



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint Nos. 2008-232, 2008-243 and 2009-39

v.

Township of Irvington (Essex)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, adopts the Administrative Law Judge’s Initial Decision dated March 20, 2012 in which the Judge approved the Settlement Agreement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of April, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: April 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Jacqueline Andrews¹
Complainant**

**GRC Complaint No. 2008-232, 2008-243 &
2009-39 (Consolidated)**

v.

**Township of Irvington (Essex)²
Custodian of Records**

Records Relevant to Complaint: Various

Requests Made: Various

Response Made: Various

Custodian: Harold E. Wiener, Municipal Clerk

GRC Complaint Filed: Various

Background

September 30, 2009

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Council considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 17:27*, [these] complaint[s] should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

October 5, 2009

Council's Interim Order distributed to the parties.

August 23, 2010

Complaints transmitted to the Office of Administrative Law.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Evans Anyanwu, Esq., of Township of Irvington Legal Department (Irvington, NJ).
Jacqueline Andrews v. Township of Irvington (Essex), 2008-232, 2008-243 & 2009-39 (Consolidated) – Supplemental Findings and Recommendations of the Executive Director

March 20, 2012

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** as follows:

1. "The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law."

Therefore, the ALJ:

"...**CONCLUDE[S]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded."

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council adopt the Administrative Law Judge's Initial Decision dated March 20, 2012 in which the Judge approved the Settlement Agreement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Jacqueline Andrews Complaint No. 2008-232; 2008-243; 2009-39
 Complainant (Consolidated)
 v.
Township of Irvington (Essex)
 Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council



Decision Distribution Date: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Jacqueline Andrews¹
Complainant**

**GRC Complaint No. 2008-232; 2008-243; 2009-39
(Consolidated)**

v.

**Township of Irvington (Essex)²
Custodian of Records**

Records Relevant to Complaint: Various

Requests Made: Various

Response Made: Various

Custodian: Harold E. Wiener, Municipal Clerk

GRC Complaint Filed: Various

Background

June 23, 2009

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties in the matter of Jacqueline Andrews v. Township of Irvington (Essex), GRC Complaint No. 2008-232. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s February 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council’s Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council’s February 25, 2009 Interim Order and is therefore in contempt of said Order.

2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s February 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.

¹ No legal representation listed on record.

² Represented by Willie L. Parker, Esq., of Township of Irvington Legal Department (Irvington, NJ).

3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

At the same meeting, the Council considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties in the matter of Jacqueline Andrews v. Township of Irvington (Essex), GRC Complaint No. 2008-243. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's March 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's March 25, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's March 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

August 11, 2009

At the August 11, 2009 public meeting, the Council considered the August 4, 2009 Supplemental Findings and Recommendations of the Executive Director in the matter of Jacqueline Andrews v. Township of Irvington (Essex), GRC Complaint No. 2009-29, 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 failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's June 11, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

Analysis

OPRA provides that:

“[t]he right to institute any proceeding under this section shall be solely that of the requestor. *Any such proceeding shall proceed in a summary or expedited manner.* The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” (Emphasis added). N.J.S.A. 47:1A-6.e.

OPRA further provides that:

“[i]f the council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the ‘Administrative Procedure Act’ ...” N.J.S.A. 47:1A-7.e.

The Council's regulations provide that:

“[t]he rules in this chapter shall be liberally construed to permit the Council to discharge its statutory function.” *N.J.A.C. 5:105-1.2*

The Council’s regulations also provide that:

“[i]n response to the complaint before it, the Council may raise issues and defenses pertaining to that complaint on a *sua sponte* basis if it deems such action appropriate or necessary and if said action on behalf of the Council would be in the interest of furthering the provisions and intent of [OPRA].” *N.J.A.C. 5:105-1.6(h)*.

The Council’s regulations further provide that:

“[i]f the Council is unable to make a determination as to the accessibility of a record based upon the complaint and the custodian's response thereto, the Council may conduct a hearing, pursuant to N.J.S.A. 47:1A-7.e, and in conformity with the rules provided for administrative hearings by a public agency in contested cases pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, insofar as they may be applicable and practicable.” *N.J.A.C. 5:105-2.7*.

