



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**January 31, 2012 Government Records Council Meeting**

Allan Johnson  
Complainant

Complaint No. 2008-141

v.

Borough of Oceanport (Monmouth)  
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that because the credible evidence adduced during the hearing at the Office of Administrative Law outweighs the parties’ exceptions, and because all of the parties have failed to otherwise provide any legal basis for the GRC to reject the Administrative Law Judge’s findings, the Council accepts the Administrative Law Judge’s Initial Decision dated October 31, 2011, which concludes:

“I **FIND** that the custodian ... failed to ‘provide all records responsive in her possession at the time of the complainants November 28, 2006 and December 04, 2006 OPRA requests.’

I further **FIND** that Councilman Sharkey failed to initially provide a response to the complaints November and December, 2006 OPRA requests.

I further **FIND** that neither the failure of the custodian ... to provide all records responsive in her possession at the time of the requests nor the failure of Councilman Sharkey to initially provide a response was a knowing and willful violation of OPRA or an unreasonable denial of access under the totality of the circumstances.” (Emphasis in original).

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 31<sup>st</sup> Day of January, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: February 3, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 31, 2012 Council Meeting**

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

**GRC Complaint No. 2008-141**

v.

**Borough of Oceanport (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

November 28, 2006 OPRA request

All correspondence, internal and external, including all e-mails belonging to Councilman Hugh Sharkey, conducting Borough business from October 1, 2006 to November 1, 2006.

December 4, 2006 OPRA request

All correspondence, internal and external, belonging to Councilman Hugh Sharkey, including all e-mails sent and received between other council members, regarding Borough business from October 12, 2006 to December 4, 2006.

**Request Made:** November 28, 2006 and December 4, 2006

**Response Made:** December 8, 2006<sup>3</sup>

**Custodian:** Kim Jungfer

**GRC Complaint Filed:** July 15, 2008<sup>4</sup>

**Background**

**August 11, 2009**

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the August 4, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

“... based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian and Councilman Sharkey fully complied with OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination

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

<sup>2</sup> Represented by John Bennett, Esq. (Shrewsbury, NJ). Councilman Hugh Sharkey is represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>3</sup> The Custodian responded to both OPRA requests on the same day.

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

of whether the Custodian failed to provide all records responsive in her possession at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests, and whether Councilman Sharkey failed to initially provide a response at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests, and, if so, whether such failure was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances."

**August 13, 2009**

Council's Interim Order distributed to the parties.

**September 28, 2009**

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

**October 31, 2011**

Administrative Law Judge ("ALJ") Dennis P. Blake's Initial Decision. The ALJ **FINDS** that although the Custodian failed to provide all records responsive in her possession at the time of the Complainants two (2) OPRA requests and Councilman Sharkey failed to initially provide a response to same, neither action was a knowing and willful violation of OPRA or an unreasonable denial of access under the totality of the circumstances.<sup>5</sup> The ALJ stated that the GRC charged him with the task of determining three (3) issues:

"Initially I have been charged with the task of determining whether the [C]ustodian ... 'failed to provide all records responsive in her possession at the time of [C]omplainant's [two] OPRA requests.' ... [The Custodian] sent approximately 30 e-mails in response to petitioners request on December 8, 2006. The testimony of Mr. Sharkey, as well as his [e-mail] log (S-7) indicates that significantly more than 30 e-mails, generated in the relevant time period, should have been accessible by the [C]ustodian at that time. [The Custodian] testified that sometime in 2007 when she received a new computer most of her previous e-mails were lost. This, however, would not explain why, at the time of [the Complainant's] request, she did not have access to the 100 – 150 e-mails that Mr. Sharkey listed in his [e-mail] log. [The Complainant's] OPRA requests were not limited by subject matter. Thus there is no apparent explanation for the transmission by [the Custodian] of only the thirty e-mails.

The second determination that the GRC requests is 'whether Councilman Sharkey failed to initially provide a response at the time of the complainant's [two] OPRA requests.' ... this determination is limited to Sharkey's 'initial' response. It is abundantly clear that Sharkey's response to the November and December, 2006 requests were transmitted more than two years after the initial request. Thus, it is equally clear that

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<sup>5</sup> The ALJ noted that although the Complainant's two (2) OPRA requests appear to be overly broad and arguments on this issue were presented at the hearing, his "limited charge from the GRC does not permit [the ALJ] to address this issue." See ALJ's Initial Decision dated October 31, 2011, pg. 27.

Sharkey failed to initially provide a response at the time of complainant's requests.

Since I have found that both the [C]ustodian and Councilman Sharkey 'failed to provide all records or an initial response,' I must now determine 'whether such failures were a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.'

...

Based on this state of the evidence, I [cannot] conclude that the heavy burden of establishing a knowing and willful violation of OPRA by ... Sharkey or the [C]ustodian has been carried in this matter. I [cannot] conclude that their failures to provide records were intentional and deliberate, with knowledge of their wrongfulness." *Id.* at pg. 26 – 33.

The ALJ thus holds that:

"I **FIND** that the custodian ... failed to 'provide all records responsive in her possession at the time of the complainants November 28, 2006 and December 04, 2006 OPRA requests.'

I further **FIND** that Councilman Sharkey failed to initially provide a response to the complaints November and December, 2006 OPRA requests.

I further **FIND** that neither the failure of the custodian ... to provide all records responsive in her possession at the time of the requests nor the failure of Councilman Sharkey to initially provide a response was a knowing and willful violation of OPRA or an unreasonable denial of access under the totality of the circumstances." (Emphasis in original).

