



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Cecilia W. Bogart
Complainant

Complaint No. 2008-172; 2008-173

v.

Borough of Lebanon (Hunterdon)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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 refunded the \$2.55 representing postage fees inappropriately charged for the Complainant’s July 9, 2008 OPRA request on March 4, 2010, within the five (5) business days required by the Council, and simultaneously provided certified confirmation of compliance to the Executive Director of the GRC, the Custodian has complied with the Council’s February 23, 2010 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and inappropriately charged postage fees of \$2.55 for the July 9, 2008 OPRA request, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007, properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant’s June 26, 2008 OPRA request, properly charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant’s June 26, 2008 OPRA request, provided the Complainant with all existing records responsive to the request, and the remainder of the requests are invalid under OPRA. 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.



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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Cecilia W. Bogart¹
Complainant**

GRC Complaint No. 2008-172; 2008-173²

v.

**Borough of Lebanon (Hunterdon)³
Custodian of Records**

Records Relevant to Complaint:

June 26, 2008 request:⁴

1. Copies of any and all e-mails from January 1, 2004 through June 26, 2008, from all business or personal addresses used by Mark Paradis, Mary Logan, R. Gary Quick, Michael Reino, Samuel Berger, Bob Schmidt, Bonnie Schmidt, Kathleen Bross, Richard Burton, Alex Saharic, Kay Winzenried, Karen Romano (Deputy Clerk from 2005 to 2007 and Acting Municipal Clerk 2008), Susan Woods, Joseph Novak, regarding:
 - a. the Borough of Lebanon Municipal Clerk's office function, performance and vacancy;
 - b. Municipal Clerk position;
 - c. Cecelia W. Bogart; her job performance, education, conference attendance, complaints, commendations, use of days off, job attendance, absence;
 - d. Deputy Clerk
 - e. Deputy Clerk position;
 - f. Appointment and Selection of Deputy Clerk 2004, 2005 and 2006;
 - g. Appointment and Selection of Cecelia W. Bogart;
 - h. Municipal Clerk;
 - i. Appointment and Selection of current Municipal Clerk
2. Copies of all e-mails in which more than three members of the Governing Body discuss any issue except meeting availability;
3. Copy of job performance memo from Personnel Committee for Cecelia Bogart dated December 2006.

¹No legal representation listed on record.

²The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.

³Represented by Trishka Waterbury, Esq., of Mason, Griffin & Pierson, PC (Princeton, NJ).

⁴Additional records were requested which are not the subject of this Denial of Access Complaint.

July 9, 2008 request:

1. Copies of all Personnel Committee meeting minutes from June 2004 to the present;
2. Copies of all Personnel Committee memos regarding Cecelia W. Bogart, RMC and/or the Municipal Clerk, from June 2004 to the present;
3. Copies of a Personnel Committee memo dated September 12, 2006 regarding Cecelia Bogart and/or the Municipal Clerk;
4. Executive Council meeting minutes dated December 13, 2007;
5. Minutes of Personnel meeting dated December 14, 2007 attended by Bonnie Schmidt, Samuel Berger, Mark Paradis.

Requests Made: June 26, 2008 and July 9, 2008

Responses Made: July 1, 2008 and July 18, 2008

Custodian: Karen Romano

GRC Complaint Filed: August 6, 2008⁵

Background

February 23, 2010

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 2010 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. Although the evidence of record indicates that the Custodian timely sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, the Custodian's response to the Complainant's June 26, 2008 request occurred one (1) day beyond the extension date of July 17, 2008 stated by the Custodian in her letter to the Complainant dated July 1, 2008. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extension of 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).
2. Because the evidence of record indicates that the Custodian's response to the Complainant's July 9, 2008 OPRA request was timely and in writing, and because the Custodian provided records responsive within the statutorily mandated response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant's July 9, 2008 request pursuant to N.J.S.A.

⁵ The GRC received the Denial of Access Complaints on said date.

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).

3. Because request Items No. 1 and No. 2 of the Complainant's June 26, 2008 OPRA request would require the Custodian to conduct research to ascertain the records responsive to the request, said request Items are invalid under OPRA pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 549 (App. Div. 2005), and N.J. Builders Ass'n v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 176 (App Div.), *certif. denied* 190 N.J. 394 (2007). *See also* Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Custodian certified in the Statement of Information that no records which were responsive to the Complainant's June 26, 2008 request Item No. 3 and July 9, 2008 OPRA request Item Nos. 1, 2, 3 and 5 existed at the time of the Complainant's two (2) requests, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Because the Custodian certified in the Statement of Information that at the time of the Complainant's July 9, 2008 request for executive council meeting minutes dated December 13, 2007, said meeting minutes had not yet been approved by the governing body, such minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and at the time of the request were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp, GRC Complaint No. 2006-51 (August 2006).
6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), it appears from the evidence of record that the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request.
7. Because the Custodian in the matter before the Council charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request, the Custodian has not violated OPRA.
8. The Custodian must refund to the Complainant \$2.55, representing the postage fees inappropriately charged for the July 9, 2008 OPRA request.

9. **The Custodian shall comply with item #8 above and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
10. The Council defers its analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records pending compliance with this Interim Order.

March 1, 2010

Council's Interim Order distributed to the parties.