The Council’s regulations also provide that “[t]he Council, at its own discretion, may reconsider any decision it renders.” *N.J.A.C. 5:105-2.10(a)*.

In all of these consolidated matters, the Custodian failed to file a Statement of Information and failed to respond to several requests for same from the GRC. The Council ordered that enforcement proceedings be instituted in the Superior Court of New Jersey, Law Division, to require the Custodian to make such filings to the GRC.

The Council is required, however, to dispose of Denial of Access Complaints in a summary or expedited manner pursuant to N.J.S.A. 47:1A-6.e.. Referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is therefore in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

Therefore, because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform

Administrative Procedures Rules, *N.J.A.C. 1:1*, this complaint should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, this complaint should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

Prepared By: Karyn G. Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

June 23, 2009 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2008-232

v.

Township of Irvington (Essex)
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s February 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council’s Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council’s February 25, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s February 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence in the record, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.



Interim Order Rendered by the
Government Records Council
On The 23rd Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 25, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2008-232

v.

**Township of Irvington (Essex)²
Custodian of Records**

Records Relevant to Complaint:

September 17, 2008 Request

The Complainant requests copies of the following:

1. Total number of personnel hired by the Wayne Smith administration between July 2002 and September 17, 2008 to include the following information:
 - Name
 - Date of hire
 - Department of hire
 - Job title
 - Primary responsibility
 - Mandated salary range
 - Starting salary
 - Merit raises
 - Current salary
 - Source of salary funding
 - Names of employees who received intra or inter-departmental transfers and/or promotions, including any salary change and the effective date of promotion/transfer
 - Date and reason for separation
 - For replaced personnel, provide name, date of hire, date of separation and the starting and ending salary of the replaced employee

2. All grants obtained between July 2002 and September 17, 2008, including the purpose, amount, duration, and any employee titles, primary job functions and salaries funded by said grants, for the following departments:
 - Parks, Recreation and Cultural Affairs

¹ No legal representation listed on record.

² Represented by Willie L. Parker, Esq., of Township of Irvington Legal Department (Irvington, NJ).
Jacqueline Andrews v. Township of Irvington (Essex), 2008-232 – Supplemental Findings and Recommendations of the Executive Director

- Irvington Neighborhood Improvement Corporation
- Department of Public Works
- UEZ

3. The primary responsibility of, and the department/office to which the following employees are assigned:

- Rasheed Akingbala
- Elias Attipoe
- Theresa Beasley
- Delanie Blackman
- James Boyd
- Renee Burgess
- Arlishia Carter
- Eula Davis
- Sharon Fraser
- Shanae Hawkins
- Shamari Hawthorne
- Kim Jackson
- Daryl Lewis
- Cozy McGhee
- Asmita Mitchell
- Donatus Ogun
- Theo Ola
- Shari Taylor
- Rasheed Wallace

4. Police department overtime and the statement of final cost for Urban Enterprise Zone (“UEZ”) Summer in the Zone during the years 2004 and 2005.³

September 22, 2008 Request

The Complainant requests on site inspection of the proposed and adopted budgets for all fiscal years of the Wayne Smith administration.

Requests Made: September 17, 2008 and September 22, 2008

Response Made: September 22, 2008 for the September 22, 2008 request only

Custodian: Harold E. Wiener, Municipal Clerk

GRC Complaint Filed: October 14, 2008⁴

³ There were other records requested that are not relevant to this complaint, specifically original request Item #2 which sought “line item municipal budgets, proposed and adopted, for all fiscal years of the Wayne Smith administration” and original request Item #5 which sought “the list of provisional, temporary and unclassified employees as of March 10, 2008, June 6-7, 2008 and September 17, 2008.” Otherwise, the records requested are the same in the Denial of Access Complaint as in the original request; however, in the Denial of Access Complaint, the Complainant renumbered the items and abbreviated the record descriptions.