The ALJ notes that in making his determination, he was "... mindful of the obvious political rivalry that permeates the relationship amongst the parties and the resulting animus that pits [the Complainant] against Mr. Sharkey. This animus is highlighted by the testimony concerning the grievance filed by [the Custodian], who [Complainant] tried to release from this litigation, against Mr. Sharkey." *Id.* at pg. 31. The ALJ states that he deemed the following factors to be relevant to his determination:

1. The duplication of requests for records by [the Complainant]. It is clear from the testimony in this matter that [the Complainant] has filed at least three OPRA requests and followed them up with formal complaints. The overlap of dates and records sought has obviously created confusion which arguably justifies some of the incomplete and untimely responses.
2. The fact that, at the time of the two requests in this matter, [the Borough] did not have an official Oceanport e-mail address for council members. As a result all council members were required to combine personal and or business e-mails with those pertaining to Borough business. Thus, instead of an automatic cc to the

- Borough of official transmissions, council members were required to actively discriminate between what was to be cc'd and what was not. This also would bring into play the automatic 30 day delete feature which, the testimony indicated, is a common feature of e-mail storage systems. Lastly, this lack of a designated e-mail address would require the [C]ustodian to involve the other council members to fulfill petitioner's requests since the last request sought 'e-mails between other council persons.'
3. The destruction or loss of relevant documents noted by the [C]ustodian when she received a new computer in 2007. Sharkey's [e-mail] log indicated that more than 100 e-mails should have been retrievable from that computer. This loss makes it impossible to refute or affirm the accuracy of Sharkey's [e-mail] log, or the [C]ustodian's transmittal of only 30 e-mails.
  4. The lack of any communication concerning [the Complainant's] requests to Sharkey at any time between the initial request and the communication from his lawyer in January, 2009. This scenario is distinctly different from the 9 unanswered requests for records which formed the basis for ALJ Martone's decision in the prior GRC matter involving these parties.
  5. The somewhat illogical timing for Sharkey's copying of the 5 e-mails in August, 2007, coupled with the credible explanation he supplied, that is, he was motivated to locate these e-mails as a result of being informed of the first GRC filing by the petitioner 4 days before he made the copies. He also credibly described the difference in the time period covered in the first filing, October 1, to October 20, 2006, with the dates of the five e-mails, all dated in November and December, 2006.
  6. The [C]ustodian's testimony that she has no reason to believe that Sharkey's failure to supply the records in question was not inadvertent.
  7. The 5 e-mails that petitioner has focused on in this matter, do not appear to have any controversial or confrontational aspect that would motivate any intent or design to conceal them." *Id.* at pg. 31-32.

The ALJ notes that with respect to a previous complaint in which the OAL found that Councilman Sharkey knowingly and willfully violated OPRA,<sup>6</sup> the facts of that complaint were different than those present herein:

"With respect to Mr. Sharkey, the willful conduct was found by ALJ Martone in the nine requests for production which had been ignored by Mr. Sharkey in that matter. In this case, Sharkey received one request for production. [The Complainant] and the [C]ustodian note in their briefs that a significant period of time passed between that one request and the eventual production of the five e-mails by Sharkey. However, there is ample proof that the multiple and sometimes conflicting requests by the [Complainant] for records from Sharkey could have led him into a belief that he had already complied with some or all of [the Complainant's] requests. Moreover, the overlap and delay of notice to Sharkey of the second GRC complaint could have added to his confusion.

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<sup>6</sup> Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (August 2009).  
Allan Johnson v. Borough of Oceanport (Monmouth), 2008-141 – Supplemental Findings and Recommendations of the  
Executive Director

Additionally, the somewhat haphazard system of preserving e-mails dealing with Borough business, as it existed in 2006, when coupled with [the Complainant's] last request that included e-mails between other council members make an accurate assessment of Sharkey's and/or the [C]ustodian's compliance rather difficult. This problem is significantly magnified by the [C]ustodian's loss of 'most of her e-mails' when she obtained a new computer in 2007 ... Lastly, I consider the [C]ustodian's testimony indicating she had no reason to doubt that Sharkey's failure to produce records was inadvertent. This is particularly significant evidence in light of her animosity toward Sharkey, as evidenced by the grievance she filed against him.

With respect to the willfulness of [the Custodian's] failure to comply with [the Complainant's] request, I note the clear evidence produced by ... Sharkey indicating that she had access to significantly more than the 30 e-mails she forwarded to the GRC in reply to [the Complainant's] requests. However, the destruction of 'most of her e-mails' sometime in 2007 makes it almost impossible to accurately gauge the accuracy and appropriateness of her response, on the same basis as noted above for Mr. Sharkey. It must, however be noted that [Sharkey's] alleged failure to respond covered only five e-mails. The allegation against the [C]ustodian covers approximately seventy. Thus, this loss of e-mails by the [C]ustodian is particularly problematic." *Id.* at pg. 32-33.

#### **November 21, 2011**

Letter from the GRC to the Complainant. The GRC states that pursuant to an earlier telephone conversation, the Complainant requested an extension of time to submit exceptions to the ALJ's Initial Decision dated October 31, 2011. The GRC states that the Complainant further advised the GRC that he received the ALJ's Initial Decision via U.S. mail only a few days ago.

The GRC states that the ALJ's Initial Decision expressly states that "[w]ithin thirteen days from the date on which this recommendation was mailed to the parties, any party may file written exceptions..." with the GRC. The GRC states that the time frame to submit written exceptions expired on November 13, 2011; however, according to the Administrative Procedures Act ("APA"), parties "shall be afforded [the opportunity]... to file *exceptions*, objections, and replies thereto, and to present argument to the head of the agency or a majority thereof ... *in writing, as the agency may direct.*" (Emphasis added.) N.J.S.A. 52:14B-10.

The GRC states that because the Complainant recently received the ALJ's Initial Decision, the GRC is granting an extension of seven (7) days to submit exceptions. The GRC requests that the Complainant provide these exceptions in writing directly to the GRC by November 28, 2011.

#### **November 21, 2011**

Letter from the GRC to the Custodian's Counsel. The GRC states that pursuant to an earlier telephone conversation, Counsel requested an extension of time to submit

exceptions to the ALJ's Initial Decision dated October 31, 2011. The GRC states that Counsel further advised the GRC that he received the ALJ's Initial Decision via U.S. mail only a few days ago.

The GRC states that the ALJ's Initial Decision expressly states that "[w]ithin thirteen days from the date on which this recommendation was mailed to the parties, any party may file written exceptions..." with the GRC. The GRC states that the time frame to submit written exceptions expired on November 13, 2011; however, according to the APA, parties "shall be afforded [the opportunity]... to file *exceptions*, objections, and replies thereto, and to present argument to the head of the agency or a majority thereof ... *in writing, as the agency may direct.*" (Emphasis added.) N.J.S.A. 52:14B-10.

