



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

FINAL DECISION

December 22, 2009 Government Records Council Meeting

Allen Frost
Complainant

Complaint No. 2008-198

v.

North Hudson Regional Fire & Rescue (Hudson)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 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:

1. 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 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). Further, pursuant to Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008), Counsel’s insufficient response has violated N.J.S.A. 47:1A-5.g. because Counsel failed to initially set forth a specific lawful basis for redactions made to the requested executive session meeting minutes.
2. Because the Custodian failed to immediately grant or deny access to the requested 2007 budget, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. The Custodian’s failure to provide a written response to the Complainant’s three (3) OPRA requests within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s request for the North Hudson Regional Fire & Rescue’s 2007 budget and Counsel provided an untimely and insufficient response to the Complainant’s OPRA requests. However, because Counsel certified that he provided access all records responsive to the Complainant’s requests on September 9, 2008 and



the Complainant received said records on September 15, 2008, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 22nd Day of December, 2009

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: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Allen Frost¹
Complainant**

GRC Complaint No. 2008-198

v.

**North Hudson Regional Fire & Rescue (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of resolutions 2008 R-7, 2008 R-12, 2008 R-14, 2008 R-21, 2008 R-28, 2008 R-29, 2008 R-30, 2008 R-31, 2008 R-33 and 2008 R-34 including all attachments (i.e. lists, contracts, or proposals).
2. Copy of the 2007 budget and 2007 audit.
3. Copies of executive session meeting minutes from January, 2007 to December 2007.³

Request Made: July 25, 2008

Response Made: September 9, 2008

Custodian: Jeffrey Welz

GRC Complaint Filed: September 3, 2008⁴

Background

July 25, 2008

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

September 3, 2008

Denial of Access Complaint filed attaching the Complainant's three (3) OPRA requests dated July 25, 2008.

The Complainant states that he hand delivered three (3) OPRA request forms to North Hudson Regional Fire & Rescue ("NHRFR") on July 25, 2008. The Complainant states that the Custodian never responded to these three (3) requests.

The Complainant does not agree to mediate this complaint.

¹ No legal representation listed on record.

² Represented by Thomas R. Kobin, Esq., of Chasan, Leyner & Lamparello P.C. (Secaucus, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

September 8, 2008

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

September 9, 2008

Custodian Counsel’s response to the OPRA request.⁵ Counsel responds in writing on the thirty-first (31st) business day after receipt of the Complainant’s OPRA requests. Counsel states that all records responsive to the Complainant’s three (3) OPRA requests are ready for pickup on September 15, 2008 because the Complainant⁶ will be away until September 12, 2008. Counsel states that redactions have been made to the 2007 executive session meeting minutes.

Counsel requests that the Complainant contact him if any OPRA requests were not included in this response. Counsel notes that in a telephone conversation, the Complainant expressed interest in obtaining copies of all records responsive.

September 9, 2008

E-mail from the Complainant to the Custodian’s Counsel. The Complainant states that he could not open the attached response from Counsel. The Complainant requests that Counsel either embed the response within an e-mail or send the response via facsimile.

September 10, 2008

E-mail from the Custodian’s Counsel to the Complainant. Counsel states that his secretary will send the response via facsimile.⁷

September 23, 2008

Custodian’s SOI with the following attachments:

- Complainant’s three (3) OPRA requests dated July 25, 2008.
- Letter from the Custodian’s Counsel to the Complainant dated September 9, 2008.
- E-mail from the Complainant to the Custodian’s Counsel dated September 9, 2008.
- E-mail from the Custodian’s Counsel to the Complainant dated September 9, 2008.
- E-mail from the Custodian’s Counsel to the Complainant dated September 10, 2008.
- Eleven (11) executive session meeting minutes for 2007 with redactions.

The Custodian’s Counsel asserts that the Complainant allegedly hand delivered his three (3) OPRA requests to the NHRFR on July 25, 2008. Counsel acknowledges that all three (3) requests bear the NHRFR’s date stamp. Counsel contends that the NHRFR only has record of request No. 1.

⁵ The Custodian’s Counsel attached his response letter to an e-mail.

⁶ The Complainant verbally notified the Custodian that he would be out of the area until September 15, 2008.

⁷ The evidence of record indicates that Counsel’s response was sent to the Complainant via facsimile on September 10, 2008.