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

Background

February 25, 2009

Government Records Council's ("Council") Interim Order. At its February 25, 2009 public meeting, the Council considered the February 18, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's September 17, 2008 OPRA request 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).
2. Because the Custodian failed to indicate the specific basis for the denial of access to the records listed in Item #1, Item #2, Item #4 and Item #5 of the Complainant's September 17, 2008 OPRA request, the Custodian has failed to prove that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
3. Because the Custodian failed to prove that the denial of access was authorized by law, and because Custodian's Counsel informed the GRC that all of the records the Complainant requested have been disclosed or will be disclosed, the Custodian shall disclose the records requested in Item #1, Item #2, Item #4 and Item #5 of the Complainant's September 17, 2008 request, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.**
5. Because the Custodian provided a written response to the Complainant within the statutorily mandated seven (7) business day time frame informing the Complainant that the records responsive to her September 22, 2008 request were available for inspection, the Custodian complied with N.J.S.A. 47:1A-1., N.J.S.A. 47:1A-5.i., and N.J.S.A. 47:1A-5.g., and did not unlawfully deny the Complainant access to the records responsive to this request.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

March 5, 2009

Council's Interim Order distributed to the parties.

March 6, 2009

Memo from the Custodian to the Irvington Legal Department. The Custodian forwards a copy of the Council's February 25, 2009 Interim Order to the Custodian's Counsel with instructions to comply with the terms of the order within five (5) business days.

March 16, 2009

Telephone call from the Complainant to the GRC. The Complainant informs the GRC that the Council's February 25, 2009 Interim Order required the Custodian to disclose certain records to the Complainant by March 13, 2009; however, the Complainant states that she did not receive any communication from the Custodian. The Complainant requests the GRC help her to obtain the records she is entitled to receive.

March 16, 2009

Letter from the GRC to the Custodian. The GRC informs the Custodian that the Complainant never received the records that the Council ordered the Custodian to disclose to her in its Interim Order. The GRC reminds the Custodian that he is now in contempt of the Council's Interim Order, and it would be in his best interest to comply with the terms of the order immediately. The GRC instructs the Custodian to provide simultaneous notification to the GRC when the Custodian discloses the records to the Complainant.

March 16, 2009

E-mail from the Complainant to the GRC. The Complainant confirms her earlier telephone conversation with the GRC, informing the GRC that the Custodian failed to comply with the Council's Interim Order.

March 16, 2009

Memo from the Custodian to the Irvington Legal Department. The Custodian forwards to Willie L. Parker, Esq., of the Irvington Legal Department, a copy of the GRC's letter to the Custodian dated March 16, 2009 and a copy of the Complainant's e-mail to the Custodian dated March 16, 2009. The Custodian requests that the Legal Department comply with the Council's Interim Order.

Analysis

Whether the Custodian complied with the Council's February 25, 2009 Interim Order?

On March 5, 2009, a copy of the Council's Interim Order was sent from the GRC to the Custodian via e-mail and UPS Next Day Air®. The GRC tracked the UPS delivery and determined the package containing the Interim Order was delivered to the Custodian's address at 10:10 am on March 6, 2009.⁶ Further, the Custodian acknowledged receipt of the Council's Interim Order via e-mail in a memorandum he sent to Willie Parker, Esq. dated March 6, 2009. Thus, there is no question that the Custodian received the Council's Order on March 6, 2009. Accordingly, the deadline date for the Custodian to comply with the terms of the Order was March 13, 2009.

On March 16, 2009, the Complainant contacted the GRC to inform the GRC that the Custodian did not disclose to her the records responsive to her request. Further, the GRC by that same date had not received from the Custodian certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4.

Paragraph 4 of the Council's February 25, 2009 Interim Order contains the terms governing compliance, which provides as follows:

The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. (Emphasis in original.)

In an effort to encourage compliance with the Council's Order, the GRC sent a letter dated March 16, 2009 to the Custodian, wherein the GRC informed the Custodian that he was in contempt of the Council's Interim Order and that the Custodian must disclose the records to the Complainant immediately. To date, the Custodian has failed and refused to comply with the terms of the Council's February 25, 2009 Interim Order.

Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's February 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's February 25, 2009 Interim Order and is therefore in contempt of said Order.

Moreover, because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's February 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.

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

⁶ UPS Tracking No. 1Z F08 904 22 1007 5610

OPRA defines a custodian as:

“ ‘Custodian of a government record’ or ‘custodian’ means *in the case of a municipality, the municipal clerk* and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.” (Emphasis added.) N.J.S.A. 47:1A-1.1

OPRA provides that:

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

OPRA also provides that:

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

OPRA further provides that:

“[t]he Government Records Council shall...prepare guidelines...*for use by records custodians in complying with the law governing access to public records* ...” (Emphasis added.) N.J.S.A. 47:1A-7.b.

Moreover, OPRA provides that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, 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:

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

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

In this matter, the Custodian demonstrated a pattern of behavior inconsistent with the duties statutorily imposed upon municipal custodians under OPRA; to wit:

- The Custodian failed to respond to the Complainant's September 17, 2008 OPRA request in violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Instead, the Custodian forwarded a copy of the Complainant's OPRA request to other township officials and requested that they respond directly to the Complainant's request.
- Although the Custodian denied the Complainant access to some of the requested records, he failed to prove that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
- The Custodian forwarded to the GRC a Statement of Information that was deficient in almost every respect.
- Despite repeated extensions of time granted by the GRC to the Custodian in order for the Custodian to correct the Statement of Information, the Custodian failed to correct and resubmit the document.
- The Custodian failed and refused to comply with the terms of the Council's February 25, 2009 Interim Order.

Based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's February 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's February 25, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's February 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2008-232

v.

Township of Irvington
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 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 September 17, 2008 OPRA request 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).
2. Because the Custodian failed to indicate the specific basis for the denial of access to the records listed in Item #1, Item #2, Item #4 and Item #5 of the Complainant’s September 17, 2008 OPRA request, the Custodian has failed to prove that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
3. Because the Custodian failed to prove that the denial of access was authorized by law, and because Custodian’s Counsel informed the GRC that all of the records the Complainant requested have been disclosed or will be disclosed, the Custodian shall disclose the records requested in Item #1, Item #2, Item #4 and Item #5 of the Complainant’s September 17, 2008 request, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).



4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
5. Because the Custodian provided a written response to the Complainant within the statutorily mandated seven (7) business day time frame informing the Complainant that the records responsive to her September 22, 2008 request were available for inspection, the Custodian complied with N.J.S.A. 47:1A-1., N.J.S.A. 47:1A-5.i., and N.J.S.A. 47:1A-5.g., and did not unlawfully deny the Complainant access to the records responsive to this request.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of February, 2009

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 5, 2009

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2008-232

v.

**Township of Irvington (Essex)²
Custodian of Records**

Records Relevant to Complaint:

September 17, 2008 Request

The Complainant requests copies of the following:

1. Total number of personnel hired by the Wayne Smith administration between July 2002 and September 17, 2008 to include the following information:
 - Name
 - Date of hire
 - Department of hire
 - Job title
 - Primary responsibility
 - Mandated salary range
 - Starting salary
 - Merit raises
 - Current salary
 - Source of salary funding
 - Names of employees who received intra-departmental or inter-departmental transfers and/or promotions, including any salary change and the effective date of promotion/transfer
 - Date and reason for separation
 - For replaced personnel, provide name, date of hire, date of separation and the starting and ending salary of the replaced employee

2. All grants obtained between July 2002 and September 17, 2008, including the purpose, amount, duration, and any employee titles, primary job functions and salaries funded by said grants, for the following departments:
 - Parks, Recreation and Cultural Affairs
 - Irvington Neighborhood Improvement Corporation

¹ No legal representation listed on record.