The GRC states that because Counsel recently received the Decision, the GRC is granting an extension of seven (7) days to submit exceptions. The GRC requests that Counsel provide these exceptions in writing directly to the GRC by November 28, 2011.

**November 22, 2011**

E-mail from Councilman Sharkey's Counsel to the GRC. Counsel requests that he also be granted an extension of time to file exceptions.

**November 22, 2011**

Letter from the GRC to Councilman Sharkey's Counsel. The GRC states that pursuant to an earlier e-mail, Counsel requested an extension of time to submit exceptions to the ALJ's Initial Decision dated October 31, 2011.

The GRC states that the ALJ's Initial Decision expressly states that "[w]ithin thirteen days from the date on which this recommendation was mailed to the parties, any party may file written exceptions..." with the GRC. The GRC states that the time frame to submit written exceptions expired on November 13, 2011; however, according to the APA, parties "shall be afforded [the opportunity]... to file *exceptions*, objections, and replies thereto, and to present argument to the head of the agency or a majority thereof ... *in writing, as the agency may direct.*" (Emphasis added.) N.J.S.A. 52:14B-10.

The GRC states that it is granting an extension of seven (7) days to submit exceptions. The GRC requests that Counsel provide these exceptions in writing directly to the GRC by November 29, 2011.

**November 22, 2011**

E-mail from the Complainant to the GRC. The Complainant requests that in the interest of fairness, the exceptions deadline should be the same day for all parties.

**November 23, 2011**

E-mail from the GRC to the Complainant. The GRC notes that Councilman Sharkey's Counsel did not request an extension of time until November 22, 2011. The GRC states that seven (7) days, which is the same amount of time afforded to the Complainant and Custodian's Counsel, ends on November 29, 2011.



**November 23, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel states that the day on which the extension was requested is irrelevant. Counsel states that all parties likely received the ALJ's Initial Decision at the same time and the extension should be equal for all parties. Counsel states that the extra day could allow Councilman Sharkey's Counsel to craft his exceptions in response to the Borough's position. Counsel states that the extra day greatly prejudices the Borough; thus, Counsel requests that all parties have the same deadline to submit exceptions.

**November 23, 2011**

E-mail from the GRC to all parties. The GRC states that APA regulations provide that "[r]equests for an extension of any time limit associated with an uncontested case shall be taken to the transmitting agency head." *N.J.A.C. 1:1-21.6*.

The GRC states that the OAL allows for parties to submit exceptions to an Initial Decision within thirteen (13) days from the date on which the decision is mailed to the parties. The GRC states that this is specifically provided on the ALJ's signature page of the Decision. The GRC states that it is aware that the parties may not have received this Decision in a timely manner. The GRC states that it has therefore granted seven (7) days to each party to submit exceptions. The GRC states that in the interest of fairness, however, all extensions expire on November 29, 2011.

**November 29, 2011**

Complainant's exceptions to the ALJ's Initial Decision. The Complainant states that at the outset of his two (2) OPRA requests, he provided verbal clarification that the correspondence sought concerned the Shrewsbury dispatch plan. The Complainant states that the Custodian was unable to locate any correspondence regarding Shrewsbury. The Complainant states that the Custodian testified that she attempted to contact Councilman Sharkey via telephone, e-mail and a letter in his Borough mailbox, but that Councilman Sharkey never responded. The Complainant contends that the Custodian could not have lost e-mails that she never received from Councilman Sharkey.

The Complainant states that during the relevant time periods encompassed in both OPRA requests, Councilman Sharkey was attempting to close the Oceanport Dispatch Center and share services with Shrewsbury. The Complainant states that Councilman Sharkey did not respond providing records showing that he was moving forward with his plan to shut down the dispatch center.

The Complainant states that in February 2009, Councilman Sharkey forwarded to the Custodian five (5) e-mails responsive to the OPRA requests at issue herein which were created in August 2007. The Complainant questions how Councilman Sharkey knew that these e-mails were responsive to the OPRA requests although his e-mail log indicates that he failed to copy the Custodian on e-mails nineteen (19) times during the relevant time period.

The Complainant further disputes how Councilman Sharkey could have created a complete e-mail log of e-mails eight months after the OPRA requests if his e-mail account deletes e-mails after thirty (30) days. The Complainant states that Councilman

Sharkey stated in testimony that his account was a Comcast account. The Complainant asserts that Comcast accounts do not offer this feature. The Complainant asserts that Councilman Sharkey's testimony reveals that he was able to supply five (5) e-mails responsive to the first OPRA request to the Custodian after the thirty (30) day time frame. The Complainant asserts that the e-mail log further shows that another e-mail responsive to the second OPRA request existed and was never provided.

The Complainant further argues that Councilman Sharkey contradicted himself many times during the pendency of this complaint. The Complainant first disputes Councilman Sharkey's February 11, 2009 certification in which he certifies that the previous Borough attorney advised not to provide access to records that were part of an investigation. See Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2008-141 (Interim Order dated August 11, 2009) at pg. 4. The Complainant asserts that according to an unidentified letter from previous Counsel to Councilman Sharkey's Counsel, this is not true. The Complainant argues that Councilman Sharkey also contradicted himself in testimony. The Complainant state that Councilman Sharkey contradicted his February 11, 2009 certification by testifying that he has two (2) computers instead of one (1). See ALJ's Initial Decision dated October 31, 2011 at pg. 12. The Complainant states that Councilman Sharkey acknowledged that the Custodian was to be copied on Borough correspondence. *Id.* at pg. 13. The Complainant asserts that Councilman Sharkey subsequently changed his testimony stating that he used his own judgment as to those e-mails on which the Custodian was copied. *Id.* at pg. 19.

The Complainant states that Councilman Sharkey admitted in testimony that he has used OPRA in the past to obtain records and that he has attended OPRA seminars. The Complainant contends that Councilman Sharkey used his knowledge of OPRA to confuse the ALJ but that the Complainant was not allowed to clarify any facts. The Complainant further asserts that Councilman Sharkey's Counsel submitted a binder of documents to the OAL, but that the Complainant never received a copy of the documents.

