



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

FINAL DECISION

January 26, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2008-77

v.

Township of Springfield (Union)
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council ("Council") considered the January 19, 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 via letter to the GRC, submitted by the Complainant's Counsel, dated December 9, 2009. 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 26th Day of January, 2010

Robin Berg Tabakin, Chair
Government Records Council

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



Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 29, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2008-77

v.

**Township of Springfield (Union)²
Custodian of Records**

Records Relevant to Complaint:

- February 1, 2008 OPRA Request:
 1. The resolution passed by the Committee, the contract, the notice that was put into the newspaper disclosing that the contract was entered into, if any, and the Certification of Available Funds for all contracts awarded since January 1, 2007 to the following vendors:
 - a. Peter A. Fico
 - b. Fireman's Mutual Benevolent Association (see March 27, 2007 meeting minutes)
 - c. Michael Gerson (see Resolution No. 2007-49)
 - d. The Institute of Forensic Psychology (see February 13, 2007 meeting minutes)
 2. Any reports or other records on file by or on behalf of Bruce Seidman, Esq., regarding any investigation he conducted.³
- February 18, 2008 OPRA Request:
 1. The contract with Dr. Michael Gerson that was authorized by Resolution No. 2007-49
 2. The "letter proposal" referred to by Resolution No. 2007-49⁴

Request Made: February 1, 2008 and February 18, 2008

Response Made: February 7, 2008 and March 4, 2008

Custodian: Kathleen Wisniewski

GRC Complaint Filed: April 8, 2008⁵

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

² Represented by Bruce H. Bergen, Esq., of Krevsky, Silber & Bergen (Cranford, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The Complainant requested an additional record, however, said record is not the subject of this Denial of Access Complaint.

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

Background

August 11, 2009

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Council considered the August 4, 2009 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, found that:

1. Because the Custodian's Counsel provided the Complainant with the requested letter proposal referred to by Resolution No. 2007-49 with appropriate redactions and identified the legal basis for said redactions, as well as because the Custodian's Counsel provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's June 23, 2009 Interim Order.
2. Although the Custodian violated OPRA on several counts, the evidence of record does not indicate that the Custodian's actions were intentional, more than negligent conduct, or that the Custodian had knowledge of her wrongfulness or conscious wrongdoing. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's multiple violations regarding her failure to adhere to the statutorily mandated response time appear negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's June 23, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian either provided the requested records to the Complainant, or provided a certification that no records responsive exist. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the Complainant with certain requested records or a specific response that no records responsive exist until after the filing of said complaint. Further, the relief ultimately achieved had a basis in law. The Custodian is obligated to either grant or deny access in writing within seven (7) business days from receipt of the request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian also carries the burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Here, the Custodian failed to properly respond to the Complainant's OPRA requests and unlawfully denied access to the requested letter proposal. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super.

423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

August 14, 2009

Council's Interim Order distributed to the parties.

September 28, 2009

Complaint transmitted to the Office of Administrative Law.

December 9, 2009

Letter from Complainant's Counsel to GRC. The Complainant's Counsel states that the parties have reached a settlement regarding the issue of reasonable prevailing party attorney's fees. As such, Counsel states that the Complainant wishes to withdraw this Denial of Access Complaint.

December 23, 2009

Letter from Custodian's Counsel to GRC. The Custodian's Counsel confirms that the parties have reached a settlement regarding the issue of reasonable prevailing party attorney's fees.

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 via letter to the GRC, submitted by the Complainant's Counsel, dated December 9, 2009. Therefore, no further adjudication is required.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

August 11, 2009 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2008-77

v.

Township of Springfield (Union)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 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's Counsel provided the Complainant with the requested letter proposal referred to by Resolution No. 2007-49 with appropriate redactions and identified the legal basis for said redactions, as well as because the Custodian's Counsel provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's June 23, 2009 Interim Order.
2. Although the Custodian violated OPRA on several counts, the evidence of record does not indicate that the Custodian's actions were intentional, more than negligent conduct, or that the Custodian had knowledge of her wrongfulness or conscious wrongdoing. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's multiple violations regarding her failure to adhere to the statutorily mandated response time appear negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's June 23, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian either provided the requested records to the Complainant, or provided a certification that no records responsive exist. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the

Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the Complainant with certain requested records or a specific response that no records responsive exist until after the filing of said complaint. Further, the relief ultimately achieved had a basis in law. The Custodian is obligated to either grant or deny access in writing within seven (7) business days from receipt of the request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian also carries the burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Here, the Custodian failed to properly respond to the Complainant's OPRA requests and unlawfully denied access to the requested letter proposal. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 14, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Paff¹
Complainant**

GRC Complaint No. 2008-77

v.

