



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

February 25, 2009 Government Records Council Meeting

Kevin N. Starkey
Complainant

Complaint Nos.2007-315, -316, -317

v.

NJ Department of Transportation
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian previously provided the Complainant with the requested records, the Council’s October 29, 2008 Interim Order was not necessary. However, the Council issued said Order because the Custodian failed to notify the Council that he had provided said records to the Complainant approximately seven (7) months prior to the adjudication of these complaints.
2. Because the Complainant’s three (3) OPRA requests were voluminous, it is reasonable that the Custodian required additional time beyond the statutorily mandated seven (7) business days to fulfill said requests. Additionally, the evidence of record indicates that the Custodian made efforts to fulfill said requests from the time that he received said requests until the time he provided said records to the Complainant. However, the evidence of record also indicates that the Custodian failed to continuously notify the Complainant in writing of the Custodian’s efforts to fulfill said requests. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access and failure to notify the Complainant in writing of when the records would be made available after the Complainant paid the special service charge appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.



3. Based on the fact that the courts of this State have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself, as well as the GRC's decisions in Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006) and Daryle Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006), the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA.

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 25th Day of February, 2009

Robin Berg Tabakin, Chair
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: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Kevin N. Starkey¹
Complainant**

GRC Complaint Nos. 2007-315, -316, -317

v.

**NJ Department of Transportation²
Custodian of Records**

Records Relevant to Complaint:

1. GRC Complaint No. 2007-315 (OPRA request no. C31093): All DC-161s, change orders and claims for the Route 29 (Sec 10C/11B) project.
2. GRC Complaint No. 2007-316 (OPRA request no. C31096): All DC-161s, change orders and claims for the Route 29 (2N) and Route 78 (5CK) project.
3. GRC Complaint No. 2007-317 (OPRA request no. C31055): All DC-161s, change orders and claims filed on the Routes 1 and 9 project (contract no. 035950170) for which EE Cruz was the general contractor.³

Requests Made: September 6, 2007

Responses Made: September 7, 2007 and September 12, 2007

Custodian: Alfred Brenner

GRC Complaints Filed: December 17, 2007

Background

October 29, 2008

Government Records Council's ("Council") Interim Order. At its October 29, 2008 public meeting, the Council considered the October 22, 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:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days regarding request no. C31055 and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (March 2008).

¹ The Complainant is an attorney representing himself.

² Represented by DAG Wayne J. Martorelli, on behalf of the NJ Attorney General.

³ The request numbers assigned to the Complainant's requests reflect the Department of Transportation's internal OPRA tracking system.

2. Because the Custodian provided the Complainant with a written response within the extended time frame regarding request no. C31055 in which the Custodian estimated a special service charge, thus providing the Complainant with an opportunity to review and object to the charge prior to it being incurred, the Custodian's September 14, 2007 response was proper pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g. Pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005), the Custodian is not required to provide the records responsive until he receives payment for said records.
3. Because the Custodian failed to notify the Complainant in writing of when the requested records would be made available after the Complainant paid the special service charge deposit for request no. C31055, the Custodian violated N.J.S.A. 47:1A-5.i.
4. The Custodian in this instant matter has not provided any evidence that he attempted to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency regarding request no. C31055. As such, the Custodian has failed to meet his burden of proof that fulfilling the Complainant's request would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.
5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days regarding requests no. C31093 and C31096 of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant's requests dated September 12, 2007, in which the Custodian requested an extension of time, is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Complainant's requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
6. Although it may be reasonable that the Complainant's requests no. C31093 and C31096 took several months to fulfill due to the nature of the requests and the volume of records responsive, the Complainant's requests are approaching one (1) year unfulfilled and the Custodian has not provided any indication as to when the records responsive will be released to the Complainant. As such, the Custodian must release the records responsive to the Complainant or show cause as to why the Custodian cannot release the records within the ordered time frame.
7. **The Custodian shall comply with item no. 6 above within ten (10) 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.

8. The issue of whether fulfilling the Complainant's forty-two (42) new OPRA requests would substantially disrupt Department of Transportation's operations is not properly before the GRC because said requests are not the subject of these Denial of Access Complaints.
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

October 30, 2008

Council's Interim Order distributed to the parties.

November 6, 2008

Custodian's response to the Council's Interim Order. The Custodian certifies that he provided the Complainant with the records responsive to request no. C31096 without redactions on March 31, 2008. The Custodian also certifies that he provided the Complainant with the records responsive to request no. C31093 without redactions on May 12, 2008. .

November 13, 2008

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the records responsive to the Complainant's OPRA requests were released to the Complainant in full and unredacted months before the Council issued its Interim Order. Additionally, Counsel contends that the Council's deferment of a decision as to whether the Custodian knowingly and willfully violated OPRA and whether the Complainant is a prevailing party is based on the Council's mistaken belief that NJDOT has not yet provided the Complainant access to the records responsive to request nos. C31093 and C31096. Counsel asserts that the Custodian's handling of said requests was reasonable given the nature and scope of said requests; specifically, that the records encompassed more than 130 boxes archived in various locations. Counsel claims that there was no intent on the NJDOT's part to disregard the requirements of OPRA.

Counsel also contends that the Complainant cannot be considered a prevailing party under N.J.S.A. 47:1A-6. Counsel states that the Complainant must demonstrate "a factual causal nexus" between the litigation and the production of the requested records, meaning that the institution of litigation was the "catalyst" that induced the agency to produce records it otherwise would have withheld. Mason v. City of Hoboken, 196 N.J. 51 (2008). Counsel asserts that the mere filing of the Denial of Access Complaints does not, in and of itself, make the Complainant a prevailing party. Counsel asserts that in this instance, the Custodian would have produced the requested records in the manner and

time frame that he did produce them with or without the filing of the Denial of Access Complaints. Counsel states that the process of locating and reviewing the requested records began long before the Complainant filed his complaints. Counsel states that the Council acknowledges the volume of the requested records and the reasonable amount of time to provide said records. As such, Counsel asserts that the Council cannot conclude that the filing of the Denial of Access Complaints was the catalyst that forced the Custodian to provide the requested records.