² Represented by William L. Parker, Esq., of Township of Irvington Legal Department (Irvington, NJ).
Jacqueline Andrews v. Township of Irvington, 2008-232 – Findings and Recommendations of the Executive Director

- Department of Public Works
 - UEZ
3. The primary responsibility of, and the department/office to which the following employees are assigned:
- Rasheed Akingbala
 - Elias Attipoe
 - Theresa Beasley
 - Delanie Blackman
 - James Boyd
 - Renee Burgess
 - Arlishia Carter
 - Eula Davis
 - Sharon Fraser
 - Shanae Hawkins
 - Shamari Hawthorne
 - Kim Jackson
 - Daryl Lewis
 - Cozy McGhee
 - Asmita Mitchell
 - Donatus Ogun
 - Theo Ola
 - Shari Taylor
 - Rasheed Wallace
4. Police department overtime and the statement of final cost for Urban Enterprise Zone (“UEZ”) Summer in the Zone during the years 2004 and 2005.³
5. A list of provisional, temporary and unclassified employees as of March 10, 2008, June 6-7, 2008 and September 17, 2008.

September 22, 2008 Request

The Complainant requests on site inspection of the proposed and adopted budgets for all fiscal years of the Wayne Smith administration.

Requests Made: September 17, 2008 and September 22, 2008

Response Made: September 22, 2008 for the September 22, 2008 request only

Custodian: Harold E. Wiener, Municipal Clerk

GRC Complaint Filed: October 14, 2008⁴

³ There were other records requested that are not relevant to this complaint. Otherwise the records requested are the same in the Denial of Access Complaint as in the original request; however, in the Denial of Access Complaint, the Complainant renumbered the items and abbreviated the record descriptions.

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

Background

September 17, 2008

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

September 17, 2008

Memorandum from the Custodian to the Irvington Business Administrator, Revenue & Finance Director, and Police Director. The Custodian forwards a copy of the Complainant's OPRA request to three (3) township officials and requests the officials respond directly to the Complainant. The Custodian also sends a copy of this memorandum to the Complainant to inform her that she may purchase copies of the introduced and adopted budgets for fiscal years 2003 through 2008 at a cost of \$177.00 for 678 total pages.

September 22, 2008

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

September 22, 2008

Custodian's response to the OPRA request. The Custodian responds in writing on the same day that the Complainant filed her OPRA request. The Custodian states that the records responsive to the Complainant's September 22, 2008 OPRA request are available for on site inspection during regular business hours.

October 14, 2008

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

- Complainant's OPRA request dated September 17, 2008
- Memorandum from the Custodian to three (3) township officials dated September 17, 2008
- Complainant's OPRA request dated September 22, 2008
- Letter from the Custodian to the Complainant dated September 22, 2008

The Complainant contends the Custodian never responded to her OPRA request dated September 17, 2008. The Complainant states she received a copy of a memorandum the Custodian sent to other township officials; however, no one subsequently responded to her request. The Complainant indicates that the Custodian only responded to her indirectly by providing her with a copy of the internal memorandum dated September 17, 2008 which informed her of the cost for copies of the requested budgets.

The Complainant states that the Custodian did send a response to her September 22, 2008 OPRA request, wherein he agreed to disclose the requested records.

The Complainant did not agree to mediate this complaint.

October 20, 2008

Request for the Statement of Information sent to the Custodian.

October 20, 2008

Letter from the Custodian to the Irvington Legal Department. The Custodian forwards the Denial of Access Complaint to the Legal Department and informs them that they must submit a completed Statement of Information to the GRC within five (5) business days otherwise the GRC may adjudicate the matter based solely on information submitted in the complaint.

October 27, 2008

Custodian's non-compliant Statement of Information ("SOI"). The Irvington Legal Department forwards the SOI; however, the SOI is not in compliance with GRC requirements or the mandates of Paff v. New Jersey Department of Labor, 392 N.J. Super. 334 (App. Div. 2007). In fact, the SOI is deficient in almost every respect. Items #7 through #12 are incomplete and/or not responsive. Further, the Custodian failed to sign the SOI certification.

October 28, 2008

Letter from the GRC to the Custodian. The GRC returns the Custodian's non-compliant SOI and states that the Custodian must promptly correct the deficiencies. Further, the GRC advises the Custodian that the GRC will only return the incomplete SOI once and that if the SOI remains incomplete, the GRC will adjudicate the matter based only on information submitted in the Denial of Access Complaint. The Custodian is informed that the deadline for returning a compliant SOI is October 30, 2008.

