



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Acting Commissioner*

**FINAL DECISION**

**May 27, 2010 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2008-48

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant voluntarily withdrew his complaint from the Office of Administrative Law in a letter to the Honorable Ronald W. Reba dated April 27, 2010. Therefore, no further adjudication is required.

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 27<sup>th</sup> Day of May, 2010

Robin Berg Tabakin, Chair  
Government Records Council



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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: June 2, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 27, 2010 Council Meeting**

**Robert A. Verry**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2008-48**

v.

**Borough of South Bound Brook  
(Somerset)**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the ordinance creating the position of Municipal Administrator.
2. Copy of the meeting minutes where the Municipal Administrator was appointed to first term of office.

**Request Made:** April 6, 2007

**Response Made:** April 6, 2007

**Custodian:** Donald Kazar

**GRC Complaint Filed:** March 17, 2008<sup>3</sup>

**Background**

**June 23, 2009**

Government Records Council's ("Council") Interim Order. At its June 23, 2009 public meeting, the Council considered the June 16, 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 "this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts for a determination of whether the Custodian failed to fully comply with the Council's March 25, 2009 Interim Order and, if so, whether such noncompliance was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances."

**June 26, 2009**

Council's Interim Order distributed to the parties.

**July 7, 2009**

Complaint transmitted to the Office of Administrative Law.

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

<sup>2</sup> Represented by William T. Cooper III, Esq. (Somerville, NJ).

<sup>3</sup>The GRC received the Denial of Access Complaint on said date.

**April 27, 2009**

Letter from the Complainant to the Honorable Ronald W. Reba. The Complainant withdraws this complaint from consideration.

**April 28, 2010**

Complaint referred back from OAL.

**Analysis**

No analysis is required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant voluntarily withdrew his complaint from the Office of Administrative Law in a letter to the Honorable Ronald W. Reba dated April 27, 2010. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 20, 2010



**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**

Robert A. Verry  
Complainant

Complaint No. 2008-48

v.

Borough of South Bound Brook (Somerset)  
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 this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts for a determination of whether the Custodian failed to fully comply with the Council’s March 25, 2009 Interim Order and, if so, whether such noncompliance was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> 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**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-48**

v.

**Borough of South Bound Brook  
(Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the ordinance creating the position of Municipal Administrator.
2. Copy of the meeting minutes where the Municipal Administrator was appointed to first term of office.

**Request Made:** April 6, 2007

**Response Made:** April 6, 2007

**Custodian:** Donald Kazar

**GRC Complaint Filed:** March 17, 2008<sup>3</sup>

**Background**

**March 25, 2009**

Government Records Council's ("Council") Interim Order. At its March 25, 2009 public meeting, the Council considered the March 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. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a definitive response as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Custodian failed to provide within the statutorily mandated seven (7) business days a specific date on which the record responsive to request Item No. 2 would be provided, the Custodian's response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to all records requested in the Complainant's December 19, 2006 OPRA request. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to request Item No. 1 exists, the Custodian must certify to this fact.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Custodian's assertion that the Complainant is in possession of the record responsive to request Item No. 2 does not relieve the Custodian of his burden to prove a lawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-6.
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 26, 2009**

Council's Interim Order distributed to the parties.

### **March 31, 2009**

Custodian's response to the Council's Interim Order. The Custodian certifies he received the Council's March 25, 2009 Interim Order on March 27, 2009. The Custodian states that he mailed the requested records to the Complainant on March 31, 2009 with certified confirmation of compliance and simultaneously copied the GRC. The Custodian certifies that he has fully complied with the Council's March 25, 2009 Interim Order.

### **April 3, 2009**

E-mail from the Complainant to the GRC attaching the Custodian's certified confirmation of compliance dated March 31, 2009. The Complainant asserts that he received the Custodian's certified confirmation of compliance but that the Custodian failed to include the requested records.

Further, the Complainant argues that the records the Custodian certifies he mailed were entirely unrelated to the instant complaint. The Complainant asserts that this is another example of how the Custodian knowingly and willful violated OPRA.

**April 3, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that all records were provided simultaneously with the certified confirmation of compliance. The Custodian asserts that the Complainant should have received a letter with copies of the reorganization meeting minutes appointing the Borough Administrator. The Custodian asserts that he has no reason to withhold the records and wants to resolve this complaint as soon as possible.