**Township of Springfield (Union)²
Custodian of Records**

Records Relevant to Complaint:

- February 1, 2008 OPRA Request:
 1. The resolution passed by the Committee, the contract, the notice that was put into the newspaper disclosing that the contract was entered into, if any, and the Certification of Available Funds for all contracts awarded since January 1, 2007 to the following vendors:
 - a. Peter A. Fico
 - b. Fireman's Mutual Benevolent Association (see March 27, 2007 meeting minutes)
 - c. Michael Gerson (see Resolution No. 2007-49)
 - d. The Institute of Forensic Psychology (see February 13, 2007 meeting minutes)
 2. Any reports or other records on file by or on behalf of Bruce Seidman, Esq., regarding any investigation he conducted.³
- February 18, 2008 OPRA Request:
 1. The contract with Dr. Michael Gerson that was authorized by Resolution No. 2007-49
 2. The "letter proposal" referred to by Resolution No. 2007-49⁴

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Custodian: Kathleen Wisniewski

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

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³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The Complainant requested an additional record, however, said record is not the subject of this Denial of Access Complaint.

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

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:

1. Although both the Custodian and the Custodian's Counsel provided written responses to the Complainant's OPRA request dated February 1, 2008 requesting an extension of time within the statutorily mandated seven (7) business days, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. The Custodian's failure to respond in writing to the Complainant's February 1, 2008 OPRA request for the Fico, Gerson and Institute of Forensic Psychology contracts either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days, as well as the Custodian's failure to grant or deny access to said records within the Complainant's offered extension of time results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contracts or an immediate response to the Complainant's request for contracts.
3. The Custodian's failure to respond in writing to the Complainant's February 18, 2008 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide an immediate response to the Complainant's request for Dr. Gerson's contract.
4. Because the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Peter A. Fico's contract and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.

5. Because the Custodian certified that the requested Fireman's Mutual Benevolent Association records relate to the Township's final bargaining position to be taken by the Township during ongoing negotiations and that no final agreement or contract exists, the requested Fireman's Mutual Benevolent Association records are not government records subject to public access pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian has carried her burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. Because the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
7. Because the Custodian's Counsel certified that the Township's outside counsel also does not maintain a contract for Dr. Michael Gerson, the Council need not address whether the Township's outside counsel is "an officer, commission or agency or authority of" the Township whose records are government records subject to public access under OPRA.
8. Because the primary purpose of the investigatory report authored by Bruce Seidman, Esq., was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, the attorney-client privilege does not apply pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1.
9. Because the text of the report authored by Bruce Seidman, Esq., is purely factual and does not contain any advice or recommendations, said report is not exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.
10. Because the requested report authored by Bruce Seidman, Esq., pertained to an ongoing investigation conducted by the Township, and because the Complainant submitted his OPRA request while said investigation was ongoing, as well as because said report could not have been subject to public access prior to the investigation since said report was created after the Township commenced its investigation, said report is exempt from public access pursuant to N.J.S.A. 47:1A-3.a.
11. Because the Custodian denied access to the report authored by Bruce Seidman, Esq., in her written response to the Complainant's request on the basis that said report constituted attorney-client privilege, and because the attorney-client privilege does not apply to the requested report since the primary purpose of said report was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason,

pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6 since she failed to identify the proper legal basis for said denial. However, the Custodian did not unlawfully deny access to said report because said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because of the Township's ongoing investigation at the time of the request

12. Because the Custodian certified that there are no records responsive to the Complainant's request for The Institute of Forensic Psychology records, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
13. Because the Custodian certified that there are no records responsive to the Complainant's request for Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access to the Complainant's OPRA request dated February 18, 2008 was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
14. The Custodian failed to carry her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested letter proposal referred to by Resolution No. 2007-49. As such, the Custodian shall release said record to the Complainant with appropriate redactions, if any.
15. **The Custodian shall comply with item # 14 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. If no record responsive exists, the Custodian must certify to this fact.**
16. 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.

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."

17. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

June 24, 2009

Council's Interim Order distributed to the parties.