Analysis

Whether the Custodian complied with the Council's October 29, 2008 Interim Order?

In the Council's October 29, 2008 Interim Order, the Council ordered the Custodian to disclose the records responsive to the Complainant's requests no. C31093 and C31096 or show cause as to why the Custodian cannot release the records within the ordered time frame. However, the Custodian certified on November 6, 2008 that he already provided the Complainant with said records in unredacted form on March 31, 2008 and May 12, 2008.

In the Findings and Recommendations of the Executive Director dated October 22, 2008, the last piece of correspondence relevant to these complaints was submitted to the GRC by the Custodian's Counsel on March 19, 2008, approximately seven (7) business days prior to the date on which the Custodian provided the Complainant with the records responsive to request no. C31096. Therefore, it is concluded that both the Custodian and the Custodian's Counsel were aware at the time the Custodian provided the Complainant with records responsive to request no. C31096 that the Complainant's Denial of Access Complaints were still pending before the GRC. As such, the Custodian was obligated to notify the GRC that he had provided the requested records to the Complainant because OPRA mandates that custodians must carry the burden of proving a lawful denial of access. N.J.S.A. 47:1A-6. The Custodian had a second opportunity to make such notification to the GRC when he released records responsive to the Complainant's request no. C31093 without redactions on May 12, 2008; however, the Custodian failed to do so.

OPRA provides that proceedings before the Council "shall proceed in a summary or expedited manner." N.J.S.A. 47:1A-6. Seven (7) months elapsed between the date that the Custodian released records responsive to request no. C31096 and the date on which the Council adjudicated these matters. Essentially, the GRC unnecessarily expended seven (7) months preparing a twenty (20) page Findings and Recommendations of the Executive Director in order to adjudicate these matters on the mistaken belief that the records requests at issue were still outstanding. Had the Custodian notified the GRC that he provided the Complainant with the records responsive, the Council would not have had to issue an Interim Order and could have used its time to expeditiously adjudicate other pressing matters.

Therefore, because the Custodian previously provided the Complainant with the requested records, the Council's October 29, 2008 Interim Order was not necessary.

However, the Council issued said Order because the Custodian failed to notify the Council that he had provided said records to the Complainant approximately seven (7) months prior to the adjudication of these complaints.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Regarding the Complainant’s request no. C31055, the Custodian properly requested an extension of time to respond to said request because the Custodian responded in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the records would be made available. Additionally, the Custodian properly notified the Complainant of the special service charge pursuant to N.J.S.A. 47:1A-5.c. However, the Custodian violated N.J.S.A. 47:1A-5.i. by failing to notify the Complainant in writing of when the records would be made available after the Complainant paid the special service charge. Although it took the Custodian approximately four (4) months to provide the Complainant with the requested records, it should be noted that said request was voluminous, encompassing numerous boxes of records.

As for the Complainant’s requests no. C31093 and C31096, the Custodian improperly requested an extension of time and said requests were “deemed” denied. Additionally, the Complainant paid the special service charge for said requests in January 2008 but the Custodian did not provide access to said records until March and May 2008. However, it should also be noted that said records are voluminous, encompassing numerous boxes of records.

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 Complainant's three (3) OPRA requests were voluminous, it is reasonable that the Custodian required additional time beyond the statutorily mandated seven (7) business days to fulfill said requests. Additionally, the evidence of record indicates that the Custodian made efforts to fulfill said requests from the time that he received said requests until the time he provided said records to the Complainant. However, the evidence of record also indicates that the Custodian failed to continuously notify the Complainant in writing of the Custodian's efforts to fulfill said requests. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access and failure to notify the Complainant in writing of when the records would be made available after the Complainant paid the special service charge appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed.

In this complaint, the Custodian violated N.J.S.A. 47:1A-5.i. by failing to notify the Complainant in writing of when the records responsive to request no. C31055 would be made available after the Complainant paid the special service charge. Additionally, the Custodian improperly requested an extension of time to respond to requests no. C31093 and C31096 and said requests were “deemed” denied. The Custodian ultimately provided access to all of the requested records after the Complainant filed his Denial of Access Complaints.

The more complicated aspect of this issue is whether the Complainant would qualify for reasonable attorney’s fees. According to the Supreme Court of New Jersey, the New Jersey Legislature has promulgated a “substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for* the prevailing party.” (Emphasis added.) New Jerseyans For A Death Penalty Moratorium v. New Jersey Department of Corrections and Devon Brown, 182 N.J. 628 (2005) (decision without a published opinion), (quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for incorporating a fee-shifting measure: to ensure “that plaintiffs with bona fide claims are able to find lawyers to represent them[,]... to attract competent counsel in cases involving statutory rights, ... and to ensure justice for all citizens.” New Jerseyans For A Death Penalty Moratorium supra, quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989). Thus, the courts of the state have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself.

In Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the requestor was an attorney requesting records on behalf of his client. The Council held that “[b]ased on the fact that the courts of the state have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff *not an attorney who is the plaintiff representing himself*, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA.” (Emphasis added). The Council also held the same ruling in Daryle Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006).

Therefore, based on the fact that the courts of this State have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself, as well as the GRC’s decisions in Boggia, supra, and Pitts, supra, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian previously provided the Complainant with the requested records, the Council’s October 29, 2008 Interim Order was not necessary. However, the Council issued said Order because the Custodian failed to notify the Council that he had provided said records to the

Complainant approximately seven (7) months prior to the adjudication of these complaints.