March 4, 2010

Custodian's response to the Council's Interim Order. The Custodian certifies that on March 4, 2010, he forwarded to the Complainant a check from the Borough of Lebanon in the amount of \$2.55 representing a reimbursement of the postage fees which were inappropriately charged for the Complainant's July 9, 2008 OPRA request.

Analysis

Whether the Custodian complied with the Council's February 23, 2010 Interim Order?

The Custodian responded to the Council's February 23, 2010 Interim Order on March 4, 2010 (the third business day after the distribution of the Council's Interim Order), attaching a certification that on that date he forwarded to the Complainant a check from the Borough of Lebanon in the amount of \$2.55 representing a reimbursement of the postage fees which were inappropriately charged for the Complainant's July 9, 2008 OPRA request.

Because the Custodian refunded the \$2.55 postage fees inappropriately charged for the Complainant's July 9, 2008 OPRA request on March 4, 2010, within the five (5) business days required by the Council, and simultaneously provided certified confirmation of compliance to the Executive Director of the GRC, the Custodian has complied with the Council's February 23, 2010 Interim Order.

Whether the Custodian's "deemed" denial of access rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

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

In the matters now before the Council, the evidence of record indicates that the Complainant submitted a request on June 26, 2008. The evidence of record further indicates that the Custodian responded in writing to the Complainant’s OPRA request on the third (3rd) business day following receipt of such request stating that due to the volume of records requested, she would require an extension of fifteen (15) business days, or until July 17, 2008, to respond to the request. The Complainant objected to such extension of time; however, the evidence of record shows that on July 18, 2008, one (1) day after the extended time period to respond, the Custodian responded to the Complainant’s June 26, 2008 request and clearly noted the specific records being disclosed, the specific records which were not being disclosed, and the legal authority for the non-disclosure of those records.

Although the evidence of record indicates that the Custodian timely sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, the Custodian’s response to the Complainant’s June 26, 2008 request occurred one (1) day beyond the extension date of July 17, 2008 stated by the Custodian in her letter to the Complainant dated July 1, 2008. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extension of the statutorily mandated seven (7) business days resulted 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).

The evidence of record also indicates that the Custodian’s response to the Complainant’s July 9, 2008 OPRA request (a second request) was timely and in writing, and because the Custodian provided records responsive within the statutorily mandated response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant’s July 9, 2008 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, request Items No. 1 and No. 2 of the Complainant’s June 26, 2008 OPRA request would have required the Custodian to conduct research to ascertain the records responsive to the request and were therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). *See also* Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Also, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007 because she certified in the Statement of Information that at the time of the Complainant's July 9, 2008 request for executive council meeting minutes dated December 13, 2007, said meeting minutes had not yet been approved by the governing body. Moreover, based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request. Additionally, the Custodian in the matter before the Council properly charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request.

Finally, the Custodian certified in the SOI that no records which were responsive to the Complainant's June 26, 2008 request Item No. 3 and July 9, 2008 OPRA request Item Nos. 1, 2, 3 and 5 existed at the time of the Complainant's two (2) requests, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and inappropriately charged postage fees of \$2.55 for the July 9, 2008 OPRA request, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007, and properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request, properly charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request, provided the Complainant with all existing records responsive to the request, and the remainder of the requests are invalid under OPRA. 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. Because the Custodian refunded the \$2.55 representing postage fees inappropriately charged for the Complainant's July 9, 2008 OPRA request on March 4, 2010, within the five (5) business days required by the Council, and simultaneously provided certified confirmation of compliance to the Executive Director of the GRC, the Custodian has complied with the Council's February 23, 2010 Interim Order.

2. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and inappropriately charged postage fees of \$2.55 for the July 9, 2008 OPRA request, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007, properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request, properly charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request, provided the Complainant with all existing records responsive to the request, and the remainder of the requests are invalid under OPRA. 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.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Cecilia W. Bogart
Complainant

Complaint No. 2008-172 and 2008-173

v.

Borough of Lebanon (Hunterdon)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 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. Although the evidence of record indicates that the Custodian timely sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, the Custodian’s response to the Complainant’s June 26, 2008 request occurred one (1) day beyond the extension date of July 17, 2008 stated by the Custodian in her letter to the Complainant dated July 1, 2008. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extension of 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).
2. Because the evidence of record indicates that the Custodian’s response to the Complainant’s July 9, 2008 OPRA request was timely and in writing, and because the Custodian provided records responsive within the statutorily mandated response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant’s July 9, 2008 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).



3. Because request Items No. 1 and No. 2 of the Complainant's June 26, 2008 OPRA request would require the Custodian to conduct research to ascertain the records responsive to the request, said request Items are invalid under OPRA pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 549 (App. Div. 2005), and N.J. Builders Ass'n v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 176 (App Div.), *certif. denied* 190 N.J. 394 (2007). *See also* Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Custodian certified in the Statement of Information that no records which were responsive to the Complainant's June 26, 2008 request Item No. 3 and July 9, 2008 OPRA request Item Nos. 1, 2, 3 and 5 existed at the time of the Complainant's two (2) requests, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Because the Custodian certified in the Statement of Information that at the time of the Complainant's July 9, 2008 request for executive council meeting minutes dated December 13, 2007, said meeting minutes had not yet been approved by the governing body, such minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and at the time of the request were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp, GRC Complaint No. 2006-51 (August 2006).
6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), it appears from the evidence of record that the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request.
7. Because the Custodian in the matter before the Council charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request, the Custodian has not violated OPRA.
8. The Custodian must refund to the Complainant \$2.55, representing the postage fees inappropriately charged for the July 9, 2008 OPRA request.