June 26, 2009

Custodian Counsel's response to the Council's Interim Order. The Custodian's Counsel certifies that he provided the Complainant and the Complainant's Counsel copies of the following records via e-mail today, June 26, 2009, which serve as the letter proposal referred to in Resolution No. 2007-49:

- Letter from Dr. Michael J. Gerson to Springfield Labor Counsel dated January 23, 2007 (redacted the name of the plaintiff in the underlying litigation).
- Letter from Springfield Labor Counsel to Edward J. Fanning, Township Administrator, dated January 29, 2007 (redacted the name of the plaintiff in the underlying litigation).
- Letter from Springfield Labor Counsel to Edward J. Fanning, Township Administrator, dated March 29, 2007 (redacted the name of the plaintiff in the underlying litigation as well as several paragraphs which are the subject of attorney-client privilege because said paragraphs discuss trial strategy and related issues. The redacted material contains no information relevant to the retention of Dr. Gerson or the terms of his retention).⁷

June 30, 2009

E-mail from Custodian's Counsel to the GRC.⁸ The Custodian's Counsel states that due to a miscommunication within his office, the plaintiff's name and docket number should not have been redacted from the records provided to the Complainant. Counsel states that the case referenced in the three (3) records released to the Complainant is Andrew Johnson v. Township of Springfield, Docket No. UNN-L-2321-06.

Analysis

Whether the Custodian complied with the Council's June 23, 2009 Interim Order?

The Council's Interim Order dated June 23, 2009 directed the Custodian to provide the Complainant with the letter proposal referred to by Resolution No. 2007-49 with appropriate redactions, if any, including the lawful basis for any redactions. The Council's Interim Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

Via letter dated June 26, 2009, the Custodian's Counsel certified that on said date he provided the Complainant with the following three (3) records that comprise the requested letter proposal:

⁷ The Complainant does not object to the redactions on the basis of the attorney-client privilege.

⁸ The Custodian's Counsel also forwarded said e-mail to the Complainant and the Complainant's Counsel. John Paff v. Township of Springfield (Union), 2008-77 – Supplemental Findings and Recommendations of the Executive Director

- Letter from Dr. Michael J. Gerson to Springfield Labor Counsel dated January 23, 2007
- Letter from Springfield Labor Counsel to Edward J. Fanning, Township Administrator, dated January 29, 2007
- Letter from Springfield Labor Counsel to Edward J. Fanning, Township Administrator, dated March 29, 2007

The Custodian's Counsel certified that he redacted from these records the name of the plaintiff and the docket number for the referenced court case. However, via e-mail dated June 30, 2009, the Custodian's Counsel stated that said redaction was in error and states that the referenced court case is Andrew Johnson v. Township of Springfield, Docket No. UNN-L-2321-06. The Custodian also certified that he redacted several paragraphs from the letter dated March 29, 2007 which are the subject of attorney-client privilege because said paragraphs discuss trial strategy and related issues.

Therefore, because the Custodian's Counsel provided the Complainant with the requested letter proposal referred to by Resolution No. 2007-49 with appropriate redactions and identified the legal basis for said redactions, as well as because the Custodian's Counsel provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's June 23, 2009 Interim Order.

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?

OPRA states that:

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

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

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

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

- The Custodian's written response to the Complainant's OPRA request dated February 1, 2008, in which the Custodian requested an extension of time to respond to said request, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and

Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which the requested records will be provided.

- The Custodian failed to respond in writing to the Complainant's February 1, 2008 OPRA request for the Fico, Gerson and Institute of Forensic Psychology contracts either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days. The Custodian also failed to grant or deny access to said records within the Complainant's offered extension of time and thus resulted in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contracts or an immediate response to the Complainant's request for contracts.
- The Custodian failed to respond in writing to the Complainant's February 18, 2008 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide an immediate response to the Complainant's request for Dr. Gerson's contract.
- Although the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Peter A. Fico's contract and there is no credible evidence in the record to refute the Custodian's certification, the Custodian failed to carry her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian failed to respond in writing within the statutorily mandated seven (7) business day response time.
- Although the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Dr. Michael Gerson's contract, the Custodian failed to carry her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian failed to respond in writing within the statutorily mandated seven (7) business days.
- Because the Custodian denied access to the report authored by Bruce Seidman, Esq., in her written response to the Complainant's request on the basis that said report constituted attorney-client privilege, and because the attorney-client privilege does not apply to the requested report since the primary purpose of said report was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, pursuant to Payton v. NJ Turnpike

Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6 since she failed to identify the proper legal basis for said denial.

- Although the Custodian certified that there are no records responsive to the Complainant's request for The Institute of Forensic Psychology records, the Custodian failed to carry her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian failed to respond in writing within the statutorily mandated seven (7) business days.
- Although the Custodian certified that there are no records responsive to the Complainant's request for Dr. Michael Gerson's contract, the Custodian failed to carry her burden of proving that this denial of access to the Complainant's OPRA request dated February 18, 2008 was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian failed to respond in writing within the statutorily mandated seven (7) business day response time.
- The Custodian failed to carry her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested letter proposal referred to by Resolution No. 2007-49.