Counsel avers that because the Custodian is a part-time employee and Senior Clerk Typist Ms. Linda DiPaolo (“Ms. DiPaolo”), who handles OPRA requests, was on vacation until July 28, 2008, Ms. Kimberly Kingsbury (“Ms. Kingsbury”), Receptionist, received the Complainant’s three (3) requests and placed them on the Custodian’s desk. Counsel asserts that the three (3) requests were then mistakenly attached to other requests submitted by the Complainant that are not at issue in the instant complaint. Counsel further asserts that Ms. Kingsbury never notified Ms. DiPaolo of the requests upon Ms. DiPaolo’s return from vacation.

Counsel avers that the Complainant came to the NHRFR headquarters on August 21, 2008 and inquired as to the status of his requests. Counsel asserts that Ms. Theodora Kross (“Ms. Kross”), Junior Accountant, informed the Complainant that she was unaware of the status of the requests because Ms. DiPaolo was out of the office when the requests were received.⁸

Counsel certifies that after receiving the Denial of Access Complaint in this matter, he responded to the Complainant on September 9, 2008 granting access to all records responsive to the Complainant’s three (3) OPRA requests and stating that all records will be ready for pickup on September 15, 2008. Counsel certifies that he advised the Complainant that redactions were made to the 2007 executive session meeting minutes and that the Complainant did not take issue with such redactions. Counsel certifies that the Complainant received the records responsive on September 15, 2008 and paid the appropriate copy costs.

Counsel avers that information was redacted as follows:

January 8, 2007 executive session meeting minutes	Contract negotiations, <u>N.J.S.A.</u> 10:4-12(b)(7) Ongoing litigation, <u>N.J.S.A.</u> 10:4-12(b)(7)
February 26, 2007 executive session meeting minutes	Personnel matters, <u>N.J.S.A.</u> 10:4-12(b)(8) Tactics and techniques utilized in protecting the safety and property of the public, <u>N.J.S.A.</u> 10:4-12(b)(6)
March 26, 2007 executive session meeting minutes	Contract negotiations, <u>N.J.S.A.</u> 10:4-12(b)(7) Litigation matters and advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7) Advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7) Personnel matters, <u>N.J.S.A.</u> 10:4-12(b)(8) Tactics and techniques, <u>N.J.S.A.</u> 10:4-12(b)(6) and <u>N.J.S.A.</u> 10:4-12(b)(7)
April 23, 2007 executive session meeting minutes	Litigation matters, <u>N.J.S.A.</u> 10:4-12(b)(7) Personnel and advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7) and <u>N.J.S.A.</u> 10:4-12(b)(8)

⁸ Counsel asserts that the Complainant re-submitted the fourth (4th) request not at issue in this complaint to Ms. Kross on August 21, 2008, but did not re-submit the three (3) OPRA requests that are the subject of this complaint.

June 25, 2007 executive session meeting minutes	Litigation matters, <u>N.J.S.A.</u> 10:4-12(b)(7) Advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7) Advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7) Litigation matters and advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7)
August 14, 2007 executive session meeting minutes (2 sets)	Personnel matters, <u>N.J.S.A.</u> 10:4-12(b)(8) Litigation matters and advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7)
September 24, 2007 executive session meeting minutes	Litigation matters, <u>N.J.S.A.</u> 10:4-12(b)(7) Contract negotiations, <u>N.J.S.A.</u> 10:4-12(b)(7)
October 22, 2007 executive session meeting minutes	Contract negotiations, <u>N.J.S.A.</u> 10:4-12(b)(7) Litigation matters, <u>N.J.S.A.</u> 10:4-12(b)(7) Personnel matters, <u>N.J.S.A.</u> 10:4-12(b)(8)
November 26, 2007 executive session meeting minutes	Litigation matters, <u>N.J.S.A.</u> 10:4-12(b)(7) Personnel matters, <u>N.J.S.A.</u> 10:4-12(b)(8)
December 17, 2007 executive session meeting minutes	Litigation matters and advice of counsel, <u>N.J.S.A.</u> 10:4-12(b)(7)

Counsel argues that this complaint should be dismissed because the NHRFR has complied with OPRA and produced all records responsive to the Complainant’s numerous requests. Counsel contends that OPRA does not absolve a requestor from acting reasonably and that the Complainant could have contacted the NHRFR if there were any issues. Counsel asserts that the NHRFR has exhibited a willingness to cooperate with the Complainant by contacting him via telephone and providing all records responsive even though the NHRFR has very limited personnel resources and provides fire and rescue services to five (5) municipalities.