The Complainant asserts that Councilman Sharkey's testimony led the ALJ to believe that he accidentally failed to copy the Custodian on six (6) e-mails responsive to the Complainant's two (2) OPRA requests. The Complainant asserts that the Custodian still has not received all responsive records. The Complainant requests that the GRC find that Councilman Sharkey knowingly and willfully denied access to records responsive to his two (2) OPRA requests.

## **November 29, 2011**

Custodian Counsel's exceptions to the ALJ's Initial Decision.

### Exception No. 1

Counsel states that the Borough first excepts to the ALJ's finding that:

“With respect to the willfulness of [the Custodian's] failure to comply with [the Complainant's] request, I note the clear evidence produced by ... Sharkey indicating that she had access to significantly more than the 30 e-mails she forwarded to the GRC in reply to [the Complainant's] requests.

However, the destruction of ‘most of her e-mails’ sometime in 2007 makes it almost impossible to accurately gauge the accuracy and appropriateness of her response, on the same basis as noted above for Mr. Sharkey. It must, however be noted that [Sharkey’s] alleged failure to respond covered only five e-mails. The allegation against the [C]ustodian covers approximately seventy. Thus, this loss of e-mails by the [C]ustodian is particularly problematic.” *Id.* at pg. 33.

Counsel states that nowhere in the Complainant’s Denial of Access Complaint are there allegations levied against the Custodian. Counsel states that the Complainant filed his complaint alleging that Councilman Sharkey unlawfully denied access to five (5) e-mails.

Counsel states that this complaint is the result of two (2) OPRA requests seeking e-mails belonging to Councilman Sharkey. Counsel states that the Custodian provided access to all responsive records in her possession and reached out to Councilman Sharkey informally and via e-mail seeking additional records. Counsel states that the Custodian subsequently provided only those records in her possession because Councilman Sharkey never responded.

Counsel states that the Complainant’s OPRA requests clearly sought e-mails to and from Councilman Sharkey, as confirmed by the Complainant in testimony. *See* T1-29. June 27, 2011. Counsel states that the Complainant confirmed in testimony that his request was never intended to include all e-mails from all council members.

Counsel argues that the ALJ’s acceptance of Councilman Sharkey’s e-mail log to support the existence of over 100 e-mails is insufficient to establish whether additional records were in the Custodian’s possession. Counsel argues that any ambiguity in the subject OPRA requests was resolved by the Complainant in testimony. Counsel argues that the ALJ’s expansion of the scope of the Complainant’s OPRA requests was erroneous. Counsel further argues that any decision based on the e-mail log is unsupported by the evidence of record.

#### Exception No. 2

Counsel states that the Borough next excepts to the ALJ’s reasons for determining that Councilman Sharkey did not knowingly and willfully violate OPRA

Counsel states that the ALJ relies on the Custodian’s opinion that she had no reason to doubt Councilman Sharkey’s February 11, 2009 e-mail stating that his failure to produce the five (5) e-mails was inadvertent. Counsel states that this statement is true because the Custodian had no evidence at the time to refute Councilman Sharkey’s assertion. Counsel contends that the OAL, however, was provided with this evidence directly from Councilman Sharkey in testimony under oath. Counsel states that Councilman Sharkey admitted to discovering the five (5) responsive e-mails in August 2007. T2-146-149. June 27, 2011. Counsel asserts that Councilman Sharkey admitted to printing out the e-mails he determined to be relevant to the OPRA requests at issue herein for preservation and then made a calculated decision to withhold access until February 11, 2009. Counsel states that Councilman Sharkey further made a claim that the e-mails

were forwarded to the Custodian; however, there is no evidence to support his claim, which begs the question why he felt the e-mails were relevant for the Borough and not the GRC.

Counsel contends that absent evidence to support Councilman Sharkey's claims, it was not until notification of this complaint that he provided access to the five (5) e-mails. Counsel asserts that these facts provided by Councilman Sharkey in testimony are enough to determine that he knowingly and willfully denied access to the responsive records. Counsel thus contends that the Custodian's opinion regarding Councilman Sharkey's February 11, 2009 e-mail should bear no weight in determining whether Councilman Sharkey knowingly and willfully violated OPRA.

Counsel states that the ALJ further reasons that Councilman Sharkey's omission of the five (5) e-mails was partially due to the delay in notice of this complaint along with the overlapping time periods of the two (2) OPRA requests. Counsel argues that this conclusion is erroneous because Councilman Sharkey testified that he made copies of the five (5) e-mails in August 2007. Counsel notes that Councilman Sharkey testified that he did not produce the e-mails because they were not relevant to the first complaint; however, the records were responsive to the two (2) OPRA requests at issue herein. Counsel asserts that Councilman Sharkey's obligation was to provide access to records in response to the Complainant's OPRA requests and not this complaint. Counsel contends that Councilman Sharkey's failure to provide the e-mails to either the Borough or the GRC until after the filing of this complaint clearly indicates that he knowingly and willfully violated OPRA.

Counsel asserts that the ALJ's Initial Decision should be modified to find that the Custodian did in fact provide to the Complainant all records responsive in her possession. Counsel further asserts that the ALJ's Initial Decision should be modified to find that Councilman Sharkey's denial of access to records he identified as responsive to the Complainant's OPRA requests at issue herein prior to the filing of this complaint was intentional and resulted in a knowing and willful violation of OPRA.

### **November 29, 2011**

Councilman Sharkey's Counsel's exceptions to the ALJ's Initial Decision attaching the following:

- Transcript No. 1 dated March 31, 2011.
- Transcript No. 2 dated June 27, 2011.

### **Exception No. 1**

Counsel states that the ALJ declined to determine whether the Complainant's two (2) OPRA requests were invalid. Counsel asserts that pursuant to well-established GRC case law, the Complainant's OPRA requests are invalid because same fail to identify specific records. Counsel states that the Complainant's OPRA requests sought "all correspondence ... and e-mail belonging to ... Sharkey ... from October 1, 2006 to November 1, 2006 including correspondence on shared services," and "All correspondence belonging to ... Sharkey including all e-mails regarding Borough ...

business ... between October 12, 2006 and December 4, 2006.” Counsel states that the Complainant confirmed in testimony that both requests sought “information – shared services information that belonged to [Councilman] Sharkey regarding Shrewsbury.” T1-69, March 31, 2011.