October 29, 2008

Letter from the Custodian to the Legal Department. The Custodian forwards the GRC's letter concerning the non-compliant SOI to the Legal Department with instructions for the Legal Department to contact the GRC and resolve the problem.

October 30, 2008

Telephone call from the Irvington Legal Department to the GRC. Willie Parker, Esq., of the Irvington Legal Department called the GRC to put his appearance on record and request an extension of time to help the Custodian prepare and submit the SOI. Mr. Parker states he will need additional time because of interference with routine municipal operations by the annual League of Municipalities convention and the upcoming Presidential election.

October 30, 2008

Facsimile transmission from the GRC to the Irvington Legal Department. The GRC grants a five (5) business day extension of time for the Legal Department to submit a completed SOI to the GRC. The GRC informs the Legal Department that the completed SOI must be returned to the GRC by November 10, 2008.

November 6, 2008

Telephone call from the Complainant to the GRC. The Complainant advises the GRC that she wants the Custodian to disclose the records that are responsive to her request or tell her why they cannot be disclosed. The Complainant states she does not want to proceed with an adjudication unless it is necessary because if the records are disclosed the Complainant intends to withdraw her complaint. The GRC informs the Complainant that a complaint withdrawal must be voluntary and in writing.

November 10, 2008

E-mail from the Complainant to the GRC. The Complainant states that she had a meeting with the Irvington Revenue & Finance Director. The Complainant states that the Director disclosed the records requested in Item #3 of the records relevant to this complaint. The Complainant states that the Director also told her that the records she requested in Item #1 and Item #2 are being assembled for disclosure.

November 13, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC never received the Custodian's SOI; therefore the GRC has commenced the adjudication of her complaint based only upon the information in the Denial of Access Complaint.

November 13, 2008

Letter from the Custodian to the Irvington Legal Department. The Custodian, after receiving a copy of the GRC e-mail correspondence to the Complainant, forwards a copy to the Legal Department and asks Willie Parker, Esq., for a status report with respect to the SOI.

November 14, 2008

E-mail from the Complainant to the GRC. The Complainant informs the GRC that she is voluntarily dismissing Item #3 in her Denial of Access Complaint.

November 14, 2008

E-mail from the GRC to the Complainant. The GRC provides the Complainant with the proper procedures for withdrawing versus amending complaints.

November 17, 2008

Telephone call from Willie Parker, Esq., to the GRC. Mr. Parker informs the GRC that all of the records the Complainant requested have been disclosed or will be disclosed to the Complainant upon her payment of the copying costs. Mr. Parker states that the Complainant recently visited the municipal building but did not wish to pay the copying costs for some of the records she requested.

November 17, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the Irvington Legal Department is amenable to disclosing all of the records the Complainant has requested upon the Complainant's payment of the copying costs. The GRC suggests the Complainant contact Mr. Parker to resolve the copying cost issue.

November 17, 2008

E-mail from the Complainant to the GRC. The Complainant informs the GRC that she inspected a few of the records she had requested; however, she has not been contacted by the Custodian or anyone else from Irvington with respect to owing money for copying costs.⁵ The Complainant informs the GRC that she did call and speak to Mr. Parker. The Complainant said Mr. Parker stated he would check on the status of her requests in a week because he was presently preparing for the League of Municipalities.

November 17, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC understood from a conversation with Mr. Parker that all of the records requested by the Complainant would be disclosed; however, for some of the records disclosure was pending payment of a copying fee. The GRC also informs the Complainant that the GRC will follow up in one week.

November 18, 2008

Telephone call from the Complainant to the GRC. The Complainant advises the GRC that she wants to allow more than one week for Mr. Parker to contact her regarding the status of this matter. The Complainant does not want the GRC to take further action until December 5, 2008. The Complainant believes this will provide the Custodian with ample time to respond to her concerning all of the records responsive to her request.

