Via e-mail dated May 13, 2009, the GRC contacted the Zoning

Officer and provided specific instructions as to what was required for compliance – releasing the records responsive to request item # 4 or providing a certification that no records responsive exist. The GRC provided the Zoning Officer with an extension to comply with the Council’s Order until May 15, 2009. To date, the GRC has not received any response from the Zoning Officer.

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).

Because the Zoning Officer failed to respond to the Custodian’s January 27, 2009 and January 30, 2009 requests for records responsive to request item # 4, and because the Zoning Officer failed to comply with the Council’s Interim Order (after receiving said Order with the GRC’s contact information on three (3) separate occasions and received an extension from the GRC to comply with said Order), it is possible that the Zoning Officer’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 Zoning Officer 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. Because the Chief Financial Officer certified that the Finance Department does not maintain any records responsive to the Complainants’ requests and because the Chief Financial Officer provided said certification to the GRC within the extended deadline date, the Chief Financial Officer has complied with the Council’s April 29, 2009 Interim Order.
2. Although the Borough Administrator certified that she does not maintain any records responsive to the Complainants’ requests, the Borough Administrator failed to provide said certification to the GRC within the extended deadline date. As such, the Borough Administrator has not fully complied with the Council’s April 29, 2009 Interim Order.

3. Because the GRC has not received any response from the Zoning Officer, the Zoning Officer has not complied with the Council's April 29, 2009 Interim Order.
4. Because the Zoning Officer failed to respond to the Custodian's January 27, 2009 and January 30, 2009 requests for records responsive to request item # 4, and because the Zoning Officer failed to comply with the Council's Interim Order (after receiving said Order with the GRC's contact information on three (3) separate occasions and received an extension from the GRC to comply with said Order), it is possible that the Zoning Officer's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, these complaints should be referred to the Office of Administrative Law for determination of whether the Zoning Officer knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

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Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 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. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested meeting minutes which have not yet been approved by the governing body because said minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). However, the Custodian's failure to provide the Complainants with an itemized list of the minutes withheld from disclosure results in an insufficient response to the request pursuant to N.J.S.A. 47:1A-5.g.
2. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the fingerprint cards responsive the Complainants' requests because said cards are exempt from public access pursuant to Executive Order No. 69 (Whitman 1997).



3. The Custodian has borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested criminal background checks because said records are exempt from public access as personnel records pursuant to N.J.S.A. 47:1A-10.
4. Pursuant to Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), because the Zoning Board of Adjustment, Finance Department and Administration Department maintain physical custody of the records responsive to items # 6-7 of the Complainants' OPRA requests, said departments must release the records responsive to the Complainants, or provide a certification that no records responsive exist.
5. **The Zoning Board of Adjustment, Finance Department and Administration Department shall comply with item # 4 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, to the Executive Director.**
6. Although the Custodian paid the \$1,000.00 civil penalty, released records responsive to the Complainants' requests, provided evidence of her multiple attempts to obtain the records responsive from various departments, carried her burden of proving a lawful denial of access to the records withheld from disclosure, or certified that the records requested do not exist, the Custodian failed to provide certified confirmation of compliance to the Executive Director within the ordered five (5) business days. As such, the Custodian has not fully complied with the Council's Interim Order dated December 18, 2008.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
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: May 1, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Stephen Jung¹
Complainant**

GRC Complaint No. 2007-299

v.

**Borough of Roselle (Union)²
Custodian of Records**

**Joseph O'Halloran³
Complainant**

GRC Complaint No. 2007-307⁵

v.

**Borough of Roselle (Union)⁴
Custodian of Records**

Records Relevant to Complaints:

1. Minutes from regular Council meetings held from January 1, 2007 until September 30, 2007
2. Minutes from Council workshops held from January 1, 2007 until September 30, 2007
3. Minutes from all special Council meetings held from January 1, 2007 until September 30, 2007
4. All minutes of the Board of Adjustment meetings held from January 1, 2007 until September 30, 2007
5. All Borough records that relate to the cost of attorney fees and related costs to the Borough that have been generated as a result of the 2006-2007 firing of: the former Borough Administrator Dave Brown, Head of the Department of Public Works Carl Bolles, and UEZ coordinator Cherron Roundtree
6. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of the demotion of the two police officers in 2007
7. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of Mayor

¹ No legal representation listed on record.

² Represented by Wilfredo Benitez, Esq. (Montclair, NJ).

³ No legal representation listed on record.

⁴ Represented by Wilfredo Benitez, Esq. (Montclair, NJ).

⁵ These complaints were combined at the Office of Administrative Law at the request of all parties. Said complaints are identical.

- Smith's refusal to pay various vendors in 2007, including but not limited to M and A Tree
8. All Borough records that pertain to the Summer Camp that was run during the summer 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency
 9. All budget records related to all expenditures of Borough money, including but not limited to any grant dollars and tax dollars spent on the Summer Camp of 2007, including final itemized budget and total expenditures
 10. All budget records related to all expenditures by the Borough, including but not limited to grant money, tax dollars, and money generated by the sale of tickets from the circus that was run during the summer of 2007. Records of what happened to profits made from this event, including the final itemized budget and total final expenditures, incomes and disbursement of profits
 11. Copy of the reorganization plan that was mentioned by Mayor Smith at various Council meetings when he discussed the reason for the firing of the Borough Administrator, and which was referenced in the Dan Burns news article, and given as the reason for the firing of Cherron Roundtree in the letter of termination that she received
 12. Copy of resolution memorializing the "reorganization plan" referenced above
 13. Current bond for Borough Clerk
 14. All Borough records that pertain to the Summer Camp that was run during the summer of 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency⁶

Requests Made: November 1, 2007

Responses Made: November 13, 2007

Custodian: Rhona Bluestein

GRC Complaints Filed: December 3, 2007

Background

December 18, 2008

Government Records Council's ("Council") Interim Order. At its December 18, 2008 public meeting, the Council considered the December 10, 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, found that:

1. The Administrative Law Judge's Initial Decision dated November 18, 2008 shall be modified to the extent that the Custodian's civil penalty shall be paid to the State of New Jersey General Treasury, care of the GRC. The Council accepts the remainder of said Decision as written.