However, the Custodian carried her burden of proving a lawful denial of access to the requested Fireman's Mutual Benevolent Association records pursuant to N.J.S.A. 47:1A-6. Additionally, the Custodian did not unlawfully deny access to the report authored by Bruce Seidman, Esq., because said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because of the Township's ongoing investigation at the time of the request. Further, the Custodian complied with the Council's June 23, 2009 Interim Order.

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

To determine 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, the Council must analyze the nature of each of the Custodian's OPRA violations listed above.

The majority of the Custodian's violations relate to her failure to adhere to the statutorily mandated seven (7) business day response time pursuant to N.J.S.A. 47:1A-5.i., as well as the immediate access provision regarding the Complainant's requests for contracts. N.J.S.A. 47:1A-5.e. Thus, the evidence of record indicates that the Custodian is not completely knowledgeable about the response time requirements under OPRA. However, the evidence of record also indicates that despite this lack of knowledge, the Custodian made attempts to fulfill the Complainant's requests. Out of the seven (7) itemized requests which are the subject of this complaint, the Custodian eventually provided a response to all but to one (1) item – the letter proposal referred to by Resolution No. 2007-47. The Council ordered disclosure of said record in its June 23, 2009 Interim Order. Regarding the remaining requests, the Custodian did not unlawfully deny access because she certified that no records responsive exist, or provided a legal basis for the denial. However, the Custodian's failure to adhere to OPRA's response time requirements resulted in a "deemed" denial of the Complainant's requests.

Although the Custodian violated OPRA on several counts, the evidence of record does not indicate that the Custodian's actions were intentional, more than negligent conduct, or that the Custodian had knowledge of her wrongfulness or conscious wrongdoing. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's multiple violations regarding her failure to adhere to the statutorily mandated response time appear negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the

John Paff v. Township of Springfield (Union), 2008-77 – Supplemental Findings and Recommendations of the Executive Director 9

complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In this instant complaint, the Complainant's Counsel requested that the Council order the Custodian to provide immediate access to all of the requested records that were not provided to the Complainant prior to the filing of this complaint.

After the filing of the Complainant's Denial of Access Complaint, the Custodian in her Statement of Information dated April 29, 2008, provided the Complainant with a copy of the requested Certification of Available Funding for Dr. Gerson. The Custodian also provided a certification in her Statement of Information that there are no records responsive to the request for the Affidavit of Publication for the Fico contract or the Institute of Forensic Psychology records. The Custodian had not provided said responses to the Complainant prior to the filing of his Denial of Access Complaint. Rather, the

John Paff v. Township of Springfield (Union), 2008-77 – Supplemental Findings and Recommendations of the Executive Director 10

Custodian had either improperly requested an extension of time to respond or failed to provide any response.

Additionally, the Council ordered the Custodian to disclose the requested letter proposal in its June 23, 2009 Interim Order because the Custodian had unlawfully denied access to said record. The Custodian complied with the Council's Order.

Pursuant to Teeters, *supra*, and the Council's June 23, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian either provided the requested records to the Complainant, or provided a certification that no records responsive exist. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the Complainant with certain requested records or a specific response that no records responsive exist until after the filing of said complaint. Further, the relief ultimately achieved had a basis in law. The Custodian is obligated to either grant or deny access in writing within seven (7) business days from receipt of the request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian also carries the burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Here, the Custodian failed to properly respond to the Complainant's OPRA requests and unlawfully denied access to the requested letter proposal. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's Counsel provided the Complainant with the requested letter proposal referred to by Resolution No. 2007-49 with appropriate redactions and identified the legal basis for said redactions, as well as because the Custodian's Counsel provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's June 23, 2009 Interim Order.
2. Although the Custodian violated OPRA on several counts, the evidence of record does not indicate that the Custodian's actions were intentional, more than negligent conduct, or that the Custodian had knowledge of her wrongfulness or conscious wrongdoing. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's multiple violations regarding her failure to adhere to the statutorily mandated response time appear negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's June 23, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian either provided the requested records to the Complainant, or provided a certification that no records responsive exist. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian failed to provide the Complainant with certain requested records or a specific response that no records responsive exist until after the filing of said complaint. Further, the relief ultimately achieved had a basis in law. The Custodian is obligated to either grant or deny access in writing within seven (7) business days from receipt of the request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian also carries the burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Here, the Custodian failed to properly respond to the Complainant's OPRA requests and unlawfully denied access to the requested letter proposal. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 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

John Paff
Complainant

Complaint No. 2008-77

v.