December 5, 2008

E-mail from the Complainant to the GRC. The Complainant informs the GRC that she has not received a response to her OPRA request from the Custodian and therefore asks the GRC to adjudicate the complaint.

December 8, 2008

Telephone call from the Custodian to the GRC. The Custodian contends there are apparent miscommunication problems with respect to the instant complaint. The Custodian informs the GRC that he sent several letters to Irvington officials and the Irvington Legal Department in order to comply with OPRA. The Custodian states that he also copied the GRC with these letters. The Custodian states he thought the SOI was corrected and submitted to the GRC and he questions why no SOI was submitted.

The GRC informs the Custodian that the GRC does not have an answer for him because his problem is an internal one. The GRC reminds the Custodian that he cannot delegate his responsibility under OPRA to other township officials. The Custodian acknowledges some miscommunication in Irvington and intimates that he needs more time to look into the matter and prepare a response.

After over a month lapsed since the first request for an extension of time, the GRC grants the Custodian five (5) more business days to either satisfactorily resolve the

⁵ The Complainant previously acknowledged in her complaint that the Custodian provided her with a copy of an internal memorandum dated September 17, 2008 which informed her of the cost to copy the proposed and adopted budgets for all fiscal years of the Wayne Smith administration. Copies of these budgets were set forth as Item #2 in the Complainant's September 17, 2008 OPRA request. The Complainant subsequently filed a request on September 22, 2008 which requested on site inspection of the budgets. *Jacqueline Andrews v. Township of Irvington, 2008-232 – Findings and Recommendations of the Executive Director*

complaint so it can be withdrawn or return a properly completed SOI so the GRC can consider the Custodian's position and legal argument during the adjudication process.

December 8, 2008

Letter from the Custodian to the Irvington Legal Department. The Custodian informs Mr. Parker in the Irvington Legal Department that he thought the corrected SOI had been sent to the GRC but learned this date from the GRC that the GRC never received the completed SOI. The Custodian informs Mr. Parker that the GRC acquiesced to another five (5) business day extension of time to submit a completed SOI to the GRC. The Custodian reminds Mr. Parker that it would not be in the best interest of Irvington if the GRC adjudicates the matter based solely on information submitted in the Denial of Access Complaint.

January 14, 2009

E-mail from Audrey Jackson to the GRC. Ms. Jackson informs the GRC that she sends this e-mail on behalf of the Custodian's Counsel. Ms. Jackson further informs the GRC that all of the records the Complainant requested have been made available to her. Ms. Jackson further states that the Complainant was at the municipal building the last week of December 2008 to review records, but decided not to purchase any of the records she reviewed.

January 15, 2009

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC received a letter from Audrey Jackson, on behalf of Custodian's Counsel, dated January 14, 2009. The GRC briefs the Complainant about the content of the e-mail. The GRC requests the Complainant prepare a certification identifying those records the Complainant requested that remain undisclosed.

January 16, 2009

E-mail from the Complainant to the GRC. The Complainant informs the GRC that the Custodian has not made all the records the Complainant requested available to her. The Complainant states she will prepare and submit to the GRC a certification identifying the present status of all of the records she requested.

January 23, 2009

Complainant's certification. The Complainant certifies that the records relevant to the complaint numbered Item #1, Item #2, Item #4 and Item #5 have not been disclosed by the Custodian.

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 also provides that:

"Custodian of a government record" or "custodian" means *in the case of a municipality, the municipal clerk* and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be." (Emphasis added.) N.J.S.A. 47:1A-1.1

OPRA further provides that:

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

Moreover, 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 ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (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 also provides that:

“[t]he Government Records Council shall...prepare guidelines...*for use by records custodians in complying with the law governing access to public records ...*” (Emphasis added.) N.J.S.A. 47:1A-7.b.

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

In this matter, the Complainant filed two (2) separate OPRA requests which gave rise to the Denial of Access Complaint. The first request was filed on September 17, 2008 and the second was filed on September 22, 2008.