9. **The Custodian shall comply with item #8 above and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
10. The Council defers its analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records pending compliance with this Interim Order.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Cecilia W. Bogart¹
Complainant**

GRC Complaint No. 2008-172; 2008-173²

v.

**Borough of Lebanon (Hunterdon)³
Custodian of Records**

Records Relevant to Complaint:

June 26, 2008 request:⁴

1. Copies of any and all e-mails from January 1, 2004 through June 26, 2008, from all business or personal addresses used by Mark Paradis, Mary Logan, R. Gary Quick, Michael Reino, Samuel Berger, Bob Schmidt, Bonnie Schmidt, Kathleen Bross, Richard Burton, Alex Saharic, Kay Winzenried, Karen Romano (Deputy Clerk from 2005 to 2007 and Acting Municipal Clerk 2008), Susan Woods, Joseph Novak, regarding:
 - a. the Borough of Lebanon Municipal Clerk's office function, performance and vacancy;
 - b. Municipal Clerk position;
 - c. Cecilia W. Bogart; her job performance, education, conference attendance, complaints, commendations, use of days off, job attendance, absence;
 - d. Deputy Clerk
 - e. Deputy Clerk position;
 - f. Appointment and Selection of Deputy Clerk 2004, 2005 and 2006;
 - g. Appointment and Selection of Cecilia W. Bogart;
 - h. Municipal Clerk;
 - i. Appointment and Selection of current Municipal Clerk
2. Copies of all e-mails in which more than three members of the Governing Body discuss any issue except meeting availability;
3. Copy of job performance memo from Personnel Committee for Cecilia Bogart dated December 2006.

¹No legal representation listed on record.

²The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.

³Represented by Trishka Waterbury, Esq., of Mason, Griffin & Pierson, PC (Princeton, NJ).

⁴Additional records were requested which are not the subject of this Denial of Access Complaint.
Cecilia W. Bogart v. Borough of Lebanon (Hunterdon), 2008-172 & 2008-173 – Findings and Recommendations of the Executive Director

July 9, 2008 request:

1. Copies of all Personnel Committee meeting minutes from June 2004 to the present;
2. Copies of all Personnel Committee memos regarding Cecelia W. Bogart, RMC and/or the Municipal Clerk, from June 2004 to the present;
3. Copies of a Personnel Committee memo dated September 12, 2006 regarding Cecelia Bogart and/or the Municipal Clerk;
4. Executive Council meeting minutes dated December 13, 2007;
5. Minutes of Personnel meeting dated December 14, 2007 attended by Bonnie Schmidt, Samuel Berger, Mark Paradis.

Requests Made: June 26, 2008 and July 9, 2008

Responses Made: July 1, 2008 and July 18, 2008

Custodian: Karen Romano

GRC Complaint Filed: August 6, 2008⁵

Background

June 26, 2008

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

July 1, 2008

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that due to the volume of records requested, she will require an extension of fifteen (15) business days, or until July 17, 2008, to respond to the request.

July 2, 2008

Letter from the Complainant to the Custodian. The Complainant states that she does not agree to the extension of time required by the Custodian. The Complainant further states that she requests that the records responsive be provided to her within the statutorily-mandated seven (7) business days under OPRA, or by July 8, 2008. The Complainant states that as municipal clerk, she repeatedly advised the governing body, staff and professionals of the Borough of Lebanon that e-mails are government records subject to OPRA. The Complainant asserts that therefore all requested e-mails should be readily accessible and available. The Complainant further asserts that all requested e-mails should be stored in a file in individuals' computers and requests that the Custodian provide all responsive records to the Complainant via e-mail.

⁵ The GRC received the Denial of Access Complaints on said date.
Cecilia W. Bogart v. Borough of Lebanon (Hunterdon), 2008-172 & 2008-173 – Findings and Recommendations of the Executive Director

July 9, 2008

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 18, 2008

Letter from the Custodian to the Complainant. The Custodian responds to the Complainant's June 26, 2008 OPRA request one (1) business day after the extended time period for a response.

The Custodian states that Borough Attorney Joseph Novak must review the records responsive to Request Item No. 1 upon his return from a trial taking place June 26, 2008 and June 27, 2008, and after his vacation from June 30, 2008 to July 22, 2008. The Custodian expects that Mr. Novak will respond to this request item by July 29, 2008.

The Custodian states that Request Item No. 2 is denied because it lacks specific, necessary detail.

The Custodian states that no records exist which are responsive to Request Item No. 3.

July 18, 2008

Letter from the Custodian to the Complainant. The Custodian states that copying charges relevant to providing records responsive to the Complainant's June 26, 2008 OPRA request total 15 pages or \$10.25.

July 18, 2008

Letter from the Custodian to the Complainant. The Custodian responds to the Complainant's July 9, 2008 OPRA request on the seventh (7th) business day following receipt thereof. The Custodian responds to the request as follows;

The Custodian states that no records responsive to Request Item No. 1 exist because Lebanon Borough Council Committees do not maintain minutes, since they report directly to Lebanon Borough Council.

The Custodian states that Borough Attorney Joseph Novak must review the records responsive to Request Item No. 2 upon his return from a trial taking place June 26, 2008 and June 27, 2008, and after his vacation from June 30, 2008 to July 22, 2008. The Custodian expects that Mr. Novak will respond to this request item by July 29, 2008.