2. Because the Complainant's three (3) OPRA requests were voluminous, it is reasonable that the Custodian required additional time beyond the statutorily mandated seven (7) business days to fulfill said requests. Additionally, the evidence of record indicates that the Custodian made efforts to fulfill said requests from the time that he received said requests until the time he provided said records to the Complainant. However, the evidence of record also indicates that the Custodian failed to continuously notify the Complainant in writing of the Custodian's efforts to fulfill said requests. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access and failure to notify the Complainant in writing of when the records would be made available after the Complainant paid the special service charge appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Based on the fact that the courts of this State have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself, as well as the GRC's decisions in Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006) and Daryle Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006), the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

October 29, 2008 Government Records Council Meeting

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NJ Department of Transportation
Custodian of Record

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days regarding request no. C31055 and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (March 2008).
2. Because the Custodian provided the Complainant with a written response within the extended time frame regarding request no. C31055 in which the Custodian estimated a special service charge, thus providing the Complainant with an opportunity to review and object to the charge prior to it being incurred, the Custodian's September 14, 2007 response was proper pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g. Pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005), the Custodian is not required to provide the records responsive until he receives payment for said records.
3. Because the Custodian failed to notify the Complainant in writing of when the requested records would be made available after the Complainant paid the special service charge deposit for request no. C31055, the Custodian violated N.J.S.A. 47:1A-5.i.



4. The Custodian in this instant matter has not provided any evidence that he attempted to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency regarding request no. C31055. As such, the Custodian has failed to meet his burden of proof that fulfilling the Complainant's request would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.
5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days regarding requests no. C31093 and C31096 of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant's requests dated September 12, 2007, in which the Custodian requested an extension of time, is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Complainant's requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
6. Although it may be reasonable that the Complainant's requests no. C31093 and C31096 took several months to fulfill due to the nature of the requests and the volume of records responsive, the Complainant's requests are approaching one (1) year unfulfilled and the Custodian has not provided any indication as to when the records responsive will be released to the Complainant. As such, the Custodian must release the records responsive to the Complainant or show cause as to why the Custodian cannot release the records within the ordered time frame.
7. **The Custodian shall comply with item no. 6 above within ten (10) 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.**
8. The issue of whether fulfilling the Complainant's forty-two (42) new OPRA requests would substantially disrupt Department of Transportation's operations is not properly before the GRC because said requests are not the subject of these Denial of Access Complaints.
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of October, 2008

Robin Berg Tabakin, Chair
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: October 30, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2008 Council Meeting**

**Kevin N. Starkey¹
Complainant**

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v.

**NJ Department of Transportation²
Custodian of Records**

Records Relevant to Complaint:

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3. GRC Complaint No. 2007-317 (OPRA request no. C31055): All DC-161s, change orders and claims filed on the Routes 1 and 9 project (contract no. 035950170) for which EE Cruz was the general contractor.³

Requests Made: September 6, 2007

Responses Made: September 7, 2007 and September 12, 2007

Custodian: Alfred Brenner

GRC Complaints Filed: December 17, 2007

Background

September 6, 2007

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on three (3) separate official OPRA request forms.

September 7, 2007

Custodian's response to the Complainant's OPRA request no. C31055. The Custodian responds in writing to the Complainant's OPRA request on the same business day of receipt of such request.⁴ The Custodian states that the requested records may not be readily available. The Custodian states that he may have to reach out to several units within the NJ Department of Transportation ("DOT") for assistance in obtaining the

¹ The Complainant is an attorney representing himself.

² Represented by DAG Wayne J. Martorelli, on behalf of the NJ Attorney General.

³ The request numbers assigned to the Complainant's requests reflect the Department of Transportation's internal OPRA tracking system.

⁴ The Custodian certifies in his Statement of Information dated February 1, 2008 that he received said request on September 7, 2007.

requested records. The Custodian states that he will contact the Complainant again shortly.

Additionally, the Custodian states that if the Complainant is requesting to receive the records responsive via mail, he will contact and advise the Complainant of the amount due. The Custodian states that the records will not be released until payment is received. The Custodian also states that the Complainant may contact DOT's Records and Information Management with any questions in the interim.

September 11, 2007

Custodian's subsequent response to the Complainant's OPRA request no. C31055 on the second (2nd) business day following the Custodian's receipt of said request. The Custodian states that he is reaching out to several units within DOT to identify and obtain the records requested. The Custodian requests an extension of time until September 21, 2007 to complete the record identification, retrieval and review required to complete the request.

September 12, 2007

Custodian's response to the Complainant's OPRA requests no. C31093 and C31096.⁵ The Custodian responds in writing to the Complainant's OPRA requests on the first (1st) business day following receipt of such requests.⁶ The Custodian requests an extension of time to fulfill said requests. The Custodian states that the requested records may not be readily available and he may have to reach out to several units within DOT for assistance in obtaining the requested records. The Custodian states that he will contact the Complainant again shortly.

Additionally, the Custodian states that if the Complainant is requesting to receive the records responsive via mail, he will contact and advise the Complainant of the amount due. The Custodian states that the records will not be released until payment is received. The Custodian also states that the Complainant may contact DOT's Records and Information Management with any questions in the interim.

September 14, 2007

E-mail from Custodian to Complainant regarding OPRA request no. C31055. The Custodian states that a special service charge will be assessed for the following reasons:

1. Several units within DOT have records that may be responsive to the request.
2. There are numerous boxes of records for the time period requested that must be pulled and sorted to identify records responsive.
3. Once records responsive are identified, said records must be reviewed for privileged information, redacted as appropriate and assembled for copying.

⁵ The Custodian responded to each request in a separate e-mail.

⁶ The Custodian certifies in his Statement of Information dated February 1, 2008 that he received said requests on September 11, 2007.

The Custodian estimates this process will take twenty (20) hours at a staff rate of \$33.73 per hour which totals \$674.60. The Custodian states that because this amount is an estimate, the actual cost may be lower or higher. The Custodian also states that said estimate does not include the copy fee for the requested records. The Custodian requests the Complainant's written confirmation of the special service charge and a 50% deposit of \$337.30. The Custodian states that until such time as the deposit is received, the Custodian will take no further action regarding this request.

September 19, 2007

Custodian's subsequent response to the Complainant's OPRA request no. C31096. The Custodian asks the Complainant to provide more information on the requested project such as the time frame that said project was under construction or the mileposts on Routes 21 and 78 where the construction occurred.

September 19, 2007

E-mail from Complainant to Custodian regarding OPRA request no. C31096. The Complainant states that he obtained the information for this request from DOT's website. The Complainant states that the project on which he is requesting records is the second project listed on the following web page:

www.state.nj.us/transportation/business/procurement/ProfServ/ConsulSelections/ConSelFY00.shtm.