⁶ This request is repetitive of request #8. Additionally, the Complainants specifically request immediate onsite inspection of all of the records relevant to this complaint.
Stephen Jung and Joseph O'Halloran v. Borough of Roselle (Union), 2007-299 and 2007-307 – Supplemental Findings and Recommendations of the Executive Director 2

2. **The Custodian shall comply with the portion of the Administrative Law Judge's Initial Decision which orders the Custodian to provide the requested records to the Complainants 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, to the Executive Director**

December 19, 2008

Council's Interim Order distributed to the parties.

December 22, 2008

E-mail from Custodian to GRC. The Custodian states that she received the Council's Interim Order on December 22, 2008. The Custodian requests an extension of time to respond to the Council's Interim Order due to the Borough's holiday closings and planned personal vacation.

December 23, 2008

E-mail from GRC to Custodian. The GRC states that because the Custodian received the Council's Interim Order on December 22, 2008, the five (5) business day deadline to comply expires on December 30, 2008 (not counting December 25, 2008 since Borough offices will be closed). The GRC grants the Custodian a five (5) business day extension of time to respond to the Council's Interim Order until the close of business on January 8, 2009 (not counting January 1, 2009 since Borough offices will be closed).

January 8, 2009

Letter from Custodian to GRC. Custodian requests a stay of the Council's Interim Order dated December 18, 2008. The Custodian requests a stay of the Council's Interim Order so that she may put together a request for reconsideration based on the merits of the complaint, including testimony from the hearing at the Office of Administrative Law ("OAL") and OPRA case law. The Custodian states that additional time is needed to prepare said request because of limited personnel. The Custodian also asserts that relocating and recopying the requested records maintained by various departments within the Borough would interfere with the daily operations of the Borough.

Additionally, the Custodian contends that OPRA does not require custodians to create new records in response to OPRA requests. The Custodian states that the Complainants indicated that they were not satisfied with the format in which certain Borough records are maintained. The Custodian states that the Administrative Law Judge ("ALJ") did not include this information in his Initial Decision. The Custodian asserts that this sets a precedent that custodians must create new records in response to OPRA requests.

Further, the Custodian claims that she has provided the Complainants with a substantial amount of the records requested prior to the hearing at OAL; however, the Custodian states that the ALJ did not include said information in his Initial Decision.

The Custodian also contends that the public interest will be negatively impacted if the stay is not granted because the Borough's operations will be affected.

January 22, 2009

Letter from GRC to Custodian. The GRC denies the Custodian's request for a stay of the Council's Interim Order dated December 18, 2008 on the basis that the intent of said request was not to appeal the Interim Order to the Appellate Division of the New Jersey Superior Court, which is the purpose for a stay of an Interim Order. The GRC states that the Custodian must comply with the Council's Interim Order within five (5) business days from receipt of this letter.

Further, the GRC states that it appears as though the Custodian's main issue is that she objects to the ALJ's Initial Decision dated November 18, 2008. The GRC states that the proper course of action for such objection would have been for the Custodian to file an exception to the Initial Decision with the GRC within thirteen (13) days from the date of said Decision as is indicated in the text of said Decision; however, the Custodian failed to do so.

January 27, 2009

E-mail from Custodian to Borough Mayor, Administrator, Chief Financial Officer, Zoning Board of Adjustment and Borough Attorney. The Custodian forwards the Council's Interim Order dated December 18, 2008. The Custodian states that she has attached a spreadsheet listing the Complainants' itemized requests and the department that maintains any records responsive. The Custodian asks that the departments provide all records responsive to the Custodian by 3:00 pm on January 29, 2009. Additionally, the Custodian asks the departments to provide a separate statement if the requested records do not exist.

January 30, 2009

E-mail from Custodian to Borough Mayor, Borough Administrator, Chief Financial Officer, and Borough Attorney. The Custodian reminds all departments to submit records responsive to the Complainant's OPRA requests directly to the Custodian.

January 30, 2009

Custodian's response to the Council's Interim Order. The Custodian encloses a check payable to the New Jersey General Treasury in the amount of \$1,000.00 dated January 30, 2009. The Custodian states that she has enclosed all records responsive to the Complainants' requests that have been provided to her that are not exempt from public access. A table indicating the Custodian's response is below:

Records Requested by Complainants	Date Records Requested by Custodian	Date Records Provided to Complainants	Legal Explanation and Citation for Non-disclosure or redactions
Minutes from regular Council meetings held from January 1, 2007 until	January 27, 2009 January 30, 2009	January 30, 2009	Minutes provided except those not yet approved by the governing body

September 30, 2007			
Minutes from Council workshops held from January 1, 2007 until September 30, 2007	January 27, 2009 January 30, 2009	January 30, 2009	Minutes provided except those not yet approved by the governing body
Minutes from all special Council meetings held from January 1, 2007 until September 30, 2007	January 27, 2009 January 30, 2009	January 30, 2009	Minutes provided except those not yet approved by the governing body
All minutes of the Board of Adjustment meetings held from January 1, 2007 until September 30, 2007	January 27, 2009 January 30, 2009	January 30, 2009	N/A
All Borough records that relate to the cost of attorney fees and related costs to the Borough that have been generated as a result of the 2006-2007 firing of: the former Borough Administrator Dave Brown, Head of the Department of Public Works Carl Bolles, and UEZ coordinator Cherron Roundtree	January 27, 2009 January 30, 2009	January 30, 2009	N/A
All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of the demotion of the two police officers in 2007	January 27, 2009 January 30, 2009	N/A	Custodian received no response from Finance & Administration
All Borough records that relate to the cost to the Borough in	January 27, 2009 January 30, 2009	N/A	Custodian received no response from Finance & Administration