Counsel states that the GRC has previously held that more narrowly tailored OPRA requests were invalid. Counsel states that in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010), the GRC determined that an OPRA request for e-mails:

“...shall therefore focus upon the following four (4) characteristics:

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient” *Id.* at pg. 5.

Counsel argues that the OPRA requests are overly broad because they are unlimited as to sender, recipient, subject matter or type of record. Counsel further argues that the requests require research.

Counsel states that in Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192 (October 2011), the GRC invalidated the complainant’s request which sought copies “... of each and every e-mail sent or received by the Municipal Clerk’s office to or from each and every other Municipal Clerk in Morris County regarding [the complainant] and/or his OPRA request from June 29, 2010 through July 22, 2010,” because it failed to specifically name “identifiable senders and recipients and because the request requires research beyond the scope of a custodian’s duties.” *Id.* at pg. 7. Counsel argues that the Complainant’s requests herein are similar to the Wolosky request and possibly even broader. Counsel notes that at least the complainant’s request in Wolosky was limited to “Municipal Clerks” and e-mails about himself or his OPRA request. Counsel argues that the Complainant’s two requests herein are for “all correspondence internal and external” and “all internal and external and all e-mails” between Councilman Sharkey and unlimited persons including all other Council members of the Borough.

Counsel asserts that the GRC has also invalidated OPRA requests where a requestor has failed to identify a subject matter. *See, e.g.,* Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010)(dismissing OPRA complaint that sought copies of, among other things, (1) 30 minutes of police radio transmissions; (2) police mobile-to-mobile data messages for a one-hour period; and (3) 20 minutes of police and fire department radio transmissions); Verry v. South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010)(dismissing OPRA complaint that sought “[e]very e-mail” from the Mayor’s e-mail account for a one-week period); Verry v. South Bound Brook (Somerset), GRC Complaint No. 2009-108 (April 2010)(dismissing OPRA complaint that sought “every e-mail sent to and received from the Custodian’s e-mail account from September 7, 2007 through September 10, 2007

[and] the week of March 23, 2008.”) and Elcavage, *supra*(dismissing OPRA complaint that sought copies of all e-mails from a person’s township e-mail account from January 1, 2008 to June 17, 2008).

Counsel asserts that the GRC must also adhere to the Appellate Division’s holding in Bent v. Township of Stafford Police Dept., 381 N.J. Super. 30, 39 (App. Div. 2005)(affirming the GRC’s determination that the complainant’s request was invalid because it failed to describe with any specify the records sought).

### Exception No. 2

Counsel states that the ALJ determined that the Custodian did not knowingly and willfully violate OPRA; however, her testimony would suggest otherwise. Counsel states that the Custodian admitted that in 2007 “most of [her] previous e-mails were lost.” *See* ALJ’s Initial Decision dated October 31, 2011 at pg. 8. Counsel states that the Custodian admitted this fact while being cross-examined by the Custodian’s Counsel. Counsel argues that this fact is critical because in the Statement of Information (“SOI”), the Custodian certified that no records responsive to the Complainant’s two (2) OPRA requests were destroyed. Counsel asserts that the Custodian’s testimony clearly contradicts her SOI response. Counsel contends that the Custodian provided a false certification to hide the fact that she failed to provide the Complainant with “approximately seventy” e-mails, which the ALJ described as “particularly problematic.” *Id.* at pg. 33.

Counsel requests that the complaint be dismissed because the Complainant’s two (2) requests are invalid. Counsel requests that if the complaint is not dismissed, the GRC determine that the Custodian’s false statement in the SOI regarding the destruction of responsive e-mails amounts to a knowing and willful violation of OPRA.

### **November 30, 2011**

Councilman Sharkey’s Counsel’s objections to the Complainant’s and Custodian Counsel’s exceptions attaching a letter from Councilman Sharkey’s Counsel to the ALJ dated September 12, 2011.

### Response to Complainant’s exceptions

Counsel disputes the Complainant’s exceptions on the grounds that the submission was not signed by the Complainant nor does it articulate any exceptions. Counsel argues that the exceptions are nothing more than the Complainant’s opinions and observations and convey a general disagreement with the ALJ’s Initial Decision. Counsel asserts that because the Complainant failed to provide any exceptions, the Council should disregard such submission.<sup>7</sup>

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<sup>7</sup> Counsel notes that the Complainant received a copy of the binder, which was submitted to the OAL, on March 31, 2011. Counsel notes that the Complainant never asserted that he lacked any material provided during the hearing until filing his exceptions on November 29, 2011.  
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Counsel notes that the Complainant did not copy his submission to the ALJ. Counsel further asserts that the Complainant falsely asserted that he was not allowed to speak during the hearing. Counsel states that the Complainant, a *pro se* litigant, was given great latitude and patience during the hearing. Counsel also asserts that the Complainant's exceptions are devoid of citations to the record. Counsel argues that if the record supported the Complainant's exceptions, he would have cited to same.

#### Response to Borough's exceptions

Counsel contends that the Custodian Counsel's exceptions are also almost entirely devoid of references to the record. Counsel asserts that regarding the Custodian Counsel's first exception that the ALJ exceeded his scope of authority, this issue was raised in closing arguments and rejected by the ALJ. Counsel states that he previously refuted Custodian Counsel's exception in a letter to the ALJ, which is attached.

#### **November 30, 2011**

Custodian Counsel's objections and reply to Councilman Sharkey's exceptions and objections respectively.

#### Response to Councilman Sharkey's exceptions

Counsel disputes Councilman Sharkey's allegation that the Custodian falsified her SOI certification regarding the destruction of responsive records. Counsel states that the SOI question is as follows:

"Specifically state the last date on which documents that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ["DARM"]."