Township of Springfield (Union)
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council ("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, finds that:

1. Although both the Custodian and the Custodian's Counsel provided written responses to the Complainant's OPRA request dated February 1, 2008 requesting an extension of time within the statutorily mandated seven (7) business days, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. The Custodian's failure to respond in writing to the Complainant's February 1, 2008 OPRA request for the Fico, Gerson and Institute of Forensic Psychology contracts either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days, as well as the Custodian's failure to grant or deny access to said records within the Complainant's offered extension of time results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contracts or an immediate response to the Complainant's request for contracts.
3. The Custodian's failure to respond in writing to the Complainant's February 18, 2008 OPRA request either granting access, denying access, seeking



clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide an immediate response to the Complainant’s request for Dr. Gerson’s contract.

4. Because the Custodian certified that there are no records responsive to the Complainant’s request for the Affidavit of Publication regarding Peter A. Fico’s contract and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
5. Because the Custodian certified that the requested Fireman’s Mutual Benevolent Association records relate to the Township’s final bargaining position to be taken by the Township during ongoing negotiations and that no final agreement or contract exists, the requested Fireman’s Mutual Benevolent Association records are not government records subject to public access pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian has carried her burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. Because the Custodian certified that there are no records responsive to the Complainant’s request for the Affidavit of Publication regarding Dr. Michael Gerson’s contract, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
7. Because the Custodian’s Counsel certified that the Township’s outside counsel also does not maintain a contract for Dr. Michael Gerson, the Council need not address whether the Township’s outside counsel is “an officer, commission or agency or authority of” the Township whose records are government records subject to public access under OPRA.
8. Because the primary purpose of the investigatory report authored by Bruce Seidman, Esq., was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, the attorney-client privilege does not apply pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1.

9. Because the text of the report authored by Bruce Seidman, Esq., is purely factual and does not contain any advice or recommendations, said report is not exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.
10. Because the requested report authored by Bruce Seidman, Esq., pertained to an ongoing investigation conducted by the Township, and because the Complainant submitted his OPRA request while said investigation was ongoing, as well as because said report could not have been subject to public access prior to the investigation since said report was created after the Township commenced its investigation, said report is exempt from public access pursuant to N.J.S.A. 47:1A-3.a.
11. Because the Custodian denied access to the report authored by Bruce Seidman, Esq., in her written response to the Complainant's request on the basis that said report constituted attorney-client privilege, and because the attorney-client privilege does not apply to the requested report since the primary purpose of said report was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-6 since she failed to identify the proper legal basis for said denial. However, the Custodian did not unlawfully deny access to said report because said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a because of the Township's ongoing investigation at the time of the request
12. Because the Custodian certified that there are no records responsive to the Complainant's request for The Institute of Forensic Psychology records, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
13. Because the Custodian certified that there are no records responsive to the Complainant's request for Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access to the Complainant's OPRA request dated February 18, 2008 was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.

14. The Custodian failed to carry her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested letter proposal referred to by Resolution No. 2007-49. As such, the Custodian shall release said record to the Complainant with appropriate redactions, if any.
15. **The Custodian shall comply with item # 14 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. If no record responsive exists, the Custodian must certify to this fact.**
16. 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.
17. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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 24, 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
June 23, 2009 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2008-77

v.

**Township of Springfield (Union)²
Custodian of Records**

Records Relevant to Complaint:

- February 1, 2008 OPRA Request:
 1. The resolution passed by the Committee, the contract, the notice that was put into the newspaper disclosing that the contract was entered into, if any, and the Certification of Available Funds for all contracts awarded since January 1, 2007 to the following vendors:
 - a. Peter A. Fico
 - b. Fireman's Mutual Benevolent Association (see March 27, 2007 meeting minutes)
 - c. Michael Gerson (see Resolution No. 2007-49)
 - d. The Institute of Forensic Psychology (see February 13, 2007 meeting minutes)
 2. Any reports or other records on file by or on behalf of Bruce Seidman, Esq., regarding any investigation he conducted.³
- February 18, 2008 OPRA Request:
 1. The contract with Dr. Michael Gerson that was authorized by Resolution No. 2007-49
 2. The "letter proposal" referred to by Resolution No. 2007-49⁴

Request Made: February 1, 2008 and February 18, 2008

Response Made: February 7, 2008 and March 4, 2008

Custodian: Kathleen Wisniewski

GRC Complaint Filed: April 8, 2008⁵

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

² Represented by Bruce H. Bergen, Esq., of Krevsky, Silber & Bergen (Cranford, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The Complainant requested an additional record, however, said record is not the subject of this Denial of Access Complaint.