attorney fees and other related costs to the Borough that have been generated as a result of Mayor Smith's refusal to pay various vendors in 2007, including but not limited to M and A Tree			
All Borough records that pertain to the Summer Camp that was run during the summer 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency	January 27, 2009 January 30, 2009	January 30, 2009	Fingerprint and background checks are exempt from public access
All budget records related to all expenditures of Borough money, including but not limited to any grant dollars and tax dollars spent on the Summer Camp of 2007, including final itemized budget and total expenditures	January 27, 2009 January 30, 2009	January 30, 2009	N/A
All budget records related to all expenditures by the Borough, including but not limited to grant money, tax dollars, and money generated by the sale of tickets from the circus that was run	January 27, 2009 January 30, 2009	January 30, 2009	N/A

during the summer of 2007. Records of what happened to profits made from this event, including the final itemized budget and total final expenditures, incomes and disbursement of profits			
Copy of the reorganization plan that was mentioned by Mayor Smith at various Council meetings when he discussed the reason for the firing of the Borough Administrator, and which was referenced in the Dan Burns news article, and given as the reason for the firing of Cherron Roundtree in the letter of termination that she received	N/A	N/A	No records responsive exist
Copy of resolution memorializing the “reorganization plan” referenced above	N/A	N/A	No records responsive exist
Current bond for Borough Clerk	N/A	N/A	No records responsive exist
All Borough records that pertain to the Summer Camp that was run during the summer of 2007, including but not limited to records of police checks and fingerprint checks administered to all	January 27, 2009 January 30, 2009	January 30, 2009	Fingerprint and background checks are exempt from public access

adults with direct access to children, records of attendance and verification of residency			
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February 3, 2009

E-mail from GRC to Custodian. The GRC requests that the Custodian legally certify to the statements made in her letter to the GRC dated January 30, 2009.

February 3, 2009

Custodian’s Certification. The Custodian certifies to the statements made in her letter to the GRC dated January 30, 2009 in response to the Council’s December 18, 2008 Interim Order.

February 9, 2009

E-mail from Complainant⁷ to GRC. The Complainant asserts that the records the Custodian provided in response to items # 8-9 are the same records provided at OAL which the ALJ deemed insufficient. The Complainant asserts that the Custodian failed to include a copy of the summer camp budget or a certified statement that no budget exists. The Complainant states that he received a collection of bills and vouchers with no statement whether these were all of the records responsive to the request. Additionally, the Complainant contends that the Custodian did not address the request for proof that all summer camp attendees had their residency verified.

Regarding item # 10, the Complainant states that he received a one sheet document with no letter head, signature or certification from the Certified Financial Officer that said record was accurate and a legal Borough record. The Complainant contends that the Custodian failed to produce the requested budget for the circus or a certified statement that no budget exists, as ordered by the ALJ.

Additionally, the Complainant states that the Custodian indicated that the Mayor informed the attorney that no reorganization plan responsive to item # 11 exists. The Complainant questions whether said third party statement is considered a certified statement.

Regarding item # 5, the Complainant states that the Custodian provided copies of settlement agreements. The Complainant contends that the Borough was ordered to provide a certified statement as to the total cost of the requested law suits.

Further, the Complainant states that the Custodian failed to address items # 6-7 at all. The Complainant also asserts that the Custodian is not in compliance with item # 4.

The Complainant asserts that the Borough is legally required to maintain all of the requested records. The Complainant contends that the budgetary information should

⁷ Stephen Jung.
 Stephen Jung and Joseph O’Halloran v. Borough of Roselle (Union), 2007-299 and 2007-307 – Supplemental Findings and Recommendations of the Executive Director 8

have been available in a format that any citizen could use to determine how much tax money is spent on a particular matter. The Complainant contends that pursuant to the OAL hearing, the Borough was either to provide the requested records or provide certified statements from the appropriate department heads that the requested records do not exist. The Complainant contends that much of the problem with providing the records responsive rests with the Mayor and Certified Financial Officer who have not cooperated with the Custodian in response to these OPRA requests and Denial of Access Complaints.

Analysis

Whether the Custodian complied with the Council’s December 18, 2008 Interim Order?

Via e-mail dated December 22, 2008, the Custodian requested an extension of time to respond to the Council’s Interim Order due to the Borough offices closing for two (2) holidays, as well as the Custodian’s planned personal vacation. The GRC granted the Custodian an extension of time until the close of business on January 8, 2009. On said date, the Custodian requested a stay of the Council’s Interim Order. The GRC denied the Custodian’s request for a stay via letter dated January 22, 2009 and restated that the Custodian must comply with the Council’s Order within five (5) business days from receipt of the GRC’s letter.

The Custodian provided the GRC with her response to the Council’s Interim Order via letter dated January 30, 2009, the fifth (5th) business day following the Custodian’s receipt of the GRC’s letter dated January 22, 2009. With said response, the Custodian submitted payment of the \$1,000.00 civil penalty assessed against her for a knowing and willful violation of OPRA. Additionally, the Custodian provided a document index detailing her responses to the Complainants’ itemized requests. A summary of the Custodian’s response is as follows:

Request Item Number	Custodian’s Response
1	Records responsive provided except for minutes not yet approved by the governing body because said minutes constitute advisory, consultative or deliberative material.
2	Records responsive provided except for minutes not yet approved by the governing body because said minutes constitute advisory, consultative or deliberative material.
3	Records responsive provided except for minutes not yet approved by the governing body because said minutes constitute advisory, consultative or deliberative material.
4	Custodian made attempts to gain access to records via e-mail dated January 27, 2009 and January 30, 2009. Custodian received no response from the Zoning Board of Adjustment.
5	Records responsive provided
6	Custodian made attempts to gain access to records via e-mail dated

	January 27, 2009 and January 30, 2009. Custodian received no response from Finance and Administration Departments
7	Custodian made attempts to gain access to records via e-mail dated January 27, 2009 and January 30, 2009. Custodian received no response from Finance and Administration Departments
8	Records responsive provided except for fingerprints and background checks which are exempt from disclosure
9	Records responsive provided
10	Records responsive provided
11	No records responsive
12	No records responsive
13	No records responsive
14	Records responsive provided except for fingerprints and background checks which are exempt from disclosure

The Custodian provided a legal certification to the GRC on February 3, 2009, the seventh (7th) business day following receipt of the GRC's letter dated January 22, 2009, in which the Custodian certified to the statements she made in her response to the Council's Interim Order dated January 30, 2009.