The Custodian states that no records responsive to Request Item No. 3 exist.

The Custodian further states that the records responsive to Request Item No. 4, executive session meeting minutes, have not yet been approved for release to the public.

The Custodian states in response to Request Item No. 5 that she has no knowledge of a Borough Council meeting occurring on December 14, 2007, and that her research has disclosed the existence of no records responsive to this request.

July 18, 2008

Letter from the Custodian to the Complainant. The Custodian states that postage relevant to responding to the Complainant's July 9, 2008 OPRA request totals \$2.55.

July 29, 2008

Letter from the Complainant to the Custodian. The Complainant addresses the Custodian's responses to her June 26, 2008 and July 9, 2008 OPRA requests as follows. The Complainant states that, with regard to any of the request items for which the Custodian contends there are no responsive records, the Complainant requests that the governing body and Mr. Novak specifically state whether they possess copies of the records requested. The Complainant states that, if the governing body and Mr. Novak possess copies of responsive records, they should produce them in accordance with OPRA. The Custodian states that it is the responsibility of individuals who create government records to provide copies of such to the Municipal Clerk. The Complainant asserts that, if the records requested are not on file in the Municipal Clerk's office, the Custodian should consult with the governing body and Mr. Novak and advise the Complainant whether such records have ever existed.

The Complainant requests a letter from the governing body advising whether the records requested have or have not been produced and/or have or have not existed. The Complainant notes that the members of the governing body have been copied on all of the OPRA requests submitted by the Complainant and all correspondence resulting therefrom, and these individuals have therefore had sufficient time to either produce the records requested or state that such records do not exist; the Complainant requests that such letter provide the specific information as it pertains to each record requested.

The Complainant requests to be informed when the executive session meeting minutes of December 13, 2007 are scheduled to be released.

The Complainant states that, with regard to Request Item No. 5, there was a meeting on December 14, 2007 at 8:30 am in which Bonnie Schmidt, Sam Berger and Mark Paradis represented the governing body as the Personnel Committee. The Complainant further states that both Ms. Schmidt and Mr. Berger made notes at that meeting. The Complainant contends that the notes of Ms. Schmidt and Mr. Berger are therefore a municipal record.

The Complainant states that, with regard to the July 9, 2008 OPRA Request Item No. 1, the Complainant believes that notes of all Personnel Committee meetings are taken by those in attendance; if that is the case, the Complainant reiterates her position that those notes are government records and requests copies of same.

August 5, 2008

Letter from the Complainant to the Custodian. The Complainant states that she visited the Borough Hall on August 4, 2008 to pick up materials responsive to the Complainant's June 26, 2008 OPRA request. The Complainant states that she was informed by the Deputy Clerk that there was no package for the Complainant. The Complainant states that she does not understand what effect Borough Attorney Novak's schedule has upon the disclosure of the records requested in her June 26, 2008 and July 9,

2008 OPRA requests and asks that the records responsive to these requests be immediately provided to her. The Complainant attaches a copy of the twenty-four (24) exemptions to disclosure under OPRA and states that none of the records requested fall within the exemptions noted therein.

August 6, 2008⁶

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

- Complainant’s OPRA request dated June 26, 2008
- Letter from the Custodian to the Complainant dated July 1, 2008
- Letter from the Complainant to the Custodian dated July 2, 2008
- Complainant’s OPRA request dated July 9, 2008
- Letter from the Custodian to the Complainant dated July 18, 2008, with attachments responsive to the June 26, 2008 OPRA request
- Letter from the Custodian to the Complainant dated July 18, 2008
- Letters from the Custodian to the Complainant dated July 18, 2008⁷
- Letter from the Complainant to the Custodian dated July 29, 2008
- Letter from the Complainant to the Custodian dated August 5, 2008

The Complainant states that she did not agree to the Custodian’s request for an extension of time to respond to the June 26, 2008 OPRA request because she believed that if someone was away from the office, then other Borough employees could comply with the request in a timely manner, and the balance of the request could be completed when those individuals who were away returned to the office, as long as it was within a reasonable time period.

The Complainant also states that the Custodian failed to comply with the extension requested, which the Complainant notes elapsed on July 17, 2008. The Complainant also states that on July 18, 2008, she received a letter from the Custodian dated July 18, 2008, in which the Custodian sought an additional extension of time until July 29, 2008 for Borough Attorney Mr. Novak to return from trial and vacation. The Complainant states that during this vacation time, Mr. Novak prepared an OPRA ordinance that was introduced on first reading at the Council meeting of July 16, 2008. The Complainant further states that Mr. Novak prioritized this ordinance over the Complainant’s OPRA request while Mr. Novak was on vacation. The Complainant states that she believes that this demonstrates a lack of good faith.

The Complainant asserts that she did not receive records responsive to Items No. 1, No. 2 and No. 3 of the June 26, 2008 OPRA request, and further asserts that she did not receive any records responsive to the July 9, 2008 OPRA request.

The Complainant does not agree to mediate this complaint.

⁶ The Complainant filed a separate Denial of Access Complaint for each OPRA request at issue.

⁷ The first of these letters set forth copying fees of \$10.25 for the records responsive to the June 26, 2008 OPRA request. The second set forth postage fees of \$2.55.

August 11, 2008

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

August 13, 2008

Telephone call from Custodian’s Counsel to the GRC. Custodian’s Counsel requests an extension of time to complete and file the SOI.