Counsel states that the Custodian answered "not applicable" because she did not destroy any records in accordance with the Borough's DARM schedule. Counsel asserts that notwithstanding the fact that records were not destroyed in accordance with the Borough's DARM schedule, it is important to note that e-mails lost or not lost when the Custodian obtained her new computer are not subject to the Complainant's two (2) OPRA requests. Counsel contends that Councilman Sharkey's attempt to include e-mails possibly lost is a deliberate distortion of this complaint, which sought only e-mails held by Councilman Sharkey.

Counsel contends that the Custodian provided the Complainant with all responsive records in her possession in 2006, which is prior to the Custodian's loss of responsive e-mails. Counsel asserts that the ensuing complaint concerned only those e-mails that Councilman Sharkey failed to supply to the Borough. Counsel disputes Councilman Sharkey's assertion that his e-mail log provides sufficient evidence to establish the existence of e-mails that the Custodian should have provided to the Complainant. Counsel asserts that this assertion should be disregarded as e-mails contained in the e-mail log were never produced or entered into evidence.

### Councilman Sharkey's objections

Counsel states that the Borough raises no objection to the Complainant's exceptions. Counsel states that as long as a signed copy of the exceptions is forwarded to the GRC, he sees no reason why the GRC should deny same. Counsel asserts that the Complainant can provide critical insight to the issues in this complaint and, as a *pro se* litigant, should be given greater latitude on the procedural shortcomings with which Councilman Sharkey takes issue.

Counsel disputes Councilman Sharkey's argument that the Borough failed to cite to the record in its exceptions. Counsel states that the Borough's exceptions include quotes from the ALJ's Initial Decision and argues those findings with evidence and testimony from the record. Counsel states that one of those arguments was whether the ALJ expanded his holding beyond the scope of the GRC's charge. Counsel contends that this is the appropriate time to raise the exception because the GRC is most capable of determining this issue. Counsel contends that this argument is the purpose of "taking exception" with an OAL decision.<sup>8</sup>

### Analysis

#### **Whether the GRC should adopt, modify or reject the ALJ's Initial Decision dated October 31, 2011?**

#### Complainant's exceptions

The Complainant asserted that Councilman Sharkey contradicted himself during the pendency of this complaint and it is proven by contradictions in his testimony. The Complainant further argued that Comcast e-mail accounts do not contain a feature that deletes e-mails after a certain amount of time.

Councilman Sharkey's Counsel subsequently objected to the Complainant's exceptions, contending that the Complainant's submission contained opinions and observations and conveys a general disagreement with the ALJ's Initial Decision.<sup>9</sup>

The GRC rejects the Complainant's exceptions. A review of the Complainant's exceptions discloses that they contain opinions and arguments unsubstantiated by the evidence of this complaint. Specifically, the Complainant asserts that Comcast e-mail accounts do not contain a feature that deletes e-mails after a certain time period; however, there is no evidence in the record to support this assertion. Further, the Complainant's exceptions question the credibility of Councilman Sharkey. However, as the trier of the fact finding hearing, the ALJ is ultimately responsible for making a determination as to the credibility of a witness. Here, the ALJ clearly articulated his reasons for the apparent

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<sup>8</sup> The GRC, knowing that it would not be able to adjudicate this complaint within the prescribed 45 days due to filings of the parties, requested and received from the OAL an extension of time until February 13, 2012 to adjudicate the instant complaint.

<sup>9</sup> The Custodian provided no objections to the Complainant's exceptions.



confusion of Councilman Sharkey. The Council will therefore not disturb the ALJ's determination in this regard.

#### Borough's exceptions

The Custodian's Counsel first excepted to the ALJ's reliance on Councilman Sharkey's e-mail log to determine that the Custodian failed to provide all records in her possession at the time of the two (2) OPRA requests. Counsel argued that because the Denial of Access Complaint contained no allegations against the Custodian, the ALJ erroneously expanded the scope of his review to determine that the Custodian did not provide access to all e-mails in her possession.

Counsel next excepted to the ALJ's holding that Councilman Sharkey did not knowingly and willfully violate OPRA. Counsel argued that although the Custodian had no evidence at the time to contradict Councilman Sharkey's February 9, 2011 e-mail advising that failure to forward to her the five (5) e-mails at issue was an oversight, Councilman Sharkey provided this evidence in testimony. Counsel argued that Councilman Sharkey printed out the responsive e-mails in August 2007, well before the filing of this complaint; however, he did not provide same to the Custodian for disclosure until February 9, 2009, after being notified of the filing of this complaint.

Councilman Sharkey then objected to the Custodian Counsel's exceptions, asserting that the Custodian's Counsel raised the issue regarding the ALJ's scope of review at OAL and it was rejected.

The GRC rejects the Borough's first exception. The Council specifically ordered that this complaint be transmitted to OAL for "... a hearing to resolve the facts, for a *determination of whether the Custodian failed to provide all records responsive in her possession* at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests ..." (Emphasis added.) Thus, the ALJ's determined that the Custodian did in fact fail to provide all records in her possession at the time of the Complainant's two (2) OPRA requests was within the scope of his review as transmitted by the Council.

The GRC also rejects the Borough's second exception. As previously stated, the ALJ is responsible for making a determination as to the credibility of a witness. The ALJ clearly articulated his decision that Councilman Sharkey's failure to provide the five (5) e-mails at issue was precipitated by a number of factors discussed in the Initial Decision.

#### Councilman Sharkey's Counsel's exceptions

Councilman Sharkey first argued that the Complainant's two (2) OPRA requests were broad and unclear pursuant to Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010), Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192 (October 2011), Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010), Verry v. South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) and Verry v. South Bound Brook (Somerset), GRC Complaint No. 2009-108 (April 2010).

Counsel next excepted to the ALJ's determination that the Custodian did not knowingly and willfully violate OPRA. Counsel argued that the Custodian falsely certified in the SOI that no records responsive were destroyed in accordance with the Borough's DARM schedule although she testified before the ALJ that she lost most of her previous e-mails when her computer was upgraded. Counsel argued that this shows that the Custodian falsified her SOI response to hide her failure to provide nearly seventy (70) e-mails, which Counsel notes that the ALJ considered to be "particularly problematic".