One of the Complainants in this matter objects to the sufficiency of the Custodian's response to the Council's Interim Order. Specifically, the Complainant asserts that the records the Custodian provided in response to items # 8-9 are the same records provided at OAL which the ALJ deemed insufficient. The Complainant asserts that the Custodian failed to include a copy of the summer camp budget or a certified statement that no budget exists. Additionally, the Complainant contends that the Custodian did not address the request for proof that all summer camp attendees had their residency verified.

Regarding item # 10, the Complainant states that he received a one sheet document with no letter head, signature or certification from the Certified Financial Officer that said record was accurate and a legal Borough record. The Complainant contends that the Custodian failed to produce the requested budget for the circus or a certified statement that no budget exists, as ordered by the Judge.

Additionally, the Complainant states that the Custodian indicated that the Mayor informed the attorney that no reorganization plan responsive to item # 11 exists. The Complainant questions whether said third party statement is considered a certified statement.

Regarding item # 5, the Complainant states that the Custodian provided copies of settlement agreements. The Complainant contends that the Borough was ordered to provide a certified statement as to the total cost of the requested law suits.

Further, the Complainant states that the Custodian failed to address items # 6-7 at all. The Complainant also asserts that the Custodian is not in compliance with item # 4.

The Complainant asserts that the Borough is legally required to maintain all of the requested records. The Complainant contends that the budgetary information should have been available in a format that any citizen could use to determine how much tax money is spent on a particular matter. The Complainant contends that pursuant to the OAL hearing, the Borough was either to provide the requested records or provide certified statements from the appropriate department heads that the requested records do not exist. The Complainant contends that much of the problem with providing the records responsive rests with the Mayor and Certified Financial Officer who have not cooperated with the Custodian in response to these OPRA requests and Denial of Access Complaints.

The specific wording of the Administrative Law Judge's Initial Decision regarding the disclosure of the requested records is as follows: "I hereby **ORDER** that that Custodian of the Borough of Roselle forthwith provide access to the existing records set forth in the November 1, 2007 OPRA requests of Stephen Jung and Joseph O'Halloran." The Complainant's assertions are that that ALJ ordered the Custodian to provide certified statements. Upon the GRC's review of the OAL file, it appears as though the Complainant is referring to a letter from the ALJ to all parties dated October 1, 2008 in which the ALJ attempts to settle the matter prior to a hearing by ordering the Custodian's Counsel to provide specific information to the Complainants. Specifically, the ALJ directed Counsel to provide the following information:

1. "Counsel is to contact the attorney and/or the secretary for the Board of Adjustment to obtain meeting minutes for the period between January 1, 2007 and September 30, 2007.
2. Records related to attorney's fees incurred by the Borough regarding the demotion of police officers Hagemann and Scaturro.
3. Counsel will confer with outside labor counsel and the chief financial officer of the Borough to obtain a certified final cost for attorney's fees related to these matters. This information should include, if they exist, all resolutions authorizing such payments.
4. Regarding the termination of Brown, Bolles and Roundtree, Counsel will provide the same information as indicated in number two. Complainants are not requesting the production of the periodic outside attorney bills.
5. 2007 Bond for Borough Clerk. Counsel will obtain a signed certification as to whether or not such bond exists. If it does exist, a copy will be provided.
6. Copy of the organization plan that was mentioned by the Mayor and a copy of resolution memorializing the reorganization plan. Counsel will make the appropriate inquiries to determine whether such a reorganization plan was reduced to writing and if so, whether it was memorialized in a resolution.
7. Budget records related to 2007 circus. Counsel is to verify the source of the numbers provided to the complainants in a summary form related to circus expenses. Counsel is to verify whether there was a budget document produced regarding the circus event. If there was no budget document produced, the custodian needs to certify that no such document exists.
8. 2007 Summer Camp. The Custodian will certify whether or not a budget exists for the 2007 Summer Camp. If such budget does exist, it is to be produced.

9. Counsel is to obtain a certification by the Chief of Police verifying that every adult who worked for the Summer Camp was fingerprinted. Counsel will also obtain a certification from an appropriate representative as to whether all of the children who participated in the summer camp were residents of Roselle.”

Because said letter relates to a potential settlement prior to a formal hearing and was not reiterated in the ALJ’s Initial Decision, the ALJ’s directives in said letter are not at issue in this complaint. Further, the ALJ directed Counsel to provide information and certified statements from Borough employees, as well as to conduct research regarding the cost of attorney’s fees. Such directives go beyond the requirements of OPRA.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*” (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (March 2005). The Court further held that “[u]nder OPRA, agencies are required to disclose only “identifiable” government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency’s files.” (Emphasis added.) *Id.* at 549.

Pursuant to MAG, *supra*, the Custodian is only required to release identifiable government records. The Custodian is not required to compile information such as whether every adult who worked for the Summer Camp was fingerprinted.

Additionally, the Complainant contends that the record the Custodian provided in response to item # 10 of the request was not on Borough letter head and did not contain a signature or certification from the Certified Financial Officer that said record was accurate and a legal Borough record. However, pursuant to Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), the Council lacks the authority to determine the validity of a record pursuant to OPRA. Also, pursuant to Rembis v. Clifton Board of Education, GRC Complaint No. 2006-186 (January 2007), the Council does not have jurisdiction over the accuracy of a record’s content.

Further, the Complainant asserts that the Borough is legally required to maintain all of the requested records and that the budgetary information should have been available in a format that any citizen could use to determine how much tax money is spent on a particular matter. However, pursuant to Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008), the Council “does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain.”

In addition, the Complainant questions whether the Custodian’s third party statement, that the Mayor informed the attorney that no reorganization plan responsive to item # 11 exists, is considered a certified statement. Because the Custodian indicated in her document index that no records responsive to item # 11 exist and because the Custodian provided a certification dated February 3, 2009 in which she attested to the

statements made in her January 30, 2009 response to the Council's Interim Order, said response is considered a certified statement.

Addressing the legal basis for non-disclosure of certain requested records, the Custodian stated that some meeting minutes responsive to the Complainants' request #. 1-3 constitute advisory, consultative or deliberative material because said minutes have not yet been approved by the governing body. The Council has previously ruled on the disclosure of draft meeting minutes. Specifically, in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council found that "...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1."