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

Background

February 1, 2008

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

February 7, 2008

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian's responses to the Complainant's request are as follows:

Complainant's Request	Custodian's Response
Contract records for Peter A. Fico	See Resolution No. 2007-118, contract and Certificate of Available Funds ("COAF") (provided by fax). The Custodian is attempting to locate the Affidavit of Publication and requests additional time to respond.
Contract records for Fireman's Mutual Benevolent Association ("FMBA")	This record is exempt from disclosure because it involved collective negotiations.
Contract records for Michael Gerson	See Resolution No. 2007-49 (provided by fax). The contract would be this resolution and a statement by the other party to the contract indicating that he accepts this resolution as the contract. Said records, COAF and Affidavit of Publication have not been located. The Custodian requests additional time to respond.
Contract records for The Institute of Forensic Psychology	No response.
Any reports of other records on file by or on behalf of Bruce Seidman regarding any investigation he conducted	Denied as attorney-client privileged.

February 11, 2008

Letter from Complainant to Custodian. The Complainant states that the Custodian denied access to any resolution, contract, publication or COAF related to the FMBA on the basis that said records involved collective negotiations. The Complainant states that the contract was accepted in final form during the Committee's closed session on March 27, 2007. The Complainant asserts that OPRA does not contain a provision that exempts contracts from disclosure. The Complainant asks the Custodian to identify the records responsive to his request and provide the specific legal basis for the denial of access.

The Complainant also states that the Custodian failed to respond to his request for records pertaining to The Institute of Forensic Psychology. The Complainant also agrees

to an extension of time until February 18, 2008 in order for the Custodian to provide the Affidavit of Publication for Peter A. Fico's contract, COAF and Affidavit of Publication for the Gerson contract (the Complainant states that he does not need a copy of the contract because it is almost identical to the resolution). Further, the Complainant contends that Bruce Seidman was not retained to provide legal services but was hired as an independent investigator. As such, the Complainant asserts that the attorney-client privilege does not apply. However, the Complainant claims that even if said exemption does apply, he should still be entitled to portions of the report. The Complainant asks the Custodian to provide a more detailed reason why he is being denied access to said report.

February 11, 2008

E-mail from Custodian's Counsel to Complainant. The Custodian's Counsel states that a Township employee passed away on February 8, 2008. As such, Counsel states that the Township's offices will be closed on February 12, 2008 for the funeral. Counsel states that the Township will make every attempt to respond to the Complainant's requests as soon as possible but appreciates the Complainant's understanding if said response takes an additional day or two due to the circumstances.

February 11, 2008

E-mail from Complainant to Custodian's Counsel. The Complainant states that he established the February 18, 2008 deadline so that he would have a date to follow up on the request. The Complainant states that additional time is not a problem.

February 15, 2008

E-mail from Custodian to Complainant. The Custodian attaches a Professional Services Resolution for Dr. Gerson and states that no written contract exists because Dr. Gerson was retained by outside counsel, not the Township.

February 18, 2008

Letter from Complainant to Custodian. The Complainant states that he is having trouble understanding the Custodian's e-mail dated February 15, 2008. The Complainant states that in the Custodian's response dated February 7, 2008, the Custodian indicated that Dr. Gerson's contract would be the resolution and a statement by the other party accepting the resolution as the contract. The Complainant states that it is now the Custodian's position that there is no contract between Dr. Gerson and the Township. The Complainant states that he is submitting another OPRA request to clarify this matter.

February 18, 2008

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

March 4, 2008

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eleventh (11th) business day following receipt of such request. The Custodian states that the Township does not have a contract with Dr. Michael Gerson.

April 8, 2008

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

- Complainant’s OPRA request dated February 1, 2008
- Custodian’s response to the Complainant’s request dated February 7, 2008, with attachments
- Letter from Complainant to Custodian dated February 11, 2008
- E-mail from Custodian’s Counsel to Complainant dated February 11, 2008
- E-mail from Complainant to Custodian’s Counsel dated February 11, 2008
- E-mail from Custodian to Complainant dated February 15, 2008
- Letter from Complainant to Custodian dated February 18, 2008
- Complainant’s OPRA request dated February 18, 2008
- Custodian’s response to the Complainant’s request dated March 4, 2008

The Complainant’s Counsel states that the Complainant submitted his OPRA request via facsimile on February 1, 2008. Counsel states that the Custodian provided a written response to said request on February 7, 2008 in which the Custodian denied access to the requested FMBA records and the Seidman reports. Counsel states that the Custodian’s response also failed to either grant or deny access to the Affidavit of Publication for Peter A. Fico, the Gerson contract, Affidavit of Publication and COAF, as well as the Institute of Forensic Psychology records. Counsel states that via letter dated February 11, 2008, the Complainant challenged the denials of access and granted an extension of time until February 18, 2008 in order for the Custodian to comply with his OPRA request. Counsel states that the Complainant received an e-mail from the Custodian’s Counsel dated February 11, 2008 in which Counsel stated that the death of a Township employee would delay the Custodian’s response a day or two. The Complainant’s Counsel states that via e-mail dated February 11, 2008 the Complainant agreed to extend the deadline if needed. However, Counsel states that it has been over six (6) weeks since the Complainant’s offer of an extension of time and he has not received a further response from the Township.