October 3, 2007

E-mail from Custodian to Complainant regarding OPRA request no. C31055. The Custodian states that on September 14, 2007 he notified the Complainant about an estimated special service charge but has not yet received a response to said charge. The Custodian states that if he does not receive a response by October 19, 2007, this request will be closed.

October 3, 2007

E-mail from Complainant to Custodian regarding OPRA request no. C31055. The Complainant states that his client has authorized the special service charge.

October 3, 2007

E-mail from Custodian to Complainant regarding OPRA request no. C31055. The Custodian states that he will prepare the records upon receipt of a deposit in the amount of \$337.30.

October 3, 2007

E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096. The Complainant seeks the status of said requests.

October 9, 2007

Letter from Complainant to Custodian regarding OPRA request no. C31055. The Complainant encloses a check for the 50% special service charge deposit in the amount of \$337.30.

October 10, 2007

E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096. The Complainant seeks the status of said requests.

October 10, 2007

E-mail from Custodian to Complainant regarding OPRA requests no. C31093 and C31096. The Custodian states that due to the extensive nature of the Complainant's requests, he is still gathering the records responsive by reaching out to several units within DOT. The Custodian requests an extension of time until October 31, 2007 in order to complete the necessary record identification, retrieval and review.

October 15, 2007

E-mail from Custodian to Complainant regarding OPRA requests no. C31093 and C31096. The Custodian states that some records responsive are in storage or are not readily available and will require legal review prior to release. As such, the Custodian requests an extension of time until November 7, 2007.

November 7, 2007

E-mail from Thomas J. Kondash, Jr., Project Engineer, to Custodian regarding OPRA request no. C31055. Mr. Kondash states that the DC-161s and change orders have been copied and will be held until given further direction by the Custodian and legal counsel.

November 30, 2007

E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096. The Complainant states that the Custodian's November 7, 2007 extension deadline has passed and asks that the Custodian provide the requested records.

December 10, 2007

E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096. The Complainant states that he has not yet received the requested records and would like to resolve this matter without intervention from the Government Records Council ("GRC").

December 11, 2007

E-mail from Custodian to Complainant regarding OPRA requests no. C31093 and C31096. The Custodian states that there are over 130 boxes currently in storage regarding OPRA request no. C31093. The Custodian states that he is attempting to determine the best way to identify the requested records. The Custodian also states that this request will require a special service charge of which the Custodian will advise once the records are retrieved. Additionally, the Custodian states that he is still trying to determine where the records responsive to OPRA request no. C31096 are located and how much effort it will take to identify the requested records.

December 11, 2007

E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096. The Complainant asks that the Custodian provide a specific date on which the

requested records will be provided as it has been approximately four (4) months⁷ since the Complainant submitted his OPRA requests.

December 17, 2007

Denial of Access Complaints regarding OPRA requests no. C31093 and C31096 filed with the GRC with the following attachments:

- Complainant's OPRA requests dated September 6, 2007
- Custodian's response to the requests dated September 12, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31096 dated September 19, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31096 dated September 19, 2007
- E-mail from Complainant to Custodian dated October 3, 2007
- E-mail from Complainant to Custodian dated October 10, 2007
- E-mail from Custodian to Complainant dated October 10, 2007
- E-mail from Custodian to Complainant dated October 15, 2007
- E-mail from Complainant to Custodian dated November 30, 2007
- E-mail from Complainant to Custodian dated December 10, 2007
- E-mail from Custodian to Complainant dated December 11, 2007
- E-mail from Complainant to Custodian dated December 11, 2007⁸

The Complainant states that he submitted his OPRA requests on September 6, 2007. The Complainant states that the Custodian requested an extension of time to fulfill the requests via e-mail dated September 12, 2007. The Complainant also states that the Custodian sought clarification of OPRA request no. C31096 via e-mail dated September 19, 2007.

The Complainant states that during the month of October 2007 he asked the Custodian the status of his requests via e-mail. The Complainant states that via e-mail dated October 10, 2007 the Custodian requested an extension of time until October 31, 2007 to fulfill the requests. The Complainant also states that, via e-mail dated October 15, 2007, the Custodian requested an extension of time until November 7, 2007 to fulfill said request.

Additionally, the Complainant states that he e-mailed the Custodian on two (2) occasions in November and December 2007 asking for an update on the status of the requests because the Custodian's extension of time had expired. The Complainant states that the Custodian indicated in an e-mail dated December 11, 2007 that he is still trying to determine where the requested records are located for OPRA request no. C31096 and how much effort it will take to identify the specific requested records. Regarding request no. C31093, the Complainant states that the Custodian indicated that there are over 130 boxes currently in storage and that the Custodian will advise as to a special service charge once the records are retrieved. Further, the Complainant states that the Custodian failed to provide a date as to when the records will be provided, nor has the Complainant

⁷ Actual time elapsed is three (3) months.

⁸ E-mails dated September 19, 2007 refer only to OPRA request no. C31096.

received any records responsive to date. The Complainant declines to mediate these complaints.

December 17, 2007

Denial of Access Complaint regarding OPRA request no. C31055 filed with the GRC with the following attachments:

- Complainant's OPRA request dated September 6, 2007
- Custodian's response to the request dated September 7, 2007
- Custodian's subsequent response to the request dated September 11, 2007
- E-mail from Custodian to Complainant dated September 14, 2007
- Letter from Complainant to Custodian dated October 9, 2007

The Complainant states that he submitted his OPRA request on September 6, 2007. The Complainant states that the Custodian requested an extension of time via e-mail dated September 7, 2007 to fulfill said request. The Complainant states that via e-mail dated September 11, 2007, the Custodian requested an extension of time until September 21, 2007 to fulfill said request. The Complainant also states that the Custodian assessed a special service charge on September 14, 2007 for \$674.60 and requested a 50% deposit before fulfilling the request. The Complainant states that on October 9, 2007 he sent check no. 26125 in the amount of \$337.50 to the Custodian for the 50% deposit. The Complainant states that to date he has not received the requested records. The Complainant declines to mediate this complaint.