The facts of these instant complaints are similar to Parave-Fogg in that the Custodian certifies that the meeting minutes not provided to the Complainants have not yet been approved by the governing body. Therefore, the Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested meeting minutes which have not yet been approved by the governing body because said minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg, supra. However, the Custodian's failure to provide the Complainants with an itemized list of the minutes withheld from disclosure results in an insufficient response to the request pursuant to N.J.S.A. 47:1A-5.g.

Additionally, the Custodian denied access to fingerprints and background checks on the basis that said records are exempt from public access. Pursuant to Executive Order No. 69 (Whitman 1997)⁸ fingerprint cards "shall not be deemed to be public records subject to inspection and examination and available for copying." Therefore, the Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the fingerprint cards responsive to the Complainants' requests because said cards are exempt from public access pursuant to Executive Order No. 69 (Whitman 1997).

As for the requested criminal background checks, the Borough completed said background checks as part of the hiring process for summer camp employees. As such, the background checks are considered personnel records. OPRA exempts personnel records from public access pursuant to N.J.S.A. 47:1A-10 with the following exceptions:

- "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of

⁸ Continued by Executive Order Nos. 21 and 26 (McGreevey 2002).

- official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.”

Criminal background checks do not fit into any of the above exceptions. Therefore, the Custodian has borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested criminal background checks because said records are exempt from public access as personnel records pursuant to N.J.S.A. 47:1A-10.

Additionally, the Custodian certified that she made attempts to gain access to the records responsive to items # 4, 6-7 via e-mail dated January 27, 2009 and January 30, 2009; however, the Custodian certified that she received no response from the Zoning Board of Adjustment, the Finance Department or the Administration Department, who maintain physical custody of the records.

In Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), the Custodian did not have physical custody over the records responsive to the Complainant’s request. The Custodian was having difficulty obtaining the records responsive or any response from the custodial department. In said complaint, the Council stated that:

“[t]he evidence of record indicates that the requested records are in the custody of the Police Department. Upon receiving the Complainant’s OPRA request, the Custodian forwarded said request to the Police Department. Additionally, in response to the GRC’s requests for additional information the Custodian sought responses from the Police Department. Although the burden of proving a lawful denial of access rests upon the Custodian pursuant to N.J.S.A. 47:1A-6, a Custodian can only provide as much information of which he/she has knowledge. In this matter, the Police Department’s responses appear to be inadequate in providing the Custodian with the proper information as requested by the GRC and required for the complete adjudication of this complaint.”

The Council held that:

“because the Custodian has not yet provided the GRC with a detailed document index identifying **all** records responsive to the Complainant’s request that were not provided to the Complainant on the basis that said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, (or a certification that the videotape is the only such record) and because the requested information must come from the Police Department, the Council orders the Police Department to provide the document index to the GRC.”

Similar to the facts in Feggans, *supra*, the evidence of record indicates that the Custodian in these instant complaints is having difficulty obtaining some of the records responsive to the Complainants' requests, specifically the records responsive to items # 4, 6-7.

Therefore, pursuant to Feggans, *supra*, because the Zoning Board of Adjustment, Finance Department and Administration Department maintain physical custody of the records responsive to items # 6-7 of the Complainants' OPRA requests, said departments must release the records responsive to the Complainants, or provide a certification that no records responsive exist.

In summary, the Custodian requested an extension of time to comply with the Council's Interim Order in writing to the GRC within the ordered five (5) business days. The Custodian then requested a stay of said Order in writing to the GRC within the extended time period. The GRC denied the Custodian's request for a stay and reissued the Council's Interim Order directing the Custodian to comply within five (5) business days. On the fifth (5th) business day, the Custodian tendered her payment of the \$1,000.00 civil penalty for a knowing and willful violation of OPRA. The Custodian also released the records responsive to the Complainants' OPRA requests, certified that the records do not exist, denied access to records responsive that were exempt from public access, and provided evidence of her attempts to gain access to records over which the Custodian does not maintain physical custody. The Custodian carried her burden of proving a lawful denial of access to the records withheld from disclosure pursuant to N.J.S.A. 47:1A-6. However, the Custodian's response was insufficient because she failed to identify the specific meeting minutes that were withheld from disclosure pursuant to N.J.S.A. 47:1A-5.g. Additionally, the Custodian failed to provide her certified confirmation of compliance to the GRC until the seventh (7th) business day.

Therefore, although the Custodian paid the \$1,000.00 civil penalty, released records responsive to the Complainants' requests, provided evidence of her multiple attempts to obtain the records responsive from various departments, carried her burden of proving a lawful denial of access to the records withheld from disclosure, or certified that the records requested do not exist, the Custodian failed to provide certified confirmation of compliance to the Executive Director within the ordered five (5) business days. As such, the Custodian has not fully complied with the Council's Interim Order dated December 18, 2008.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested meeting minutes which have not yet been approved by the governing body because said minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). However, the Custodian's failure to provide the Complainants with an itemized

list of the minutes withheld from disclosure results in an insufficient response to the request pursuant to N.J.S.A. 47:1A-5.g.

2. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the fingerprint cards responsive the Complainants' requests because said cards are exempt from public access pursuant to Executive Order No. 69 (Whitman 1997).
3. The Custodian has borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested criminal background checks because said records are exempt from public access as personnel records pursuant to N.J.S.A. 47:1A-10.
4. Pursuant to Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), because the Zoning Board of Adjustment, Finance Department and Administration Department maintain physical custody of the records responsive to items # 6-7 of the Complainants' OPRA requests, said departments must release the records responsive to the Complainants, or provide a certification that no records responsive exist.
- 5. The Zoning Board of Adjustment, Finance Department and Administration Department shall comply with item # 4 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, to the Executive Director.**
6. Although the Custodian paid the \$1,000.00 civil penalty, released records responsive to the Complainants' requests, provided evidence of her multiple attempts to obtain the records responsive from various departments, carried her burden of proving a lawful denial of access to the records withheld from disclosure, or certified that the records requested do not exist, the Custodian failed to provide certified confirmation of compliance to the Executive Director within the ordered five (5) business days. As such, the Custodian has not fully complied with the Council's Interim Order dated December 18, 2008.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

December 18, 2008 Government Records Council Meeting

Stephen Jung
Complainant

v.