Further, Counsel argues that the Complainant waived his right to receive a written response to his OPRA requests pursuant to N.J.S.A. 47:1A-5.i. because the Complainant noted on his OPRA requests that the Custodian could call when the requested records were ready for pickup. Counsel contends that in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the GRC deliberated on the issue of a waiver of the statutorily mandated time frame set forth in N.J.S.A. 47:1A-5.i. Counsel states that, the Custodian asserted in that complaint that the Complainant verbally waived the required seven (7) business day time frame for a response. Counsel states that the Council explained that the statutorily mandated time frame could not be relaxed because the Custodian never received the Complainant’s waiver in writing. Counsel states that the GRC held that “[t]he Custodian could have tried to obtain a written agreement from the Complainant in order to extend the time period required to respond.” *Id.*

Counsel contends that the GRC's holding in Paff is a clear indication that a custodian should honor a requestor's desire to grant a custodian leeway when such desire is put in writing. Counsel argues that the Complainant's written statement to call when the records were ready is a clear expression of the Complainant's desire to waive the Custodian's statutory obligation to respond. Counsel requests that the GRC find that the NHRFR was absolved of responding within statutory obligations of N.J.S.A. 47:1A-5.i.

Additionally, Counsel contends that even if the GRC finds that the Complainant's explicit waiver is an insufficient argument, the actions of the NHRFR do not rise to the level of a knowing and willful violation of OPRA. Counsel contends that according to Deluca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), a knowing and willful violation must meet a certain set of standards:

“[t]he 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; the Custodian must have had some knowledge that his actions were wrongful; the Custodian's actions must have had a positive element of conscious wrongdoing; the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.”

Counsel contends that there is no knowing and willful violation of OPRA in the instant complaint because the Complainant was provided with all records responsive. Counsel asserts that the Complainant's three (3) OPRA requests were merely misplaced. Counsel further asserts that when one (1) of the requests was brought to the NHRFR's attention, an immediate response to that request was provided via telephone and all of the requested records were provided on September 15, 2008.⁹

Finally, Counsel states that OPRA creates a separate standard for small classes of public agencies, specifically:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person ... in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census, a board of education having a total district enrollment of 500 or fewer, or a public authority having less than \$10 million in assets, during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less...” N.J.S.A. 47:1A-5.a.

Counsel argues that the NHRFR is a clear example of the type of public agency the Legislature had in mind when drafting N.J.S.A. 47:1A-5.a. (providing that small municipalities of 5,000 people or fewer, board of educations with an enrollment of 500 or

⁹ Counsel also argues why prevailing party attorney's fees should not be awarded to the Complainant; however, prevailing party attorney's fees is not at issue in the instant complaint.
Allen Frost v. North Hudson Regional Fire & Rescue, 2008-198 – Findings and Recommendations of the Executive Director

fewer and public agencies with assets less than \$10 million may have limited OPRA hours). However, Counsel admits that the NHRFR does not fall within the asset parameters of N.J.S.A. 47:1A-5.a. because the NHRFR serves several municipalities, does not have an official clerk and does not collect taxes. Moreover, Counsel states that the NHRFR is not an authority but rather a joint meeting formed under N.J.S.A. 40:48B-1 et seq.¹⁰ However, Counsel contends that NHRFR's limited function is to provide fire and rescue services to its member municipalities and does not collect taxes or have a town clerk. Counsel argues that the NHRFR is exactly the type of public agency the Legislature envisioned when creating N.J.S.A. 47:1A-5.a. and the response should be deemed timely.¹¹

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 further provides that:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person ... in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census, a board of education having a total district enrollment of 500 or fewer, or a public authority having less than \$10 million in assets, during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less...” N.J.S.A. 47:1A-5.a.

¹⁰ The Consolidated Municipal Services Act, N.J.S.A. 40:48B-1 et seq.

¹¹ The Custodian did not certify to the search undertaken. Additionally, the Custodian did not certify whether any records responsive 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”).

OPRA states that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also states that:

*“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the *specific basis therefor* on the request form and *promptly return it to the requestor*. The custodian shall sign and date the form and provide the requestor with a copy therefore. 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.*”* (Emphasis added.) N.J.S.A. 47:1A- 5.g.

Additionally, OPRA provides that:

*“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ... failure to respond shall be deemed a denial of the request ...*”* (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A.

47:1A-5.g.¹² 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).

Further, N.J.S.A. 47:1A-5.i. requires that a custodian provide the specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008), the Custodian responded in a timely manner providing redacted records to the Complainant; however, the Custodian failed to provide a specific legal basis for said redactions. The Council, relying on prior decisions in Paff v. Township of Plainsboro, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.) and Schwarz v. NJ Department of Human Services, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.) held that:

"[t]he Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction ... Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6."