**April 17, 2009**

E-mail from the GRC to the Complainant. The GRC requests that the Complainant advise as to whether the Complainant is in possession of the records responsive to his April 6, 2007 OPRA request as per the Custodian's April 3, 2009 e-mail.

**April 20, 2009**

E-mail from the Complainant to the GRC attaching a copy of the envelope that contained the Custodian's certification. The Complainant states that he received the attached envelope on April 4, 2009 and points out that, contrary to the Custodian's certification that the records were mailed on March 31, 2009, the envelope is postmarked April 2, 2009.

Additionally, the Complainant argues that the Council's Interim Order was e-mailed to the Custodian on March 26, 2009 but the Custodian certifies that the Interim Order was received on March 27, 2009. Further, the Complainant argues that the Custodian incorrectly identified as Executive Session meeting minutes the records ordered to be disclosed in paragraph No. 3 of the Custodian's certification. Finally, the Complainant requests that the Custodian confirm that the meeting minutes received from 2004 are the minutes of the Custodian's first term in office as Municipal Administrator.

**April 20, 2009**

E-mail from the Custodian to the GRC. The Custodian asserts that, as per his staff, the mailing might have been delayed because additional postage was needed. The Custodian states that the copy of the envelope attached to the Complainant's April 20, 2009 e-mail clearly shows that the certification was sent to the Complainant on March 31, 2009. The Custodian further asserts that the Council's Interim Order was received by mail in his office after March 26, 2009.

The Custodian contends that the Complainant failed to inform the GRC that the letter attached to the requested records explicitly stated that no records responsive to Item No. 1 exist and that the 2004 meeting minutes correspond with the time that the Custodian was appointed as Municipal Administrator. The Custodian asserts that there was never any mention of Executive Session minutes and that the Complainant is in possession of all records ordered to be provided by the GRC.

**April 21, 2009**

E-mail from the Complainant to the GRC attaching a copy of the Custodian's March 31, 2009 certification. The Complainant argues that the Custodian's March 31, 2009 certification should be considered invalid because the Custodian admitted in his



April 21, 2009 e-mail that there was never any mention of Executive Session minutes even though paragraph No. 3 of the certification identifies Executive Session meeting minutes as the records ordered to be provided to the Complainant.

The Complainant requests that the GRC investigate whether the Custodian's use of Executive Session minutes and shortage of postage, in light of the fact that the Borough has a postage meter, was done so knowingly and willfully in order to delay delivery of the requested records.

#### **April 21, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that after reviewing the file concerning the instant complaint and his certification, the Custodian found that paragraph No. 3 of his certification is in error. The Custodian asserts that given the number of OPRA requests and Denial of Access Complaints filed by the Complainant, errors can be made at times. The Custodian states that, regardless of the error in the certification, the Complainant received the records required to be provided by the Council's March 25, 2009 Interim Order within five (5) business days from receipt of the Order.<sup>4</sup>

### **Analysis**

#### **Whether the Custodian complied with the Council's March 25, 2009 Interim Order?**

Although the Custodian provided certified confirmation of compliance to the GRC regarding the instant complaint, the Complainant disputes the Custodian's position that he has complied with the GRC's March 25, 2009 Interim Order. Specifically, the Complainant contends that he did not receive the requested records at the same time as the Custodian's certification. The Custodian argues that his staff advised that additional postage was required to send the request records. Additionally, the Complainant disputes the fact that the Custodian's certification erroneously identifies Executive Session minutes as the records ordered to be disclosed.

The Complainant also requests that the GRC investigate whether the Custodian's failure to apply the proper postage to the records ordered to be provided and error in paragraph 3 of the Custodian's certification was done so knowingly and willfully in order to delay delivery of requested records ordered to be provided in the Council's March 25, 2009 Interim Order.

Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian fully complied with the Council's March 25, 2009 Interim Order. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts for a determination of whether the Custodian failed to fully comply with the Council's March 25, 2009 Interim Order and, if so, whether such noncompliance was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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<sup>4</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-48 – Supplemental Findings and Recommendations of the Executive Director 4

## **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts for a determination of whether the Custodian failed to fully comply with the Council's March 25, 2009 Interim Order and, if so, whether such noncompliance was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

June 16, 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

March 25, 2009 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2008-48

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 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. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because he failed to provide a definitive response as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Custodian failed to provide within the statutorily mandated seven (7) business days a specific date on which the record responsive to request Item No. 2 would be provided, the Custodian’s response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to all records requested in the Complainant’s December 19, 2006 OPRA request. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to request Item No. 1 exists, the Custodian must certify to this fact.**



4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Custodian's assertion that the Complainant is in possession of the record responsive to request Item No. 2 does not relieve the Custodian of his burden to prove a lawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-6.
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 25<sup>th</sup> Day of March, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: March 27, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-48**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the ordinance creating the position of Municipal Administrator.
2. Copy of the meeting minutes where the Municipal Administrator was appointed to first term of office.

**Request Made:** April 6, 2007

**Response Made:** April 6, 2007

**Custodian:** Donald Kazar

**GRC Complaint Filed:** March 17, 2008<sup>3</sup>

**Background**

**April 6, 2007**

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.

**April 6, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request. The Custodian states that he believes no ordinance responsive to request Item No. 1 exists. The Custodian states that locating the meeting minutes responsive to request Item No. 2 may take three (3) to four (4) weeks because the Borough minutes are not indexed.

The Custodian then states that he is aware that the Municipal Administrator's position is noted in the salary ordinance, so there may actually be an ordinance creating the Municipal Administrator position.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**March 17, 2008**

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

- Complainant’s OPRA request dated April 6, 2007.
- Letter from the Custodian to the Complainant dated April 6, 2007.

The Complainant states that he submitted an OPRA request to the Custodian via e-mail on April 6, 2007. The Complainant states that the Custodian responded in writing on the same day as receipt of the Complainant’s request stating that he did not believe there was an ordinance creating the Municipal Administrator position, but then asserted that such an ordinance may actually exist. The Complainant states that he did not receive another correspondence from the Custodian after April 6, 2007.

The Complainant contends that the Custodian’s failure to respond to the OPRA request amounts to a knowing and willful violation of OPRA under the totality of the circumstances. The Complainant further avers that OPRA provides that a custodian must grant or deny access by no later than the statutorily mandated seven (7) business days following receipt of an OPRA request and that the Custodian in this matter failed to do so for nearly a year.

The Complainant did not agree to mediate this complaint.

**March 17, 2008**

E-mail from the Custodian to the GRC.<sup>4</sup> The Custodian states that the Complainant’s assertions in the Denial of Access Complaint do not accurately reflect the Complainant’s actual dealings with the Custodian. The Custodian asserts that the Complainant informed him on many occasions that there was no rush in providing the records requested, but that the Complainant would advise the Custodian when he would need to obtain the records requested.

The Custodian states that the Complainant was an employee with the Borough at the time these OPRA requests were submitted. The Custodian states that the Complainant was in the Custodian’s office several times to discuss OPRA requests and at times was given invoices without the use of the request forms.

**March 27, 2008**

Request for the Statement of Information sent to the Custodian.

**March 31, 2008**

E-mail from Custodian to the GRC. The Custodian requests an extension until April 14, 2008 to submit the Statement of Information.

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<sup>4</sup> The Custodian sent this e-mail in regards to three (3) complaints filed simultaneously. This request is one (1) of those three (3) complaints. The others are 2008-49 and 2008-50, adjudicated simultaneously herewith.

**March 31, 2008**

E-mail from the GRC to the Custodian. The GRC acknowledges receipt of the Custodian's request for an extension of the deadline to submit the Statement of Information. The GRC states that because the Custodian must also submit two (2) additional Statements of Information for other complaints, the GRC is extending the Custodian's deadline until close of business on April 16, 2008. The GRC further states that no additional extensions will be given and that the GRC will adjudicate this complaint with the evidence of record if the Statement of Information is not received by April 16, 2008.

**April 14, 2008**

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

- Complainant's OPRA request dated April 6, 2007.
- Letter from the Custodian to the Complainant dated April 6, 2007.

The Custodian states that he responded to the Complainant's April 6, 2007 OPRA request on the same day as receipt of the request stating that the Custodian believed no ordinances responsive existed.