December 28, 2007

E-mail from Custodian to Complainant regarding the Complainant's three (3) OPRA requests. The Custodian states that the records responsive to OPRA request no. C31055 have been assembled and are currently under legal review. The Custodian states that he is still trying to ascertain the location and scope of records responsive to OPRA request no. C31093. The Custodian states that there are over 130 boxes in storage related to the project which is the subject of said request. Additionally, the Custodian states that he is still trying to ascertain the location and scope of records responsive to OPRA request no. C31096.

January 10, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

January 14, 2008

E-mail from Custodian to Complainant regarding OPRA request no. C31055. The Custodian states that the requested records are available and ready to be mailed. The Custodian states that the special service charge for twelve (12) hours at \$33.73 an hour totals \$404.76. The Custodian also states that the copy fee for 1,493 pages totals \$380.75. Additionally, the Custodian states that the balance due is \$448.21.

January 15, 2008

E-mail from Custodian to Complainant regarding OPRA request no. C31096. The Custodian states that a special service charge will be assessed for the following reasons:

1. Several units within DOT have records that may be responsive to the request.
2. Numerous boxes of records must be retrieved offsite and sorted to identify the records responsive to the request.
3. Records responsive must be reviewed for privileged information, redacted as necessary and assembled for copying.

The Custodian estimates twelve (12) hours of staff time to accomplish the above at \$33.73 per hour, totaling \$404.76. The Custodian states that in order to proceed with this request, he requires written confirmation from the Complainant and payment of a 50% deposit in the amount of \$202.38.

January 15, 2008

E-mail from GRC to Custodian's Counsel granting a five (5) business day extension of time to complete the SOI.⁹

January 17, 2008

Letter from Complainant to Custodian regarding OPRA request no. C31096. The Complainant encloses a check in the amount of \$202.38 for the 50% deposit.

January 22, 2008

OPRA request receipt regarding OPRA request no. C31055. The Custodian provides the Complainant with 1,493 pages of records responsive to his request.

January 23, 2008

E-mail from Custodian to Complainant regarding OPRA request no. C31093. The Custodian states that he located the requested records and must assess a special service charge for the following reasons:

1. There are over 130 boxes related to the Route 29 Tunnel Project that must be retrieved from archives
2. Staff must review all boxes to locate specific records responsive to the request
3. Records responsive must be reviewed for privileged information, redacted as necessary and assembled for copying
4. Due to staff constraints and the volume of the records, this process will significantly impact the day to day operations of the agency.

The Custodian estimates approximately seventy-five (75) hours at \$33.73 per hour which totals \$2,529.75. The Custodian states that in order to proceed with this request he requires written confirmation from the Complainant and payment of a 50% deposit in the amount of \$1,264.88.

January 25, 2008

Letter from Complainant to Custodian regarding OPRA request no. C31093. The Complainant encloses a check in the amount of \$1,264.88 for the 50% deposit.

⁹ In response to Counsel's verbal request.

January 31, 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 an SOI on January 10, 2008 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

February 1, 2008

Custodian's SOI with the following attachments:¹⁰

- OPRA request receipt regarding OPRA request no. C31055 dated September 7, 2007
- Custodian's response to OPRA request no. C31055 dated September 7, 2007
- OPRA request receipt regarding OPRA request no. C31093 dated September 11, 2007
- OPRA request receipt regarding OPRA request no. C31096 dated September 11, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31055 dated September 11, 2007
- Custodian's response to OPRA request no. C31093 dated September 12, 2007
- Custodian's response to OPRA request no. C31096 dated September 12, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31055 dated September 14, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31096 dated September 19, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31055 dated October 3, 2007
- E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096 dated October 3, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31055 dated October 3, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31055 dated October 3, 2007
- E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096 dated October 3, 2007
- E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096 dated October 10, 2007
- E-mail from Custodian to Complainant regarding OPRA requests no. C31093 and C31096 dated October 10, 2007
- E-mail from Custodian to Complainant regarding OPRA requests no. C31093 and C31096 dated October 15, 2007
- E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096 dated November 30, 2007
- E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096 dated December 10, 2007

¹⁰ The signature page of the SOI is dated January 23, 2008, however, the SOI was submitted to the GRC under cover letter dated February 1, 2008.

- E-mail from Custodian to Complainant regarding OPRA requests no. C31093 and C31096 dated December 11, 2007
- E-mail from Complainant to Custodian regarding OPRA requests no. C31093 and C31096 dated December 11, 2007
- E-mail from Custodian to Complainant regarding OPRA requests no. C31055, C31093 and C31096 dated December 28, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31055 dated January 14, 2008
- OPRA request receipt regarding OPRA request no. C31055 dated January 22, 2008¹¹

The Custodian certifies that he received the Complainant's OPRA request no. C31055 on September 7, 2007 and forwarded said request to Capital Program Management's ("CPM") OPRA Liaison for a response on said date. The Custodian certifies that he received an e-mail from DOT's Tort Litigation section on September 10, 2007 indicating that the records responsive to OPRA request no. C31055 were located and an extensive amount of time would be necessary to pull the records. The Custodian states that the Tort Litigation section suggested a two (2) week extension.

The Custodian also certifies that he received the Complainant's OPRA requests no. C31093 and C31096 on September 11, 2007. The Custodian certifies that his initial responses to all three (3) of the Complainant's requests were dated September 7, 2007 and September 12, 2007 in which the Custodian advised the Complainant that the requested records may not be readily available and that the Custodian may have to reach out to several units to obtain said records. The Custodian certifies that via e-mail dated September 11, 2007 he requested an extension of time until September 21, 2007 to fulfill OPRA request no. C31055.

