



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

VINCENT P. MALTESE, Chairman  
COMMISSIONER SUSAN BASS LEVIN  
ACTING COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

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

**FINAL DECISION**

**April 25, 2007 Government Records Council Meeting**

Robert E. Ahlers  
Complainant

Complaint No. 2007-57

v.

Township of Hardwick  
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 2007 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 failed to fulfill the Complainant’s request for records within seven (7) business days after being informed of the request’s submission to the township CPA, thus resulting in an unlawful denial of access pursuant to N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i.
2. The Custodian did not bear her burden of proving that this denial was within the statutorily mandated limits of OPRA pursuant to N.J.S.A. 47:1A-6.
3. Based on the facts that the Custodian did release the records relevant to this request after the Complainant resubmitted the request, the Custodian’s actions appear merely negligent, heedless, or unintentional. Therefore, 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.

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 25<sup>th</sup> Day of April, 2007

Vincent P. Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Secretary  
Government Records Council

**Decision Distribution Date: May 1, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 25, 2007 Council Meeting**

**Robert E. Ahlers<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-57**

v.

**Township of Hardwick<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of vouchers and any receipts pertaining to checks No. 11809, 11907 and 12105, from 2006.

**Request Made:** December 14, 2006

**Response Made:** December 21, 2006

**Custodian:** Judith Fisher

**GRC Complaint Filed:** January 17, 2007

**Background**

**December 14, 2006**

Complainant's Open Public Records Act ("OPRA") request.<sup>3</sup> The Complainant requests the records relevant to this complaint listed above to the Township CPA.

**December 21, 2006**

Memo from the Township Certified Public Accountant ("CPA") to the Complainant on the fifth (5<sup>th</sup>) business day following receipt of such request. The CPA informs the Complainant that his OPRA request is being returned. The CPA advises the Complainant to send his request to the Custodian of Record in order to assure proper handling.

**January 17, 2007**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA records request dated December 14, 2006.

The Complainant asserts that he submitted an OPRA request to the Township of Hardwick on December 14, 2006. The Complainant further asserts that he never received a response from the Custodian. The Complainant finally asserts that he believes that because the request concerns records relevant to the Custodian, the Custodian is simply ignoring the request.

---

<sup>1</sup> No representation listed.

<sup>2</sup> Represented by Kevin C. Decie, Esq. (Hackettstown, NJ).

<sup>3</sup> Complainant's OPRA request was filed on the Township's official OPRA request form.

**February 9, 2007**

Offer of Mediation sent to both parties.

**February 20, 2007**

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

**February 22, 2007**

Request for the Statement of Information sent to the Custodian.

**February 23, 2007**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests that an extension of time for the submission of the Statement of Information because the Custodian is ill and will not return to work until the due date of February 27, 2007.

**February 23, 2007**

E-mail from the GRC to the Custodian's Counsel. The GRC states that the new Statement of Information deadline is set for March 1, 2007.

**February 27, 2007**

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

- Complainant's OPRA records request dated December 27, 2006,<sup>4</sup>
- Letter from the CPA to the Custodian dated January 24, 2007 (with attachments),
- Letter from the Custodian to the Complainant dated January 24, 2007,
- Check for payment of records from Complainant to the Custodian dated January 27, 2007, and
- Letter from the Custodian to the Complainant dated January 31, 2007 (with attachments).

The Custodian states that in a telephone call from the Township CPA the Custodian was informed that the Complainant had filed an OPRA request dated December 14, 2006. The Custodian states that she informed the CPA that the proper procedure for OPRA requests was that the Township Clerk, who is the Custodian, should receive the requests. The Custodian states that she told the CPA to return the request to Complainant and direct the Complainant to send his request to the Custodian. The CPA returned the Complainant's request to him on December 21, 2006.

**Analysis**

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

---

<sup>4</sup> The Complainant's OPRA request submitted with the Denial of Access Complaint was dated December 14, 2006.

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 also provides that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

The Complainant asserts that the Custodian never responded to his OPRA request dated December 14, 2006. The Custodian states that the Township CPA informed the Custodian that an OPRA request had been received in the mail. The Custodian asserts that the CPA was informed to return the request to the Complainant and advise the Complainant to follow procedure by mailing the request to the Custodian pursuant to the provisions set forth in OPRA. The Custodian also asserts that the CPA responded to the Complainant on December 21, 2006, the fifth (5<sup>th</sup>) business day after receiving the request, and informed the Complainant of the proper procedure for requesting the records responsive to the request.

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.

The question arises as to whether or not the Custodian was acting within the statutory limits of N.J.S.A. 47:1A-5.h. OPRA protects any Custodian that receives a request from another official when said Custodian has no previous knowledge of the request. N.J.S.A. 47:1A-5.h. In this case, the Custodian was informed of the OPRA

request by the CPA, who is akin to an “official or employee” of the Custodian’s agency. Therefore, the Custodian became obligated to fulfill the Complainant’s request at the moment that the CPA informed the Custodian of the request’s existence and is not protected by N.J.S.A. 47:1A-5.h.

While the Custodian may have advised the CPA to return the request to the Complainant, the Custodian had knowledge of the request at the point that the CPA contacted her. Therefore, the Custodian should have begun to take steps to fulfill the request at that time. The Custodian acted partly within N.J.S.A. 47:1A-5.h., but misconstrued the statute out of the favor of the public. The Custodian’s failure to fulfill the request within seven (7) business days of being informed of the request’s existence places the burden on the Complainant to locate the Custodian in contravenes N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Though the Custodian was in violation of N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i., the records relevant to this request were released to the Complainant upon resubmission of the OPRA request to the Custodian. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to fulfill the Complainant's request for records within seven (7) business days after being informed of the request's submission to the township CPA, thus resulting in an unlawful denial of access pursuant to N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i.
2. The Custodian did not bear her burden of proving that this denial was within the statutorily mandated limits of OPRA pursuant to N.J.S.A. 47:1A-6.
3. Based on the facts that the Custodian did release the records relevant to this request after the Complainant resubmitted the request, the Custodian's actions appear merely negligent, heedless, or unintentional. Therefore, 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.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 18, 2007