Counsel contends that the Custodian failed to bear her burden of proving a lawful denial of access to the requested FMBA records. Counsel states that the Custodian’s basis for said denial was that the requested records involved collective bargaining negotiations which are exempt from disclosure. Counsel asserts that OPRA does not exempt from disclosure collective bargaining contracts but rather provides that immediate access ordinarily shall be granted to collective negotiations agreements pursuant to N.J.S.A. 47:1A-5.e. Counsel also claims that the Custodian failed to bear her burden of proving a lawful denial of access to the Seidman reports, which she denied under OPRA’s exemption for attorney-client privilege. N.J.S.A. 47:1A-1.1.

Additionally, Counsel asserts that the Custodian failed to identify the records responsive to the Complainant’s request for the FMBA and Seidman records even after the Complainant specifically requested such identification in his letter to the Custodian dated February 11, 2008. Counsel contends that the Complainant is forced to file this Denial of Access Complaint in order to invoke the requirements of Paff v. Department of

Labor, 392 N.J. Super. 334 (App. Div. 2007) which requires the Custodian to provide a sworn statement detailing the following information:

1. The search undertaken to satisfy the request
2. The records responsive to the request
3. The determination of whether the records or portions of the records are confidential and the source of the confidential information
4. A statement of the agency's records retention and destruction schedule as well as the last date on which any records responsive may have been destroyed. *Id.* at 341.

Further, Counsel states that in the Custodian's response to the Complainant's OPRA request, the Custodian indicated that she needed more time to locate the requested Peter A. Fico and Gerson records. Counsel asserts that the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day response time as the Council ruled in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006). Counsel states that without being asked, the Complainant offered the Custodian an extension of time until February 18, 2008. Counsel also states that upon learning of the death of a Township employee, the Complainant agreed to allow the Custodian additional time to respond to his request. However, Counsel states that despite the Complainant's accommodations, the Custodian has not yet provided the Complainant with a further response to his requests. Counsel asserts that such failure to respond results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007). Counsel further contends that the Custodian's failure to respond in any way to the Complainant request for the Institute of Forensic Psychology's records also constitutes a "deemed" denial.

Counsel requests the following relief from the Council:

1. A finding that the Custodian violated OPRA by improperly denying access to the FMBA and Seidman records;
2. A finding that the Custodian unlawfully denied access to the Peter A. Fico, Gerson and Institute of Forensic Psychology records by not responding within the extended period of time offered by the Complainant (a "deemed" denial);
3. An order compelling the Custodian to provide immediate access to all of the requested records specified in this portion of the complaint;
4. A finding that the Complainant is a "prevailing party" and entitled to an award of attorney's fees pursuant to N.J.S.A. 47:1A-6; and
5. An assessment of civil penalties against the Custodian if she is found to have knowingly and willfully violated OPRA under the totality of the circumstances.

Additionally, Counsel states that the Complainant submitted a second OPRA request on February 18, 2008. Counsel states that the Custodian responded to said request via facsimile dated March 4, 2008 in which the Custodian indicated that the Township does not have a contract with Dr. Michael Gerson. Counsel contends that if the Custodian received the Complainant's request on February 19, 2008, the seven (7) business days would have expired on February 28, 2008. Counsel asserts that the

Custodian's failure to respond until March 4, 2008 constitutes a "deemed" denial pursuant to Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007). Counsel also claims that the Custodian's failure to either grant access or deny access to the Complainant's request for the letter proposal mentioned in Resolution No. 2007-49 constitutes a "deemed" denial pursuant to Paff v. Borough of South Bound Brook, GRC Complaint No. 2006-158 (May 2007).

Further, Counsel states that the Custodian indicated in her e-mail to the Complainant dated February 15, 2008 that the Township does not have a written contract with Dr. Gerson because he was retained by outside counsel. Counsel contends that because Dr. Gerson was retained with public funds and was awarded a professional services contract in accordance with the Local Public Contracts Law, N.J.S.A. 40A:11-5(1)(a)(i) requires that a copy of the contract be "available for public inspection in the office of the clerk." Counsel asserts that although the Council has not previously addressed this issue, it appears as though the outside counsel falls within the meaning of "an officer, commission or agency or authority of" the Township whose records are government records subject to public access because the outside counsel acted as the Township's agent by retaining Dr. Gerson. Counsel asserts that to hold otherwise would allow public agencies to shield their contracts from public view by hiring private parties to enter into and retain all copies of public contracts, thus circumventing OPRA.