The Custodian certifies that he forwarded OPRA requests no. C31093 and C31096 to the CPM OPRA Liaison for action on September 12, 2007. The Custodian certifies that on September 13, 2007 he received an e-mail from CPM advising that the records requested for all of the Complainant's requests may be in storage and would take time to retrieve and review. The Custodian certifies that on September 12, 2007 he advised CPM's OPRA Liaison that due to the large volume of records involved in the Complainant's three (3) OPRA requests, a special service charge is warranted. The Custodian certifies that in said e-mail he asked the OPRA Liaison to estimate the time and effort involved for each request. The Custodian also certifies that on September 12, 2007 he received an e-mail from DOT's Region South seeking clarification of the Complainant's OPRA request no. C31093. Additionally, the Custodian certifies that he received various e-mails dated September 12, 2007 regarding the initial estimate of time required to locate records responsive to OPRA request no. C31055. The Custodian certifies that he continued to receive e-mails regarding DOT's efforts to locate records responsive to the Complainant's requests on September 14, 2007. The Custodian certifies that on September 14, 2007 he advised the Complainant that a special service charge would be assessed for OPRA request no. C31055.

¹¹ The Custodian submitted additional records which are not relevant to the adjudication of this complaint. Kevin N. Starkey v. NJ Department of Transportation, 2007-315, 2007-316 and 2007-317 – Findings and Recommendations of the Executive Director 9

Further, the Custodian certifies that he sought clarification of the Complainant's request no. C31096 via e-mail dated September 19, 2007. The Custodian certifies that he received the Complainant's e-mail authorizing the special service charge for OPRA request no. C31055 on October 3, 2007. The Custodian certifies that he advised the Complainant of the status of his requests via e-mail dated October 10, 2007 based on verbal communications from DOT units. The Custodian also certifies that on October 15, 2007 he advised DOT units that the Complainant agreed to the special service charge for OPRA request no. C31055 and to proceed with assembling the records. Additionally, the Custodian certifies that a member of his staff requested a status update from the units involved regarding the Complainant's requests on October 15, 2007, November 7, 2007, November 30, 2007, December 6, 2007, December 10, 2007 and December 27, 2007.

The Custodian certifies that he advised the Complainant of the status of OPRA requests no. C31093 and C31096 in writing on December 11, 2007. The Custodian also certifies that via e-mail dated December 28, 2007, he advised the Complainant that the records responsive to OPRA request no. C31055 were under legal review, that there are over 130 boxes in storage responsive to OPRA request no. C31093, and that DOT is still trying to ascertain the location and scope of the records responsive to OPRA request no. C31096. The Custodian further certifies that he notified the Complainant in writing on January 14, 2008 that the records responsive to OPRA request no. C31055 were available and that the balance due is \$448.21.

Additionally, the Custodian certifies that he notified the Complainant in writing on January 15, 2008 that the estimated special service charge for OPRA request no. C31096 is \$404.76 (twelve (12) hours at \$33.73 an hour). The Custodian certifies that on January 17, 2008 he provided the Complainant with the records responsive to OPRA request no. C31055. The Custodian also certifies that on January 22, 2008 he notified the Complainant that there are over 100 boxes in storage which are being reviewed for records responsive to OPRA request no. C31093 and that the Custodian is waiting for the Complainant's authorization of the special service charge for OPRA request no. C31096. The Custodian asserts that the DOT tried to be as responsive as possible considering its lack of staff resources and the volume of the requested records.

The Custodian contends that because he provided records responsive to the Complainant's OPRA request no. C31055, the Complainant's claim of denial for said request is moot. The Custodian states that the Complainant has failed to respond to DOT's January 15, 2008 e-mail regarding a special service charge for OPRA request no. C31096. The Custodian asserts that when the requested records are in storage or archived, a custodian's response advising the requestor when the records can be made available is a sufficient response pursuant to N.J.S.A. 47:1A-5.i. The Custodian states that due to the large number of boxes and the dispersal of the requested records, he is unable to provide the Complainant with a meaningful estimate of when the records responsive to OPRA requests no. C31093 and C31096 can be made available. The Custodian asserts that in and of itself, this fulfills the Custodian's obligation to respond and does not amount to a denial of access.

Additionally, the Custodian certifies that the Complainant has filed forty-two (42) new OPRA requests similar in scope and complexity to the requests at issue in these

complaints. The Custodian contends that pursuant to N.J.S.A. 47:1A-5.g. a requestor cannot inundate an agency with requests that would substantially disrupt agency operations. The Custodian claims that it would substantially disrupt agency operations for the GRC to require any more effort of DOT in responding to these requests than the current efforts. Further, the Custodian contends that he has not denied access to any of the requested records and requests that this complaint be dismissed.

February 27, 2008

Complainant's response to the Custodian's SOI with the following attachments:

- E-mail from Thomas J. Kondash, Project Engineer, to Custodian regarding OPRA request no. C31055 dated November 7, 2007
- Letter from Complainant to Custodian regarding OPRA request no. C31096 dated January 17, 2008
- Letter from Complainant to Custodian regarding OPRA request no. C31093 dated January 25, 2008
- Complainant's summary of requested attorney's fees¹²

The Complainant states that the Custodian took more than four (4) months to respond to his OPRA requests despite the statutory mandate that he provide records within seven (7) business days. The Complainant also states that the Custodian did not respond to any request until after the Complainant filed his Denial of Access Complaints.

The Complainant states that DOT internal e-mails reveal that the records responsive to OPRA request no. C31055 were copied and ready for release on November 7, 2007 yet the Custodian did not release said records until January 2008. The Complainant asserts that because the Custodian did not provide the requested records until after he filed his Denial of Access Complaints and because the Custodian failed to promptly produce records responsive to OPRA request no. C31055, the Complainant is entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant also states that the Custodian, in his SOI, stated that DOT "remains engaged in efforts to locate and identify the records [responsive to] Request No. C31093." The Complainant states that he provided the Custodian with a 50% deposit for the estimated special service charge regarding said request and asks the Council to order DOT to produce said records.

Additionally, the Complainant states that, contrary to the Custodian's statement that the Complainant has not responded to the estimated special service charge regarding OPRA request no. C31096, the Complainant mailed the requested deposit on January 17, 2008. The Complainant asks the Council to order DOT to produce said records. The Complainant also states that N.J.S.A. 47:1A-5.i. provides that if records are not provided by the promised date, such failure results in a "deemed" denial. The Complainant states that the Custodian continuously promised to provide records by a certain date and failed to meet said deadlines.