August 13, 2008

Letter from the GRC to Custodian’s Counsel. The GRC grants a five (5) business day extension of time to August 22, 2008 to file the SOI.

August 22, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 26, 2008
- Custodian’s response to request dated June 26, 2008
- Letter from the Custodian to the Complainant dated July 1, 2008
- Letter from the Complainant to the Custodian dated July 2, 2008
- Complainant’s OPRA request dated July 9, 2008
- Custodian’s response to request dated July 9, 2008
- Two (2) Letters from the Custodian to the Complainant dated July 18, 2008
- Letter from the Complainant to the Custodian dated July 29, 2008
- Letter from the Complainant to the Custodian dated August 5, 2008
- Certification of the Custodian dated August 22, 2008

The Custodian certifies that she received the Complainant’s June 26, 2008 OPRA request on the same day, and further certifies that by letter dated July 1, 2008, the Custodian requested a fifteen (15) business day extension of time to July 17, 2008 to respond to the Complainant’s June 26, 2008 OPRA request. The Custodian also certifies that on July 1, 2008, she telephoned the Complainant and advised that the Borough was unable to forward all of the requested records within seven (7) business days because various members of the governing body and Borough Attorney Joseph Novak were on vacation during the month. The Custodian certifies that during that telephone conversation, the Complainant requested that the Custodian forward any records that were available or obtainable within the time requirements of OPRA and that the remainder of the requested records be forwarded to the Complainant as soon as any other persons returned from vacation. The Custodian further certifies that on July 2, 2008, she received a letter facsimile from the Complainant requesting that the information sought by her be provided within seven (7) business days by e-mail.

The Custodian further certifies that on July 9, 2008 she received a second OPRA request from the Complainant. The Custodian also certifies that on July 18, 2008 she forwarded to the Complainant the Borough’s response and records responsive to the Complainant’s June 26, 2008 OPRA request. The Custodian further certifies that she advised the Complainant:

- (1) the communications records requested in the June 26, 2008 OPRA request would be reviewed by Borough Attorney Mr. Novak upon his return from trial and vacation, anticipated to be on or before July 29, 2008;
- (2) denied Complainant's request for copies of all e-mails in which more than 3 members of the governing body discuss any issue except meeting availability on the grounds that the request lacked specific necessary detail; and
- (3) advised that the Complainant was unable to find the requested job performance memo.⁸

The Custodian also certifies that she provided an escrow balance statement to the Complainant dated July 18, 2008 regarding the June 26, 2008 OPRA request, confirming the production of 15 pages totaling \$10.25 inclusive of envelope costs and a remaining amount in escrow of \$49.25.

The Custodian further certifies that on July 18, 2008 she forwarded the Borough's response and records in reply to the Complainant's July 9, 2008 OPRA request. The Custodian certifies that in her response she advised the Complainant:

- (1) Borough Council Committees do not maintain minutes;
- (2) the communications records requested would be reviewed by Attorney Novak upon his return from trial and vacation, anticipated to be on or before July 29, 2008;
- (3) research did not indicate the existence of any records responsive to the Complainant's request for a Personnel Committee memo dated September 12, 2006; and
- (4) the requested executive session minutes were not yet approved for release to the public and advised that research of the Borough's files did not disclose any records of a December 14, 2007 meeting.

The Custodian also certifies that she provided an escrow balance statement dated July 18, 2008 to the Complainant regarding the Complainant's July 9, 2008 OPRA request, confirming the production of zero pages, totaling \$2.55 inclusive of postage costs, and a remaining amount in escrow of \$46.70.

The Custodian argues that the facts of these cases demonstrate that the Custodian provided all responsive records to the Complainant, and that any remaining record requests that form the basis of these Denial of Access Complaints were either not valid OPRA requests or not government records subject to OPRA, or no records responsive to the requests exist.

The Custodian further argues that she properly provided all responsive records to the Complainant in response to the Complainant's June 26, 2008 OPRA request. The Custodian asserts that because of the voluminous nature of the request, the Custodian responded to the June 26, 2008 OPRA request in writing on July 1, 2008, the third (3rd)

⁸ The Custodian also certifies to providing additional records responsive which are not the subject of this Denial of Access Complaint.
Cecilia W. Bogart v. Borough of Lebanon (Hunterdon), 2008-172 & 2008-173 – Findings and Recommendations of the Executive Director

business day after receipt thereof, requesting a fifteen (15) business day extension of time within which to respond.

The Custodian further contends that Item No. 2 of the Complainant's June 26, 2008 OPRA request sought e-mail records for an unspecified time period, involving unspecified governing body members, and which would have required the Custodian to conduct research to identify responsive records. The Custodian argues that this request does not identify specific government records but is instead an improper general request for information. The Custodian asserts that as such, the denial of access was proper. *See MAG Entertainment LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 549 (App. Div. 2005); *N.J. Builders Ass'n v. NJ Council on Affordable Housing*, 390 N.J. Super. 166, 176 (App Div.), *certif. denied* 190 N.J. 394 (2007).

The Custodian also argues that Item No. 3 of the Complainant's OPRA request sought a copy of a job performance memorandum regarding a municipal employee (the Complainant herself), but that in her July 18, 2008 response to the Complainant, the Custodian indicated that no record responsive to the request could be located. The Custodian contends that even if such record did exist, the request concerned a specific municipal employee and would therefore be considered a personnel record, which is specifically exempt from the definition of a government record under OPRA. N.J.S.A. 47:1A-10. The Custodian contends that as such, this request was properly denied.