Custodian's Counsel objected to Councilman Sharkey's exceptions. Counsel noted that the Custodian's SOI is specific to records destroyed in accordance to a municipality's DARM schedule. Counsel argued that the Custodian's SOI response was accurate because no records were destroyed in accordance with the Borough's DARM schedule. Counsel further argued that the loss of e-mails is irrelevant because the Custodian received a new computer after she responded to the subject OPRA requests.

The GRC rejects Councilman Sharkey's first exception. All of the Council's decisions to which Counsel cited were decided after this complaint was transmitted to the OAL and thus cannot be retroactively applied to the instant complaint.

The GRC further rejects Councilman Sharkey's second exception. Additionally, the Custodian's response in the SOI that the DARM question did not apply was accurate, because a loss of records does not amount to a destruction of records in accordance with a DARM schedule. Moreover, the evidence indicates that the Custodian responded to the OPRA requests at issue herein prior to receiving a new computer and losing most of her previous e-mails.

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties.

"The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavaliere v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the

administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ clearly articulated the seven (7) factors he considered to be important to his decision. The ALJ then made a determination based on those seven (7) factors and the extensive testimony of all parties (encompassing two (2) days of hearings). The ALJ further indicated that he was mindful of not only the adverse relationships between the parties, but also of the previous complaint in which Councilman Sharkey was found to have knowingly and willfully violated OPRA.

Because the credible evidence adduced during the hearing at the OAL outweighs the parties’ exceptions, and because all of the parties have failed to otherwise provide any legal basis for the GRC to reject the ALJ’s findings, the Council accepts the ALJ’s Initial Decision dated October 31, 2011, which concludes:

“I **FIND** that the custodian ... failed to ‘provide all records responsive in her possession at the time of the complainants November 28, 2006 and December 04, 2006 OPRA requests.’

I further **FIND** that Councilman Sharkey failed to initially provide a response to the complaints November and December, 2006 OPRA requests.

I further **FIND** that neither the failure of the custodian ... to provide all records responsive in her possession at the time of the requests nor the failure of Councilman Sharkey to initially provide a response was a knowing and willful violation of OPRA or an unreasonable denial of access under the totality of the circumstances.” (Emphasis in original).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the credible evidence adduced during the hearing at the Office of Administrative Law outweighs the parties’ exceptions, and because all of the parties have failed to otherwise provide any legal basis for the GRC to reject the Administrative Law Judge’s findings, the Council accepts the Administrative Law Judge’s Initial Decision dated October 31, 2011, which concludes:

“I **FIND** that the custodian ... failed to ‘provide all records responsive in her possession at the time of the complainants November 28, 2006 and December 04, 2006 OPRA requests.’

I further **FIND** that Councilman Sharkey failed to initially provide a response to the complaints November and December, 2006 OPRA requests.

I further **FIND** that neither the failure of the custodian ... to provide all records responsive in her possession at the time of the requests nor the failure of Councilman Sharkey to initially provide a response was a knowing and willful violation of OPRA or an unreasonable denial of access under the totality of the circumstances.” (Emphasis in original).

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 24, 2012



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

**JON S. CORZINE**  
*Governor*

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

**INTERIM ORDER**

**August 11, 2009 Government Records Council Meeting**

Allan Johnson  
Complainant

Complaint No. 2008-141

v.

Borough of Oceanport (Monmouth)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian and Councilman Sharkey fully complied with OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination of whether the Custodian failed to provide all records responsive in her possession at the time of the Complainant’s November 28, 2006 and December 4, 2006 OPRA requests, and whether Councilman Sharkey failed to initially provide a response at the time of the Complainant’s November 28, 2006 and December 4, 2006 OPRA requests, and, if so, whether such failure was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council



**Decision Distribution Date: August 14, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

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

**GRC Complaint No. 2008-141**

v.

**Borough of Oceanport (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

November 28, 2006 OPRA request

All correspondence, internal and external, including all e-mails belonging to Councilman Hugh Sharkey, conducting Borough business from October 1, 2006 to November 1, 2006.

December 4, 2006 OPRA request

All correspondence, internal and external, belonging to Councilman Hugh Sharkey, including all e-mails sent and received between other council members, regarding Borough business from October 12, 2006 to December 4, 2006.

**Request Made:** November 28, 2006 and December 4, 2006

**Response Made:** December 8, 2006<sup>3</sup>

**Custodian:** Kim Jungfer

**GRC Complaint Filed:** July 15, 2008<sup>4</sup>

**Background**

**November 28, 2006**

Complainant's first (1<sup>st</sup>) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**December 4, 2008**

Complainant's second (2<sup>nd</sup>) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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

<sup>2</sup> Represented by John Bennett, Esq. (Shrewsbury, NJ).

<sup>3</sup> The Custodian responded to both OPRA requests on the same day.

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

**December 8, 2006**

Custodian's response to the two (2) OPRA requests. The Custodian responds to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of the Complainant's November 28, 2006 request and fourth (4<sup>th</sup>) business day after receipt of the Complainant's December 4, 2006 request providing access to thirty (30) e-mails at a cost of \$14.25.

**July 15, 2008**

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

- Complainant's OPRA request dated November 28, 2006.
- Complainant's OPRA request dated December 4, 2006 with Custodian's notes thereon.
- E-mail from Hugh Sharkey to Captain Spencer dated October 5, 2006.
- E-mail from Councilman Hugh Sharkey William D. Moss dated November 13, 2006.
- E-mail to Councilman Hugh Sharkey William D. Moss dated November 14, 2006.<sup>5</sup>

The Complainant states that he submitted an OPRA request to the Custodian on November 28, 2006 and December 4, 2006. The Complainant states that the Custodian provided the Complainant with records on December 8, 2006. The Complainant states that, in response to a separate OPRA request with another municipality, the Complainant was provided with the attached e-mails responsive to the instant complaint that were not provided by the Custodian. The Complainant asserts that these records were withheld from disclosure by the Custodian and Councilman Hugh Sharkey ("Councilman Sharkey").

The Complainant does not agree to mediate this complaint.

**July 22, 2008**

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

**July 24, 2008**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 28, 2006 with Custodian's notes thereon.
- Complainant's OPRA request dated December 4, 2006 with Custodian's notes thereon.