¹² The Complainant submitted additional records which were previously provided to the GRC. Kevin N. Starkey v. NJ Department of Transportation, 2007-315, 2007-316 and 2007-317 – Findings and Recommendations of the Executive Director 11

March 19, 2008¹³

Letter from Custodian's Counsel to GRC with the following attachments:

- E-mail from Custodian to Complainant regarding OPRA request no. C31096 dated January 15, 2008
- E-mail from Custodian to Complainant regarding OPRA request no. C31093 dated January 23, 2008

The Custodian's Counsel states that the Complainant's three (3) OPRA requests sought large volumes of records generated in connection with completed DOT projects. Counsel states that the Custodian responded to each request in a timely manner and on several occasions indicated that the records may not be readily available, the records may be spread out among multiple units within DOT, the requests encompassed a large volume of records, the records were archived off-site with no certainty as to their actual locations, and that the records must be reviewed for privileged information and redacted if necessary. Counsel asserts that in such instances the seven (7) business day response time mandated by OPRA does not apply.

Counsel objects to the Complainant's suggestion that the Custodian has or continues to intentionally withhold records because a special service charge has been assessed. Counsel states that the Custodian's reasons for assessing a special service charge were outlined in the Custodian's e-mail to the Complainant dated January 23, 2008.

Counsel also contends that OPRA does not require an agency to substantially disrupt its operations to expedite its responses to voluminous requests such as the three (3) at issue and the forty two (42) currently pending with DOT. *See New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 181 (App. Div. 2007), certif. denied 190 N.J. 394 (2007). Counsel asserts that the Custodian's responses to the Complainant's requests were reasonable and in line with both the letter and spirit of OPRA.

Further, Counsel states that the Complainant's request for \$3,800.00 in attorney's fees does not represent fees paid by the requestor to retain counsel, but rather are fees paid to the Complainant's own law firm at an hourly rate of \$200.00. Counsel asserts that neither the interest of justice nor the public interest would be served by ordering DOT to pay the excessive fees requested by the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

¹³ Additional correspondence submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint or restates the facts/legal arguments previously submitted to the GRC. Kevin N. Starkey v. NJ Department of Transportation, 2007-315, 2007-316 and 2007-317 – Findings and Recommendations of the Executive Director 12

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

Additionally, OPRA defines a government record as:

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

OPRA provides that:

“[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*The requestor shall have the opportunity to review and object to the charge prior to it being occurred.” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ... The requestor shall be advised by the custodian when the record can be made*

available. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, N.J.S.A. 47:1A-5.i provides that a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

Complainant’s OPRA Request No. C31055

The Complainant stated that he submitted his OPRA request on September 6, 2007. The Custodian certified that he received said request on September 7, 2007 and provided the Complainant with a written response on September 11, 2007, the second (2nd) business day following receipt of said request, in which the Custodian requested an extension of time until September 21, 2007 to complete the record identification, retrieval and review necessary to fulfill the request. The Custodian also certified that he informed the Complainant in writing on September 14, 2007 of the amount of the special service charge assessed to fulfill said request. In said correspondence to the Complainant, the Custodian indicated that he would not proceed with fulfilling the request until the Complainant agreed to the special service charge and paid a 50% deposit. The Custodian certified that he received the Complainant’s e-mail agreeing to the special service charge

¹⁴ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

on October 3, 2007. The Complainant submitted a check for the 50% deposit on October 9, 2007.¹⁵ At the time of the Complainant's Denial of Access Complaint, December 17, 2007, the Complainant stated that the Custodian had not yet provided any records responsive. The Custodian certified that he notified the Complainant via e-mail dated December 28, 2007 that the records were under legal review. The Custodian further certified that he notified the Complainant via e-mail dated January 14, 2008 that the records responsive were available upon payment of the remaining balance. The Custodian certified that he provided the Complainant with said records on January 17, 2008.¹⁶

In Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (March 2008), the Custodian provided the Complainant with a written response to the request on the second (2nd) business day following receipt of said request. In said response, the Custodian indicated that she required an extension of time to fulfill the request and provided an anticipated date upon which she would provide the requested records to the Complainant. The Council held that the Custodian properly requested an extension of the statutorily mandated seven (7) business day response time because the Custodian notified the Complainant in writing within said time period that she required an extension of time and provided a date on which the records would be provided.

The facts of Johnson, supra, are similar to those in this instant complaint. Specifically, the Custodian in this instant matter provided the Complainant with a written response to the request on the second (2nd) business day following receipt of the request in which the Custodian requested an extension of time and provided an anticipated date on which he would fully respond to the Complainant's request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson, supra.

However, on September 14, 2007, during the Custodian's extended time period to respond to the request, the Custodian assessed a special service charge and indicated that he would not proceed with fulfilling the request until the Complainant agreed to the special service charge and paid a 50% deposit. The Complainant paid the 50% deposit on October 9, 2007, after the Custodian's September 21, 2007 extended deadline had expired.

N.J.S.A. 47:1A-5.c. permits a custodian to charge a special service charge in addition to the actual cost of duplicating the record if accommodating the request requires an extraordinary expenditure of time and effort. Additionally, the Custodian must provide the Complainant with an opportunity to object to the special service charge prior to it being incurred.

¹⁵ The Complainant does not object to the special service charge in the Denial of Access Complaint.

¹⁶ The date of the OPRA request receipt is January 22, 2008.

Here, the Custodian notified the Complainant in writing of the estimated special service charge and indicated that the Custodian would not move forward with fulfilling the request until he received the Complainant's payment of a 50% deposit.

OPRA provides that copies of government records may be purchased upon payment of the fee prescribed by law or regulation. N.J.S.A. 47:1A-5.b. Additionally, in Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Council held that:

“[a]s the Custodian is awaiting payment for the duplication cost of the requested records, she is not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005).”

Thus, the Custodian in this matter was not required to release records until the Complainant paid the appropriate fees, which in this case was a 50% deposit of the estimated special service charge.

Therefore, because the Custodian provided the Complainant with a written response within the extended time frame in which the Custodian estimated a special service charge, thus providing the Complainant with an opportunity to review and object to the charge prior to it being incurred, the Custodian's September 14, 2007 response was proper pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g. Pursuant to Paff, supra, Santos, supra, and Cuba, supra, the Custodian is not required to provide the records responsive until he receives payment for said records.