The Custodian also maintains that the Complainant's request for e-mails concerning seventeen (17) different subjects was properly denied because no e-mails were found regarding the specific subjects requested, or those e-mails that were located concerned personnel matters not subject to disclosure under N.J.S.A. 47:1A-10. The Custodian contends that although she could have properly denied this request item as overly broad and failing to specify identifiable government records, the Custodian undertook to research the Borough's records to locate and identify responsive records. The Custodian asserts that this search did not disclose the existence of responsive records. The Custodian further asserts that each individual identified in the Complainant's request notified the Custodian either that no records responsive could be found, or such records as were located were not disclosable because they concerned personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian argues that this request was properly denied.

The Custodian contends that she properly responded to the Complainant's July 9, 2008 OPRA request because no records responsive to the request were found to exist. The Custodian states that the Complainant's July 9, 2008 OPRA request sought Personnel Committee meeting minutes, Personnel Committee memos regarding specific employees and positions, Executive Council meeting minutes dated December 13, 2007 and the minutes of a specific meeting regarding personnel matters. The Custodian contends that on July 18, 2008, the seventh (7th) business day after receipt thereof, the Custodian responded in writing advising that no minutes for the Personnel Committee existed because the Personnel Committee did not keep minutes, that any communications would be reviewed by Borough Attorney Novak upon his return from trial and vacation, with a response anticipated on or before July 29, 2008, that no record responsive to the request for a memorandum existed, and that the requested executive committee meeting

minutes were not yet approved for release to the public. The Custodian asserts that this response was both timely and proper.

The Custodian contends that draft meeting minutes are pre-decisional and are not disclosable pursuant to the GRC's decision in Parave-Fogg v. Lower Alloways Creek Twp. GRC Complaint No. 2006-51 (August 2006). The Custodian further contends that the remaining four requests seek records which constitute personnel records, which are not disclosable pursuant to N.J.S.A. 47:1A-10. Nevertheless, the Custodian asserts that no records responsive to the request for memoranda exist and that she so informed the Complainant.

The Custodian also contends that personal meeting notes prepared by the members of the governing body or the Personnel Committee are not government records pursuant to the Appellate Division's decision in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007); *see also* Hardwick v. NJ Dept. of Transportation, GRC Complaint No. 2007-164 (February 2008).

The Custodian requests that the GRC find that all records responsive to the Complainant's OPRA requests have been provided, that any remaining record request forming the basis of these complaints is 1) not a valid OPRA request; 2) not a government record subject to disclosure under OPRA; and/or 3) no record responsive exists. The Custodian requests that the GRC therefore dismiss the instant Denial of Access Complaints as being unreasonable, without factual basis, as failing to state a claim upon which relief can be granted and not subject to OPRA.

November 10, 2009

GRC requests a certification from the Custodian that the postage amounts charged to the Complainant represent actual postage costs incurred.

November 13, 2009

Legal certification from the Custodian. The Custodian certifies that the postage amounts charged to the Complainant represent actual postage costs incurred.

January 19, 2010

E-mail from the GRC to Custodian's Counsel. The GRC asks Custodian's Counsel to provide the date upon which the Borough of Lebanon approved the minutes of the December 14, 2007 personnel meeting referenced in the Complainant's July 9, 2008 OPRA request, pursuant to its obligation under the Open Public Meetings Act.

January 20, 2010

E-mail from Custodian's Counsel to the GRC. Custodian's Counsel advises that the Personnel Meeting of December 14, 2007 was a meeting of a subcommittee of the Borough Council. Custodian's Counsel states that no minutes are kept (or are required to be kept) of such meetings, and therefore, there were no minutes to approve.

January 20, 2010

E-mail from the Complainant to the GRC. The Complainant advises the GRC that the Borough set a policy at a Council meeting in 2006 that minutes were to be kept by the

subcommittee chair for all subcommittee meetings. The Complainant further advises the GRC that the policy had not been rescinded as of December 14, 2007.

January 20, 2010

E-mail from the GRC to Custodian’s Counsel. The GRC asks Custodian’s Counsel to provide the date upon which the Borough of Lebanon approved the executive council meeting minutes dated December 13, 2007 referenced in the Complainant’s July 9, 2008 OPRA request, pursuant to its obligation under the Open Public Meetings Act.

January 27, 2010

Telephone call from Custodian’s Counsel to GRC. Custodian’s Counsel confirms the Custodian’s certification in the SOI that the Borough has not yet approved the executive council meeting minutes dated December 13, 2007 pursuant to its obligation under the Open Public Meetings Act.

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 states that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.

...

If 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.

...

If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] ..., the custodian shall delete or excise from a copy of the record that portion which the

custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

OPRA further states 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 to a government record or deny a request for access to a government record *as soon as possible, but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived.

...

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.

The GRC will first address whether the Custodian’s responses to the Complainant’s requests were appropriate under OPRA.

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.⁹ 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).

⁹ 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.

In the matters now before the Council, the evidence of record indicates that the Complainant submitted a request on June 26, 2008. The evidence of record further indicates that the Custodian responded in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request stating that due to the volume of records requested, she will require an extension of fifteen (15) business days, or until July 17, 2008, to respond to the request. The Complainant objected to such extension of time; however, the evidence of record shows that on July 18, 2008, one (1) day after the extended time period to respond, the Custodian responded to the Complainant's June 26, 2008 request and clearly noted the specific records being disclosed, the specific records which were not being disclosed, and the legal authority for the non-disclosure of those records.