Borough of Roselle (Union)
Custodian of Record

Complaint No. 2007-299

Joseph O'Halloran
Complainant

v.

Borough of Roselle (Union)
Custodian of Record

Complaint No. 2007-307

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 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:

1. The Administrative Law Judge's Initial Decision dated November 18, 2008 shall be modified to the extent that the Custodian's civil penalty shall be paid to the State of New Jersey General Treasury, care of the GRC. The Council accepts the remainder of said Decision as written.
2. **The Custodian shall comply with the portion of the Administrative Law Judge's Initial Decision which orders the Custodian to provide the requested records to the Complainants 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, to the Executive Director**



Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 19, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stephen Jung¹
Complainant**

GRC Complaint No. 2007-299

v.

**Borough of Roselle (Union)²
Custodian of Records**

**Joseph O'Halloran³
Complainant**

GRC Complaint No. 2007-307⁵

v.

**Borough of Roselle (Union)⁴
Custodian of Records**

Records Relevant to Complaints:

1. Minutes from regular Council meetings held from January 1, 2007 until September 30, 2007
2. Minutes from Council workshops held from January 1, 2007 until September 30, 2007
3. Minutes from all special Council meetings held from January 1, 2007 until September 30, 2007
4. All minutes of the Board of Adjustment meetings held from January 1, 2007 until September 30, 2007
5. All Borough records that relate to the cost of attorney fees and related costs to the Borough that have been generated as a result of the 2006-2007 firing of: the former Borough Administrator Dave Brown, Head of the Department of Public Works Carl Bolles, and UEZ coordinator Cherron Roundtree
6. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of the demotion of the two police officers in 2007
7. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of Mayor

¹ No legal representation listed on record.

² Represented by Wilfredo Benitez, Esq. (Montclair, NJ).

³ No legal representation listed on record.

⁴ Represented by Wilfredo Benitez, Esq. (Montclair, NJ).

⁵ These complaint were combined at the Office of Administrative Law at the request of all parties. Said complaints are identical.

Smith's refusal to pay various vendors in 2007, including but not limited to M and A Tree

8. All Borough records that pertain to the Summer Camp that was run during the summer 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency
9. All budget records related to all expenditures of Borough money, including but not limited to any grant dollars and tax dollars spent on the Summer Camp of 2007, including final itemized budget and total expenditures
10. All budget records related to all expenditures by the Borough, including but not limited to grant money, tax dollars, and money generated by the sale of tickets from the circus that was run during the summer of 2007. Records of what happened to profits made from this event, including the final itemized budget and total final expenditures, incomes and disbursement of profits
11. Copy of the reorganization plan that was mentioned by Mayor Smith at various Council meetings when he discussed the reason for the firing of the Borough Administrator, and which was referenced in the Dan Burns news article, and given as the reason for the firing of Cherron Roundtree in the letter of termination that she received
12. Copy of resolution memorializing the "reorganization plan" referenced above
13. Current bond for Borough Clerk
14. All Borough records that pertain to the Summer Camp that was run during the summer of 2007, including but not limited to records of police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency⁶

Requests Made: November 1, 2007

Responses Made: November 13, 2007

Custodian: Rhona Bluestein

GRC Complaints Filed: December 3, 2007

Background

April 30, 2008

Government Records Council's ("Council") Interim Orders. At its April 30, 2008 public meeting, the 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, found that based on the inadequate evidence in these matters, the Council is unable to determine whether or not the original Custodian unlawfully denied access to the requested records. Thus, these complaints should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, these complaints should be referred to the Office of Administrative Law for determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

⁶ This request is repetitive of request #8. Additionally, the Complainants specifically request immediate onsite inspection of all of the records relevant to this complaint.

April 30, 2008

Council's Interim Orders distributed to the parties.

May 22, 2008

Complaints transmitted to the Office of Administrative Law.

November 18, 2008

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **CONCLUDES** that the Custodian's denial of access to the Complainants' OPRA requests was not authorized by law and is in violation of N.J.S.A. 47:1A-5. Specifically, the ALJ states that:

“[t]he Custodian is required to grant access to the government records or deny the request for access no later than seven business days after receiving the request. N.J.S.A. 47:1A-5(i). Since the requests were made on November 1, 2007, [the Custodian's] grant of access or denial was due by November 14, 2007 (accounting for the November 6, 2007 Election Day and the November 12, 2007 celebrated Veteran's Day). She had no records available at that time. On that day she provided no access to any of the requested records. Instead, she provided [the Complainants] with a letter dated November 13, 2007, requesting an unspecified amount of additional time to grant access ‘. . . because of the volume of materials being requested.’ Her letter did not meet the requirement of N.J.S.A. 47:1A-5 that the Custodian shall indicate the specific basis upon which she is unable to comply. She testified that the reasons for non-compliance were (1) her lack of staff trained in record retrieval, (2) the lack of response from any of the department heads with whom she had communicated and who had (with the exception of Council minutes) exclusive knowledge of the existence of and/or control of the requested records, (3) her belief that some of the requests were not sufficiently specific, (4) the lack of an automatic retrieval system in Roselle, and (5) the lack of preparation of or approval of the requested Council minutes. None of those reasons were conveyed to [the Complainants]. Indeed, she could not have forthrightly suggested that the volume of the materials requested was the reason for non-access by the November 14, 2007 due date because, without the cooperation of or communication from the department heads, she could not have had any idea whether or not the requested records were voluminous. She admittedly had specific knowledge at least as to the status of Council minutes for which she had responsibility, but did not share this information.

[The Custodian] never represented to [the Complainants] that their record requests would substantially disrupt Borough operations, and consequently made no attempt to seek a reasonable solution for an accommodation. See N.J.S.A. 47:1A-5(g). Once they rejected her request for additional time, she had no further communication with them until they filed their complaints.”