However, N.J.S.A. 47:1A-5.i. provides that a custodian shall advise the requestor of when the requested records can be made available. Thus, at the time that the Complainant paid the 50% deposit for the estimated special service charge, the Custodian should have informed the Complainant of an anticipated date on which the requested records would be provided. Besides the Custodian's estimated time frame of twenty (20) hours to locate, redact and assemble the requested records, the Custodian does not provide the Complainant with any more information as to when the records would be made available. However, the Custodian made the records available to the Complainant on January 14, 2008.

Therefore, because the Custodian failed to notify the Complainant in writing of when the requested records would be made available after the Complainant paid the special service charge deposit, the Custodian violated N.J.S.A. 47:1A-5.i.

Additionally, the Custodian's Counsel contends that the Complainant's request sought large volumes of records and that in such instances the seven (7) business day response time mandated by OPRA does not apply. Counsel asserts that OPRA does not require an agency to substantially disrupt its operations to expedite its responses to voluminous requests pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 181 (App. Div. 2007), certif. denied 190 N.J. 394 (2007).

OPRA provides that a custodian may deny a request that would substantially disrupt agency operations after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. N.J.S.A. 47:1A-5.g.

The Custodian in this instant matter has not provided any evidence that he attempted to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. As such, the Custodian has failed to meet his burden of proof that fulfilling the Complainant's request would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.

Complainant's OPRA Requests No. C31093 and C31096

The Complainant stated that he submitted said requests on September 6, 2007. The Custodian certified that he received said requests on September 11, 2007. Via e-mail dated September 12, 2007, the first (1st) business day following the Custodian's receipt of the Complainant's requests, the Custodian requested an extension of time to respond to said requests; however, the Custodian failed to provide an anticipated deadline date on which he would provide the requested records. The Custodian sought clarification of the Complainant's request no. C31096 via e-mail dated September 19, 2007, the fifth (5th) business day following receipt of the request. The Complainant provided the Custodian with clarification the same day. The Custodian requested another extension of time to fulfill the requests and provided an anticipated deadline date when the requested records would be made available via e-mail dated October 10, 2007, approximately one (1) month following the Custodian's receipt of said request.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the Custodian requested an extension of time to fulfill said request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant's request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley [v. Township of Rockaway], GRC Complaint No. 2007-11 (October 2007).”

The facts of this current complaint are similar to those in Hardwick, *supra*. Specifically, the Custodian in this instant matter provided a written response to both of the Complainant's requests within the statutorily mandated seven (7) business days. In such written response the Custodian requested an extension of time to fulfill said requests but failed to provide an anticipated deadline date as to when the requested records would be made available. Thus, the Council's ruling in Hardwick, *supra*, applies to this instant matter.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant's requests dated September 12, 2007, in which the Custodian requested an extension of time, is inadequate under OPRA pursuant to Hardwick, supra, and the Complainant's requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra.

Additionally, the Complainant paid the deposit for both requests in January 2008 and has not yet received the requested records. Although it may be reasonable that the Complainant's request took several months to fulfill due to the nature of the requests and the volume of records responsive, the Complainant's requests are approaching one (1) year unfulfilled and the Custodian has not provided any indication as to when the records responsive will be released to the Complainant. As such, the Council shall order the Custodian to release the records responsive to the Complainant or show cause as to why the Custodian cannot release the records within the ordered time frame.

Complainant's Forty-Two (42) New OPRA Requests

The Custodian certifies that the Complainant has filed forty-two (42) new OPRA requests similar in scope and complexity to the requests at issue in these complaints. The Custodian contends that pursuant to N.J.S.A. 47:1A-5.g. a requestor cannot inundate an agency with requests that would substantially disrupt agency operations. The Custodian claims that it would substantially disrupt agency operations for the GRC to require any more effort of DOT in responding to these requests than the current efforts.

The Custodian's Counsel also contends that OPRA does not require an agency to substantially disrupt its operations to expedite its responses to voluminous requests such as the three (3) at issue and the forty two (42) currently pending with DOT. *See New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 181 (App. Div. 2007), certif.. denied 190 N.J. 394 (2007).

The issue of whether fulfilling the Complainant's forty-two (42) new OPRA requests would substantially disrupt DOT's operations is not properly before the GRC because said requests are not the subject of these Denial of Access Complaints.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days regarding request no. C31055 and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (March 2008).
2. Because the Custodian provided the Complainant with a written response within the extended time frame regarding request no. C31055 in which the Custodian estimated a special service charge, thus providing the Complainant with an opportunity to review and object to the charge prior to it being incurred, the Custodian’s September 14, 2007 response was proper pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g. Pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005), the Custodian is not required to provide the records responsive until he receives payment for said records.
3. Because the Custodian failed to notify the Complainant in writing of when the requested records would be made available after the Complainant paid the special service charge deposit for request no. C31055, the Custodian violated N.J.S.A. 47:1A-5.i.
4. The Custodian in this instant matter has not provided any evidence that he attempted to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency regarding request no. C31055. As such, the Custodian has failed to meet his burden of proof that fulfilling the Complainant’s request would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.
5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days regarding requests no. C31093 and C31096 of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant’s requests dated September 12, 2007, in which the Custodian requested an

extension of time, is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Complainant's requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

6. Although it may be reasonable that the Complainant's requests no. C31093 and C31096 took several months to fulfill due to the nature of the requests and the volume of records responsive, the Complainant's requests are approaching one (1) year unfulfilled and the Custodian has not provided any indication as to when the records responsive will be released to the Complainant. As such, the Custodian must release the records responsive to the Complainant or show cause as to why the Custodian cannot release the records within the ordered time frame.
7. **The Custodian shall comply with item no. 6 above within ten (10) 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.**
8. The issue of whether fulfilling the Complainant's forty-two (42) new OPRA requests would substantially disrupt DOT's operations is not properly before the GRC because said requests are not the subject of these Denial of Access Complaints.
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie
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Approved By: Catherine Starghill, Esq.
Executive Director

October 22, 2008