Although the evidence of record indicates that the Custodian timely sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, the Custodian's response to the Complainant's June 26, 2008 request occurred one (1) day beyond the extension date of July 17, 2008 stated by the Custodian in her letter to the Complainant dated July 1, 2008. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extension of 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).

Moreover, the evidence of record indicates that the Complainant submitted a second OPRA request on July 9, 2008. The evidence further indicates that the Custodian responded to this request in writing on the seventh (7th) business day following receipt thereof and clearly noted the specific records being disclosed, the specific records which were not being disclosed, and the legal authority for the non-disclosure of those records.

Therefore, because the evidence of record indicates that the Custodian's response to the Complainant's July 9, 2008 OPRA request was timely and in writing, and because the Custodian provided records responsive within the statutorily mandated response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant's July 9, 2008 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).

Next, the GRC examines whether the Custodian properly denied access to the requested records under OPRA.

June 26, 2008 request Items No. 1 and 2

The Complainant's June 26, 2008 request sought copies of "any and all" e-mails from January 1, 2004 through June 26, 2008, from the personal or business e-mail accounts of fourteen (14) specific individuals regarding nine (9) separate subjects. The request also sought "copies of all e-mails in which more than three members of the

Governing Body discuss any issue except meeting availability.” These request items are overly broad under OPRA and would require the Custodian to conduct research.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.*” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG’s request under OPRA:

“Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.* at 549.

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹⁰ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”¹¹

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court enumerated the responsibilities of a custodian and a requestor as follows:

“OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent, *supra*.

production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J.Super. at 177.

Moreover, the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f 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." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

In the instant matter, the Complainant's requests for e-mails at request Items No. 1 and 2 fail to identify with reasonable clarity the records sought and are therefore invalid under OPRA. These requests specify a broad category of records, *i.e.*, e-mails, which must contain a certain subject matter. For request Item No. 1, the Custodian would be required to research all e-mails sent by fourteen (14) individuals for an approximately 54-month period to ascertain which of those e-mails contains any of nine (9) subjects requested by the Complainant. For request Item No. 2, the Custodian would be required to research all e-mails for an unspecified time period to ascertain which of those e-mails contains a discussion among three or more members of the governing body of any issue except meeting availability. Such research is clearly outside the boundaries of a custodian's duties under OPRA as contemplated by the Appellate Division in MAG, *supra*, and New Jersey Builders, *supra*.¹²

Because request Items No. 1 and No. 2 of the Complainant's June 26, 2008 OPRA request would require the Custodian to conduct research to ascertain the records responsive to the request, said request Items are invalid under OPRA pursuant to MAG,

¹² Although the Custodian certifies that records were located by two of the specified individuals and asserts that such records are exempt from disclosure pursuant to N.J.S.A. 47:1A-10, the GRC declines to address said issue because the Custodian was not required under OPRA to conduct research to satisfy an overly broad request.

supra, and *New Jersey Builders, supra*. See also *Bent v. Stafford Police Department*, 381 N.J.Super. 30 (App. Div. 2005); *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).

June 26, 2008 request Item No. 3; July 9, 2008 request Items No. 1, 2, 3 and 5

The Complainant's June 26, 2008 request Item No. 3 sought a copy of a job performance memo from the Personnel Committee for Cecelia Bogart dated December 2006, and the Complainant's July 9, 2008 request Items No. 1, 2, 3 and 5 sought copies of all Personnel Committee meeting minutes from June 2004 to the present, copies of all Personnel Committee memos regarding Cecelia W. Bogart, RMC and/or the Municipal Clerk, from June 2004 to the present, copies of a Personnel Committee memo dated September 12, 2006 regarding Cecelia Bogart and/or the Municipal Clerk, and minutes of a Personnel meeting dated December 14, 2007 attended by Bonnie Schmidt, Samuel Berger and Mark Paradis. The Custodian has certified that no records exist which are responsive to the requests for such records.

In *Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian certified in the SOI that no records which were responsive to the Complainant's June 26, 2008 request Item No. 3 and July 9, 2008 OPRA request Item Nos. 1, 2, 3 and 5 existed at the time of the Complainant's two (2) requests, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the requested records pursuant to *Pusterhofer, supra*.

July 9, 2008 request Item No. 4

The Complainant's July 9, 2008 OPRA request Item No. 4 sought executive council meeting minutes dated December 13, 2007. The Custodian certified in the SOI that said meeting minutes were not yet approved.

OPRA exempts from the definition of a government record "inter-agency, intra-agency advisory, consultative, or deliberative material[.]" *N.J.S.A.* 47:1A-1.1.

In *Parave-Fogg v. Lower Alloways Creek Twp*, GRC Complaint No. 2006-51 (August 2006), the GRC determined that the Custodian did not unlawfully deny access to the requested meeting minutes because the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constituted inter-agency, intra-agency advisory, consultative, or deliberative material and were exempt from disclosure pursuant to *N.J.S.A.* 47:1A-1.1.

Similarly, in the matter now before the Council, the Custodian certified in the SOI that at the time of the Complainant's July 9, 2008 request for executive session council meeting minutes dated December 13, 2007, said meeting minutes had not yet been approved by the governing body. As such, the requested minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and at the time of the request were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007. N.J.S.A. 47:1A-1.1.; Parave-Fogg v. Lower Alloways Creek Twp. GRC Complaint No. 2006-51 (August 2006).