The ALJ continued to state that:

“...the purpose of OPRA to make government records accessible to citizens would be subverted if a Custodian could defend her inaction by claiming that she was denied access to records by other officials.”

The ALJ cited N.J.S.A. 47:1A-11.a. in that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [N.J.S.A. 47:1A et seq.], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation[.]”

The ALJ **CONCLUDED** that: “Roselle Record Custodian Bluestein knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.”

The ALJ reasoned that:

“[t]here can be no presumption of ‘willful’ misconduct simply because of the failure of a public official to respond to an OPRA request in a timely manner. Had the Legislature intended to impose a civil monetary penalty merely for failing to respond within the statutory timeframe, there would have been no need to include the ‘willful’ standard. The intent of the Legislature was to provide prompt access to government records through OPRA. Although such promptness was lacking here, the Legislature set the bar very high for the imposition of monetary penalties where delay occurs.

Although OPRA does not contain a definition of what constitutes a ‘knowing and willful’ violation, the GRC uses a definition formulated through several court decisions involving other statutes...Willful misconduct must be intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless or unintentional. ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996); also see Fielder v. Stonack, 141 N.J. 101, 124 (1995) and Alston v. City of Camden, 168 N.J. 170, 185 (2001). While there need not be the actual intent to cause harm, the action must exhibit a positive element of conscious wrongdoing. Fielder, supra, 141 N.J. at 124.

[The Custodian] acknowledged a familiarity with OPRA’s requirements. That would include an awareness of its tight time frames. Nevertheless, she did not even initiate an inquiry to the department heads for the requested records until November 8, 2007, four business days after the [Complainants’] requests. She compounded her tardy reaction to the November 1 requests by advising the department heads that they had until November 19, 2007 to provide her with the documents, a date that was

well beyond the seven-business-day timetable. In this regard she acted deliberately and with knowledge that she would not comply within the mandated response time. It is astonishing that [the Custodian] received no response or cooperation whatsoever from any of the Roselle personnel with whom she communicated. However, her lack of timely or even delayed follow-up with these individuals represents willful misconduct.

As previously indicated, [the Custodian] misrepresented to [the Complainants] that the reason she needed more time to provide the public records was because of the volume of the materials being requested. This misrepresentation was willful and deliberate since, by her own admission, she had no idea at that time whether or not compliance would be impeded because of the size of the request. She had no knowledge as to the existence of the requested records, no independent access to these records, and no response from those who did.

There has been no showing that [the Custodian's] conduct was vindictive or maliciously motivated. She did not totally ignore her responsibilities. It is evident that others in the Roselle administration were complicit in the denial of access by callously ignoring [the Custodian's] request for cooperation. Nevertheless...the Custodian knew of the wrongfulness of her conduct when she denied access to the public records. Although an argument can be made that a civil penalty for the willful misconduct that occurred here should deservedly be laid upon the entire Borough administration in view of the complicity of several officials, the clear language of the statute provides for the assessment of individual penalties against a public official, officer, employee or custodian...Under the totality of the circumstances, Bluestein, as the Custodian of Records for the Borough of Roselle should be subject to a civil penalty of \$1,000 for knowingly and willfully violating OPRA and unreasonably denying access under the totality of the circumstances.”

Therefore, the ALJ **ORDERS** the Custodian to provide access to the existing records set forth in the Complainants' November 1, 2007 OPRA requests. Additionally, the ALJ **ORDERS** the Custodian to “pay a civil penalty in the amount of \$1,000 to the Government Records Council.”

Analysis

Pursuant to N.J.S.A. 2A:58-10, N.J.S.A. 2A:11(f) and N.J. Court Rule 4:70-3, payment of civil penalties are to be remitted to the Treasurer of the State of New Jersey.

Although the ALJ's Initial Decision dated November 18, 2008 orders the Custodian to pay a civil penalty in the amount of \$1,000.00 to the GRC, the Council modifies said decision to the extent that the Custodian's civil penalty shall be paid to the State of New Jersey General Treasury, care of the GRC.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Administrative Law Judge's Initial Decision dated November 18, 2008 shall be modified to the extent that the Custodian's civil penalty shall be paid to the State of New Jersey General Treasury, care of the GRC. The Council accepts the remainder of said Decision as written.

2. **The Custodian shall comply with the portion of the Administrative Law Judge's Initial Decision which orders the Custodian to provide the requested records to the Complainants 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, to the Executive Director**

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

April 30, 2008 Government Records Council Meeting

Stephen Jung
Complainant

Complaint No. 2007-299

v.

Borough of Roselle (Union)
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 unanimous to adopt the entirety of said findings and recommendations. The Council, therefore, finds that based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the original Custodian unlawfully denied access to the requested records. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the original 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 30th 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: April 30, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stephen Jung¹
Complainant**

GRC Complaint No. 2007-299

v.

**Borough of Roselle (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Minutes from regular council meetings held from January 1, 2007 until September 30, 2007.
2. Minutes from council workshops held from January 1, 2007 until September 30, 2007.
3. Minutes from all special council meetings held from January 1, 2007 until September 30, 2007.
4. All minutes of the Board of Adjustment meetings held from January 1, 2007 until September 30, 2007.
5. All borough records that relate to the cost of attorney fees and related costs to the borough that have been generated as a result of the 2006-2007 firing of: the former Borough Administrator Dave Brown, Head of the Department of Public Works Carl Bolles, and UEZ coordinator Cherron Roundtree.
6. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of the demotion of the two police officers in 2007.
7. All Borough records that relate to the cost to the Borough in attorney fees and other related costs to the Borough that have been generated as a result of Mayor Smiths refusal to pay various vendors in 2007, including but not limited to M and A Tree.
8. All Borough records that pertain to the Summer Camp that was run during the summer 2007, including but not limited to records of Police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency.
9. All budget records related to all expenditures of Borough money, including but not limited to any grant dollars and tax dollars spent on the Summer Camp of 2007, including final itemized budget and total expenditures.
10. All budget records related to all expenditures by the Borough, including but not limited to grant money, tax dollars, and money generated by the sale of tickets from the circus that was run during the summer of 2007. Records of what happened to profits made from this event, including the final itemized budget and total final expenditures, incomes and disbursement of profits.