Pursuant to N.J.S.A. 47:1A-7.b., the GRC prepared and forwarded to the Custodian a request for a properly completed SOI. In response, the Custodian forwarded to the GRC a SOI that was deficient in almost every respect. Items #7 through #12 of the SOI were incomplete and/or not responsive. Moreover, the Custodian failed to sign the SOI’s certification page. The GRC returned the SOI to the Custodian with instructions for correction; however, despite repeated extensions of time granted by the GRC to the Custodian and the Custodian’s Counsel in order to provide them with an opportunity to present their position and legal argument by submitting to the GRC a properly completed SOI, the Custodian and Custodian’s Counsel failed and refused to submit said SOI. Accordingly, it is necessary to adjudicate this matter based upon the information in the Complainant’s Denial of Access Complaint as supplemented by the evidence of record.

September 17, 2008 Request

The Complainant states that she never received a response to this OPRA request, other than a copy of a memorandum the Custodian sent to three (3) township officials requesting that they respond directly to the Complainant. The Complainant states that she never received any subsequent communications from the township officials.

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. Accordingly, a custodian’s failure to respond in writing to a complainant’s OPRA request 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).

Here, the evidence of record reveals that the Custodian did not respond in writing to the Complainant’s September 17, 2008 OPRA request, either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. In fact, the record reveals the Custodian never responded to the Complainant’s OPRA request at all.

The Custodian's failure to respond in writing to the Complainant's September 17, 2008 OPRA request 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, supra.

The Complainant stated that she had a meeting with the Irvington Revenue & Finance Director on November 10, 2008. The Complainant stated that at the meeting the Director disclosed the records requested in Item #3 of the records relevant to this complaint. The evidence of record does not indicate that the records requested in Item #1, Item #2, Item #4 and Item #5 of this request were disclosed. Pursuant to OPRA, "...[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. There is nothing in the record to indicate that the Custodian provided the Complainant with a specific lawful basis for denying her access to these records.

Accordingly, because the Custodian failed to indicate the specific basis for the denial of access to the records listed in Item #1, Item #2, Item #4 and Item #5 of the Complainant's September 17, 2008 OPRA request, the Custodian has failed to prove that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.

With respect to Item #1, Item #2, Item #4 and Item #5 of this request, because the Custodian failed to prove that the denial of access was authorized by law, and because Custodian's Counsel informed the GRC that all of the records the Complainant requested have been disclosed or will be disclosed, the Custodian shall disclose the records requested in Item #1, Item #2, Item #4 and Item #5 of the Complainant's September 17, 2008 request, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).

September 22, 2008 Request

On the same date that the Complainant filed this request for an on site inspection of the proposed and adopted budgets for all fiscal years of the Wayne Smith administration, the record reveals the Custodian provided a written response informing the Complainant that the records responsive to her request were available for on site inspection during regular business hours.

Because the Custodian provided a written response to the Complainant within the statutorily mandated seven (7) business day time frame informing the Complainant that the records responsive to the her request were available for inspection, the Custodian complied with N.J.S.A. 47:1A-1., N.J.S.A. 47:1A-5.i., and N.J.S.A. 47:1A-5.g., and did not unlawfully deny the Complainant access to the records responsive to her request.

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

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

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 September 17, 2008 OPRA request 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).
2. Because the Custodian failed to indicate the specific basis for the denial of access to the records listed in Item #1, Item #2, Item #4 and Item #5 of the Complainant's September 17, 2008 OPRA request, the Custodian has failed to prove that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
3. Because the Custodian failed to prove that the denial of access was authorized by law, and because Custodian's Counsel informed the GRC that all of the records the Complainant requested have been disclosed or will be disclosed, the Custodian shall disclose the records requested in Item #1, Item #2, Item #4 and Item #5 of the Complainant's September 17, 2008 request, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.**
5. Because the Custodian provided a written response to the Complainant within the statutorily mandated seven (7) business day time frame informing the Complainant that the records responsive to her September 22, 2008 request were available for inspection, the Custodian complied with N.J.S.A. 47:1A-1., N.J.S.A. 47:1A-5.i., and N.J.S.A. 47:1A-5.g., and did not unlawfully deny the Complainant access to the records responsive to this request.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009