The Custodian certifies that her search for the requested records included searching through the Borough's files and contacting Councilman Sharkey via e-mail and

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<sup>5</sup>The Complainant attaches one (1) other e-mail that is not to or from Councilman Sharkey, but does reference an e-mail sent by Councilman Sharkey. The e-mail does not appear to be responsive to either of the Complainant's two (2) requests.



telephone and placing both requests in Councilman Sharkey's Borough mailbox. The Custodian certifies that Councilman Sharkey did not respond to the Custodian.

The Custodian certifies that she provided thirty (30) e-mails responsive to the Complainant's two (2) OPRA requests on December 8, 2006. The Custodian certifies that all records responsive to the Complainant's two (2) OPRA requests that are maintained in the Borough's records have been provided to the Complainant. The Custodian certifies that no further records responsive are accessible to the Borough.

**January 15, 2009**

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey requests that the GRC forward a copy of the instant complaint to himself and his counsel, Michael Fitzgerald, Esq.

**January 26, 2009**

E-mail from the GRC to Councilman Sharkey. The GRC states that the complaint file is attached. The GRC states that if Councilman Sharkey plans to submit a response to the complaint, any response must be in the form of a legal certification. The GRC requests that Councilman Sharkey provide this certification by close of business on February 5, 2009.

**February 5, 2009**

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey states that he is requesting an extension of time to provide a legal certification.

**February 5, 2009**

E-mail from the GRC to Councilman Sharkey. The GRC grants a request for an extension of time until February 11, 2009 to submit the legal certification.

**February 11, 2009**

Legal certification from Councilman Sharkey with the following attachments

- Letter from Councilman Sharkey to the GRC dated February 11, 2009.
- 130 e-mails responsive to the Complainant's two (2) OPRA requests.

Councilman Sharkey certifies that during his time as a councilman, he used his personal e-mail address to conduct government business. Councilman Sharkey certifies that his personal account automatically deletes sent items every thirty (30) days and also has limited space, forcing Councilman Sharkey to delete old and unnecessary e-mails in order to free up space for new e-mails. Councilman Sharkey certifies that, before deleting any government records, he attempted to forward such e-mails to the Custodian for record-keeping purposes.

Councilman Sharkey certifies that with regard to the instant complaint, he believes all e-mails responsive were forwarded to the Custodian in the regular course of forwarding e-mails prior to deletion. Councilman Sharkey certifies that to the extent that any e-mail is not in the possession of the Custodian, it is the result of an inadvertent error

or oversight during the maintenance of Councilman Sharkey's personal e-mail account and not a deliberate or willful attempt to withhold government records from disclosure.

Further, Councilman Sharkey certifies that a three (3) year investigation of Oceanport's government was conducted by the Monmouth County Prosecutor's Office based on information provided by Councilman Sharkey in July 2005. Councilman Sharkey certifies that both law enforcement and the Borough attorney advised that he not disclose any records relating to the investigation. Councilman Sharkey certifies that it was his understanding that records relating to an investigation conducted by law enforcement were not subject to disclosure under OPRA. Councilman Sharkey certifies that two (2) boxes of records in possession of the New Jersey State Police were obtained by Councilman Sharkey and reviewed on January 21, 2009.

Councilman Sharkey expresses concern regarding previous certifications submitted by the Custodian: specifically, that the Custodian found only thirty (30) e-mails out of 134 e-mails that his records show have the "@oceanportborough.com" e-mail suffix. Councilman Sharkey states that he has located an additional twenty-one (21) e-mails containing his e-mail address, along with those of other elected officials, on which the Custodian was not copied. Councilman Sharkey contends that this could be viewed as noncompliance with OPRA on the part of other elected officials. Councilman Sharkey states that he also located five (5) additional e-mails that fall within the time period responsive. Councilman Sharkey certifies that these e-mails, which were inadvertently missed, are being forwarded to the Custodian for disclosure.

Councilman Sharkey requests that the GRC consider the totality of the circumstances regarding his struggle to comply with OPRA without jeopardizing a three (3) year law enforcement investigation. Councilman Sharkey urges the GRC to take into account the problems encountered when elected officials have to use their personal e-mail addresses to conduct government business.<sup>6</sup>

### **March 27, 2009**

E-mail from the Custodian to the Complainant attaching five (5) e-mails. The Custodian states that she apologizes for the delay in forwarding these records to the Complainant. The Custodian avers that, after contacting Councilman Sharkey to confirm whether he forwarded the records to the Complainant, the Custodian contacted the GRC for advice. The Custodian states the GRC advised to her to use her judgment about providing the five (5) e-mails. The Custodian states that because she believed the records were responsive to the Complainant's OPRA requests, she thought she should provide them to the Complainant.<sup>7</sup>

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

<sup>7</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

## Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. 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.

In this complaint, the Complainant asserts that the Custodian and Councilman Sharkey failed to provide access to three (3) e-mails that the Complainant obtained as part of a separate OPRA request to another municipality.

Conversely, the Custodian certifies in the SOI that the thirty (30) e-mails provided to the Complainant at a copying cost of \$14.25 represent all records responsive to the Complainant’s two (2) OPRA requests and that no other records responsive were maintained by the Borough. However, Councilman Sharkey refutes the Custodian’s certification in this regard and himself certifies that his records show that the Custodian should possessed and provided 134 e-mails responsive. Councilman Sharkey also certifies that the e-mails responsive to the Complainant’s OPRA requests were part of a three (3) year investigation and that he was advised not to disclose any records pertaining to the investigation by law enforcement and the Borough attorney.

Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian and Councilman Sharkey fully complied with OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to

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resolve the facts, for a determination of whether the Custodian failed to provide all records responsive in her possession at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests, and whether Councilman Sharkey failed to initially provide a response at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests, and, if so, whether such failure was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that, based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian and Councilman Sharkey fully complied with OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination of whether the Custodian failed to provide all records responsive in her possession at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests, and whether Councilman Sharkey failed to initially provide a response at the time of the Complainant's November 28, 2006 and December 4, 2006 OPRA requests, and, if so, whether such failure was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009