The Custodian contends that he responded immediately after receipt of the request and that the Complainant was later informed verbally that the Municipal Administrator position was appointed each year during a reorganization meeting. The Custodian further asserts that the Complainant already had a copy of the requested meeting minutes because he received them from the Custodian annually in the Complainant's capacity as Chief of Police.

The Custodian contends that the Complainant had knowledge that the administrator position was appointed on an annual basis because the Complainant is a former employee of the Borough.

The Custodian finally questions why the Complainant, if he felt his request had not been fulfilled within the statutorily mandates of OPRA, waited to file a complaint until nearly a year after the April 6, 2007 OPRA request when a Denial of Access Complaint could have been filed earlier.

**April 24, 2008**

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian's arguments against the Complainant's Denial of Access Complaint are confusing.

First, the Complainant contends that if the Custodian's response to the Complainant's OPRA request were accurate, then the Custodian would have completed the response section of the OPRA request, which remains blank. The Complainant further avers that, contrary to the Custodian's assertion that a verbal conversation took place following the April 6, 2007 written response, no further communication took place regarding this request.

Second, the Complainant avers that the Custodian stated that he believed that an ordinance responsive to request Item No. 1 may exist, but failed to follow up with a response as to whether a record responsive actually exists.

Finally, the Complainant asserts that the Custodian purposely failed to date the Complainant's OPRA request form and that there would have been no need to file a complaint if the Custodian had complied with OPRA.

### **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:

"[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5.g.

OPRA further provides that:

"a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived...." 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.

In this complaint, the Custodian responded in writing on the same business day as receipt of the Complainant’s request stating that no record responsive to Item No. 1 exists. The Custodian further stated that the minutes responsive to Item No. 2 would take three (3) to four (4) weeks. The Custodian then stated that a record responsive to Item No. 1 may exist, but failed to specifically grant or deny access to the requested ordinance.

N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because he failed to provide a definitive response as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.

Moreover, in Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian responded in writing to the Complainant on the seventh (7<sup>th</sup>) business day requesting an extension of time to respond to the Complainant’s request. The Custodian initially failed to provide a specific date on which the requested records would be made available. The GRC held that the Custodian’s request for an extension of time to respond to the Complainant’s OPRA request was inadequate and resulted in a deemed denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra, because the Custodian failed to provide a specific date on which the records would be made available for the Complainant as required in N.J.S.A. 47:1A-5.i.

The Custodian in this complaint sought in writing an extension of time to respond to request Item No. 2 on the same business day following receipt of the Complainant’s OPRA request, but failed to provide a specific date upon which the Complainant would be provided with the record responsive to request Item No. 2. Therefore, because the Custodian failed to provide within the statutorily mandated seven (7) business days a specific date on which the record responsive to request Item No. 2 would be provided, the Custodian’s response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick, supra.

Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant’s April 6,

2007 OPRA request. The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to request Item No. 1 exists, the Custodian must certify to this fact.

The Custodian asserts in the SOI that the Complainant already has a copy of the record responsive to request Item No. 2 because the Complainant received the minutes in his capacity as Chief of Police.

In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* at 618, citing Times of Trenton Publishing Co. v. Lafayette Yard Community Dev. Corp., 183 N.J. 519, 535 (2005).

The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. In the adjudication of the Denial of Access Complaint, the Council's decision noted the certification of the custodian that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public; moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Housing Authority, GRC Complaint No. 2005-145 (May 2006).

In the instant complaint, the Complainant did not substantiate the Custodian's assertion by admitting to being in possession of the requested meeting minutes. Therefore, the Custodian's assertion that the Complainant is in possession of the record responsive to request Item No. 2 does not relieve the Custodian of his burden to prove a lawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-6.

**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. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a definitive response as to whether the record

requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.

2. Because the Custodian failed to provide within the statutorily mandated seven (7) business days a specific date on which the record responsive to request Item No. 2 would be provided, the Custodian's response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to all records requested in the Complainant's December 19, 2006 OPRA request. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to request Item No. 1 exists, the Custodian must certify to this fact.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Custodian's assertion that the Complainant is in possession of the record responsive to request Item No. 2 does not relieve the Custodian of his burden to prove a lawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-6.
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.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 18, 2009