In the instant complaint, the NHRFR acknowledged receipt of the Complainant's three (3) OPRA requests on July 25, 2008. However, the Custodian did not respond to the Complainant's requests within the statutorily mandated seven (7) business day time frame. Further, Counsel responded in writing to the Complainant on September 9, 2008 providing access to the records responsive and advising that redactions were made to the 2007 executive session meeting minutes, but Counsel failed to provide a specific lawful basis for said redactions. Paff, supra, is distinguishable from the instant complaint in that the Custodian in Paff, supra, responded in writing within the statutorily mandated time frame, whereas in the instant complaint, Counsel responded thirty-one (31) days following receipt of the Complainant's three (3) OPRA requests.

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 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). Further, pursuant to Paff, supra, Counsel's insufficient response has violated N.J.S.A. 47:1A-5.g. because Counsel failed to initially set forth a specific lawful basis for redactions made to the requested executive session meeting minutes.

¹² 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.

Moreover, the budget requested in the instant complaint is specifically classified as an “immediate access” record pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The Custodian in this complaint failed to immediately respond to the Complainant’s request for the NHRFR 2007 budget. Further, Counsel responded on September 9, 2008 stating that access to the requested budget is granted and the Complainant received said budget on September 15, 2008. As in Herron, supra, the Custodian had a duty to respond immediately because the Complainant’s request was for an immediate access record pursuant to N.J.S.A. 47:1A- 5.e. Therefore, because the Custodian failed to immediately grant or deny access to the requested 2007 budget, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.

Additionally, the Custodian’s Counsel argues that Complainant’s note on the bottom of each request form stating that the Custodian could call when the requested records were ready for pickup is a waiver of the statutorily mandated seven (7) business day response time. The GRC has in the past recognized a requestor’s waiver of the statutorily mandated time frame for response. *See* Deluca v. City of Ventnor (Atlantic), GRC Complaint No. 2008-08 (December 2008)(holding that no violation of the response time occurred because the Complainant definitively waived her right under OPRA based on the complexity of said request). However, the Complainant’s note in the instant complaint does not explicitly waive the seven (7) business day response time frame. Such note merely directs the Custodian to contact the Complainant when the records are ready. Therefore, the Custodian still had an obligation to respond in writing as per the requirements of N.J.S.A. 47:1A-5.i.

Finally, Counsel argues that the NHRFR is a clear example of the type of public agency the Legislature had in mind when drafting N.J.S.A. 47:1A-5.a. (providing that small municipalities of 5,000 people or fewer, board of educations with an enrollment of 500 or fewer and public agencies with assets less than \$10 million may have limited OPRA hours). Counsel requests that the GRC view the NHRFR’s response as timely based on Counsel’s belief that N.J.S.A. 47:1A-5.a. should apply to the NHRFR in this complaint. However, Counsel admits in the SOI that the NHRFR does not fall within the asset parameters of N.J.S.A. 47:1A-5.a., because the NHRFR serves several municipalities, does not have an official clerk and does not collect taxes.

Contrary to Counsel’s assertions, the Legislature was extremely clear as to which types of small public agencies should be granted limited OPRA hours. In fact, the Legislature took the time to set parameters such agencies must meet. Not only does Counsel admit that the NHRFR does not fall within the asset parameters, Counsel never

asserted that the NHRFR had publicly posted limited OPRA hours prior to the filing of the Complainant's OPRA requests. Therefore, Counsel's argument is without merit.

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

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

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

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

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).

The Custodian's failure to provide a written response to the Complainant's three (3) OPRA requests within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for the NHRFR's 2007 budget and Counsel provided an untimely and insufficient response to the Complainant's OPRA requests. However, because Counsel certified that he provided access all records responsive to the Complainant's requests on September 9, 2008 and the Complainant received said records on September 15, 2008, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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 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). Further, pursuant to Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008), Counsel's insufficient response has violated N.J.S.A. 47:1A-5.g. because Counsel failed to initially set forth a specific lawful basis for redactions made to the requested executive session meeting minutes.
2. Because the Custodian failed to immediately grant or deny access to the requested 2007 budget, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. The Custodian's failure to provide a written response to the Complainant's three (3) OPRA requests within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for the North Hudson Regional Fire & Rescue's 2007 budget and Counsel provided an untimely and insufficient response to the Complainant's OPRA requests. However, because Counsel certified that he provided access all records responsive to the Complainant's requests on September 9, 2008 and the Complainant received said records on September 15, 2008, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009