¹ No legal representation listed on record.

² Represented by Wilfredo Benitez, Esq. (Montclair, NJ).

11. Copy of the reorganization plan that was mentioned by Mayor Smith at various council meetings when he discussed the reason for the firing of the Borough Administrator, and which was referenced in the Dan Burns news article, and given as the reason for the firing of Cherron Roundtree in the letter of termination that she received.
12. Copy of resolution memorializing the “reorganization plan” referenced above.
13. Current bond for Borough Clerk.
14. All Borough records that pertain to the Summer Camp that was run during the summer of 2007, including but not limited to records of Police checks and fingerprint checks administered to all adults with direct access to children, records of attendance and verification of residency.³

Request Made: November 1, 2007

Response Made: November 13, 2007

Custodian: Rhona Bluestein

GRC Complaint Filed: December 3, 2007

Background

November 1, 2007

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on four (4) official OPRA request forms.

November 13, 2007

Custodian’s Response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the Borough is requesting additional time to respond to the Complainant’s OPRA requests because of the volume of material being requested.

November 18, 2007

Letter from the Complainant to the Custodian. The Complainant acknowledges the Custodian’s request for an extension, but states that the request is unwarranted because the OPRA requests are for records that should have been readily available to the public.

December 3, 2007

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

- Complainant’s four (4) OPRA requests dated November 1, 2007
- Letter from the Custodian to the Complainant dated November 13, 2007
- Letter from the Complainant to the Custodian dated November 18, 2007

The Complainant asserts that he submitted four (4) OPRA requests on November 1, 2007. The Complainant also asserts that he received correspondence dated November

³ This request is repetitive of request #8. Additionally, the Complainant specifically requests immediate onsite inspection of all of the records relevant to this complaint.

13, 2007, from the Custodian requesting an extension of time. The Complainant further asserts that he responded on November 18, 2007 to the Custodian's letter asserting that the requested extension is unwarranted.

December 14, 2007

Offer of Mediation sent to both parties.

December 21, 2007

The Custodian agrees to mediation, but the Complainant declines mediation.

January 10, 2008

Request for the Statement of Information sent to the Custodian.

January 28, 2008

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on January 10, 2008, and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

February 13, 2008

Custodian's Statement of Information ("SOI"). The Custodian provides the GRC with an incomplete Statement of Information. The Custodian's submission is non-compliant with the GRC procedures and the New Jersey Superior Court decision in John Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), because the Custodian failed to provide a complete document index containing certain information as specifically detailed in the request for the Statement of Information.

The Custodian asserts that OPRA requires the requestor to specifically identify the records being sought in order for the Custodian to search for a specific document, but it does not require the Custodian and other municipal personnel to perform new tasks that require cross-referencing that did not previously exist, compile lists or information that did not previously exist, originate new documents, perform research for the requestor, make interpretations and choices for the requestor, or in essence perform new tasks. The Custodian also asserts that the Complainant's OPRA requests require the Custodian to identify whether actual records exist or not.

The Custodian contends that she had and still has the intent of providing the Complainant with the records of the minutes requested. The Custodian also contends that the minutes for the following meetings have been approved and are available: April 25, 2007, June 27, 2007, July 11, 2007, and August 8, 2007. The Custodian further contends that these minutes were not available at the time of the original request.

The Custodian states that the Complainant demanded immediate access to all the requested records, rather than the statutorily mandated seven (7) business day response time. The Custodian also states that she is severely understaffed and providing immediate access to the requested records would have substantially disrupted the

agency's operations. The Custodian further states that the Complainant was unwilling to allow additional time for a response.

March 7, 2008

Letter from the Complainant to the GRC. The Complainant asserts that within the Custodian's Statement of Information, the Custodian failed to address all of his requests. The Complainant also asserts that the material that was made available to him by the Custodian was incomplete and disorganized. Therefore, the Complainant further asserts that he felt it to be prudent on his part to inform the GRC of what was and was not made available to him by the Custodian.

Items #1-3

The Complainant asserts that some of the minutes were available, but not all. The Complainant also asserts that he did not receive a copy of the memo that was sent to the department heads requesting that the records be provided to the Custodian.

Item #4

The Complainant asserts that nothing was available and that he did not receive a copy of the memo that was sent to the department heads requesting that the records be provided to the Custodian.

Item #5-7

The Complainant contends that no documents were provided with insufficient explanation. The Complainant also contends that each of these firings resulted in a separate lawsuit against the Borough, Mayor and Council, and as a taxpayer he would expect that the Borough would monitor each lawsuit along with the related paperwork. The Complainant further contends that if the Borough did not do this, and if the records were not readily available, the Borough would not have been able to prepare and present a case in the multiple court hearings.

The Complainant asserts that his request was as specific as possible considering he is a citizen who was not part of the actual lawsuit; as such, he has no way of knowing the names of the attorneys who were involved. The Complainant also asserts that he believes it is reasonable, and probably required, that the Borough track the expenditures that relate to such lawsuits to ensure that they do not exceed the appropriate amount.

Items #8 and 11-13

The Complainant contends that no information was provided to him nor was any explanation.

Item #9

The Complainant asserts that copies of payment vouchers were provided in addition to a list of staff; however, no written budget was provided that documented the

total appropriation for either the summer camp or any certified documentation of the final expenditures. The Complainant also asserts that the vouchers provided exceeded the total recreation appropriation for 2007. The Complainant further asserts that there was no documentation of approval to move money or to exceed the total amount of the appropriation for all Borough recreation programs.

The Complainant notes that included in the summer camp vouchers there was a payment voucher for renting two buses to transport school children from their schools to the circus, but the summer camp had not begun by the time the circus was held.

Item #10

The Complainant asserts that he received a list of tickets sold and money collected by the Mayor typed on plain white paper without any letterhead or signature certifying to the information. The Complainant also asserts that no documentation was provided that showed that the information given to him were the final numbers. The Complainant further asserts that he did not receive any indication of how much profit was realized, where the money went, nor a copy of the contract with the circus.

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

Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the original 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, based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008