Paper Copies and Postage Fees

The Custodian has certified that she provided an escrow balance statement to the Complainant dated July 18, 2008, regarding the June 26, 2008 OPRA request, confirming the production of 15 pages totaling \$10.25 inclusive of postage costs and a remaining amount in escrow of \$49.25. The Custodian has also certified that she provided an escrow balance statement dated July 18, 2008 to the Complainant regarding the Complainant's July 9, 2008 OPRA request, confirming postage costs totaling \$2.55, and a remaining amount in escrow of \$26.70. The Custodian has certified that the postage costs charged to the Complainant are actual postage costs incurred by the Township.

As noted by the Appellate Division in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), the Legislature intended that, as a general rule, public agencies should charge requestors the actual cost of duplication of paper copies, exclusive of the costs of labor or overhead. Notwithstanding this general rule, however, the Appellate Division stated that "small public bodies... have limited equipment and resources[.]" *Id.* Because of this, "[i]n some cases, ... the most efficient approach is to allow small public agencies the right to charge the specific monetary amounts contained in the second sentence of the statute without undertaking onerous determinations of their actual costs." *Id.* The Appellate Division therefore upheld the GRC's determination that the Borough of Mount Arlington properly charged the plaintiff in Windish the duplication rates set forth in OPRA rather than the actual costs of duplication of the requested records. *Id.*¹³

Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), it appears from the evidence of record that the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request.¹⁴

OPRA provides that:

¹³ According to the 2005 U.S. Census, the population of the Borough of Mount Arlington was 5,332.

¹⁴ According to the 2000 U.S. Census, the population of the Borough of Lebanon was 1,065. It is therefore a "small public body" pursuant to the Windish decision.

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.” [Emphasis added] N.J.S.A. 47:1A-5.b.¹⁵

The assessment of actual postage costs by a custodian for the delivery of requested records via mail is reasonable. See Constantine v. Township of Bass River, 406 N.J.Super. 305, 313 (App. Div. 2009); see also N.J.S.A. 39:4-131 (permitting the assessment of \$1 per page administrative costs for requests for motor vehicle accident reports not made in person); N.J.S.A. 53:2-3 (permitting additional fees that the New Jersey State Police may charge for certified copies of reports, photographs or other information pertaining to automobile accidents or other casualties).

The evidence of record indicates that the Custodian provided an escrow balance statement to the Complainant dated July 18, 2008, regarding the June 26, 2008 OPRA request, confirming the production of 15 pages totaling \$10.25 inclusive of postage costs and a remaining amount in escrow of \$49.25. However, the Custodian has also certified that she provided an escrow balance statement dated July 18, 2008 to the Complainant regarding the Complainant’s July 9, 2008 OPRA request (for which no responsive records were provided), confirming postage costs totaling \$2.55, and a remaining amount in escrow of \$46.70. Because no responsive records were provided in response to the Complainant’s July 9, 2008 OPRA request, the \$2.55 fee charged by the Custodian to respond to this request is not reasonable under OPRA. As such, the Custodian must refund to the Complainant \$2.55, representing the postage fees inappropriately charged for the July 9, 2008 OPRA request.

Whether the Custodian’s “deemed” denial of access 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 its analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records pending compliance with this Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the evidence of record indicates that the Custodian timely sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, the Custodian’s response to the Complainant’s June 26, 2008 request occurred one (1) day beyond the extension date of July 17, 2008 stated by the Custodian in her letter to the Complainant dated July 1, 2008. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either

¹⁵ OPRA goes on to set forth a range of maximum allowable duplication fees.

granting access, denying access, seeking clarification or requesting an extension of time within the extension of 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).

2. Because the evidence of record indicates that the Custodian’s response to the Complainant’s July 9, 2008 OPRA request was timely and in writing, and because the Custodian provided records responsive within the statutorily mandated response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant’s July 9, 2008 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).
3. Because request Items No. 1 and No. 2 of the Complainant’s June 26, 2008 OPRA request would require the Custodian to conduct research to ascertain the records responsive to the request, said request Items are invalid under OPRA pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 549 (App. Div. 2005), and N.J. Builders Ass’n v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 176 (App Div.), *certif. denied* 190 N.J. 394 (2007). *See also* Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Custodian certified in the Statement of Information that no records which were responsive to the Complainant’s June 26, 2008 request Item No. 3 and July 9, 2008 OPRA request Item Nos. 1, 2, 3 and 5 existed at the time of the Complainant’s two (2) requests, and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Because the Custodian certified in the Statement of Information that at the time of the Complainant’s July 9, 2008 request for executive council meeting minutes dated December 13, 2007, said meeting minutes had not yet been approved by the governing body, such minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and at the time of the request were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp, GRC Complaint No. 2006-51 (August 2006).
6. Based on the Appellate Division’s decision in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), it appears from the evidence of record that the Custodian in the matter before

the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request.

7. Because the Custodian in the matter before the Council charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request, the Custodian has not violated OPRA.
8. The Custodian must refund to the Complainant \$2.55, representing the postage fees inappropriately charged for the July 9, 2008 OPRA request.
9. **The Custodian shall comply with item #8 above and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
10. The Council defers its analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records pending compliance with this Interim Order.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010