Counsel requests the following relief from the Council:

1. A finding that the Custodian violated OPRA by failing to respond to the Complainant's request within the statutorily mandated seven (7) business days;
2. A finding that the Custodian violated OPRA by not granting or denying access to the requested letter proposal within the statutorily mandated seven (7) business days;
3. A finding that the outside counsel who entered into and possesses a copy of the contract with Dr. Gerson is "an officer, commission, agency or authority of" the Township and subject to OPRA;
4. An order compelling the Custodian and/or outside counsel to provide immediate access to the requested records;
5. A finding that the Complainant is a "prevailing party" and entitled to an award of attorney's fees pursuant to N.J.S.A. 47:1A-6; and
6. An assessment of civil penalties against the Custodian if she is found to have knowingly and willfully violated OPRA under the totality of the circumstances.

The Complainant did not agree to mediate this complaint.

April 11, 2008

Request for the Statement of Information sent to the Custodian.

April 22, 2008

Letter of representation from Custodian's Counsel. The Custodian's Counsel submits the Custodian's unsigned Statement of Information.

April 28, 2008

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

- Complainant's OPRA request dated February 1, 2008
- Complainant's OPRA request dated February 18, 2008
- Letter from Custodian's Counsel to GRC dated April 29, 2008⁶

The Custodian certifies that she received the Complainant's OPRA requests on February 1, 2008 and February 18, 2008. The Custodian certifies that she responded to said requests on various dates.

The Custodian certifies that she searched all appropriate locations where the requested published notice of a professional services contract with Peter A. Fico would be located and has not been able to locate said record. The Custodian believes that no such publication took place. The Custodian also certifies that no contract exists responsive to the Complainant's request for the FMBA contract with the Township as alluded to in the meeting minutes dated March 27, 2007. The Custodian certifies that the notation in said minutes does not refer to the approval of a final contract but rather refers to the approval of the final bargaining position to be taken by the Township during ongoing negotiations. The Custodian certifies that to date, the Township has not entered into a contract with FMBA for the time period beginning January 1, 2007.

Regarding the report by Bruce Seidman, the Custodian's certification indicates that the matter continues to be the subject of an ongoing criminal investigation by the Union County Prosecutor and potential civil litigation by various parties against the Township. The Custodian contends that said report is exempt from disclosure as attorney-client privileged and intra-agency advisory, consultative or deliberative material.

Additionally, the Custodian certifies that she has attached the requested Certification of Available Funding for Dr. Gerson to her SOI. The Custodian states that the Township Attorney located said record upon reviewing his files in preparation of the SOI. Further, the Custodian certifies that there are no records responsive to the remainder of the Complainant's OPRA request regarding Dr. Gerson and the Institute of Forensic Psychology.

April 29, 2008

Letter from Custodian's Counsel to GRC. The Custodian's Counsel asserts that the requested report prepared by Bruce Seidman, Esq. is not a government record subject to disclosure because said report constitutes attorney-client privileged as well as intra-agency advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Additionally, Counsel contends that even if said report is considered a government record, said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3⁷ because it is part of an ongoing investigation.

Counsel states that the requested report authored by Bruce Seidman, Esq., for the Township of Springfield concerns potential improprieties in the administering of the Fire

⁶ The Custodian attaches additional records which are not relevant to the adjudication of this complaint.

⁷ N.J.S.A. 47:1A-3.a.

Department's hiring exam. Counsel states that at the time the Township requested the report to be prepared, the Township was the subject of threatened or actual civil litigation concerning the hiring exam. Counsel states that the only written report from Bruce Seidman, Esq., to the Township is an e-mail addressed to the Township Attorney which was verbally transmitted to the Township Committee. Counsel states that to date, the Union County Prosecutor's Office is involved in an investigation regarding said procedure. Further, Counsel states that the civil litigation concerning the hiring exam was dismissed by the Superior Court of New Jersey. Counsel asserts that the OPRA request which is the subject of this Denial of Access Complaint was an attempt by the plaintiffs in the civil suit to obtain information they might not be entitled to by way of discovery. *See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div. 2005).

Based on the abovementioned facts, Counsel contends that at the time of the Complainant's OPRA request and at all times thereafter, the requested report prepared by Bruce Seidman, Esq., was the subject of attorney-client privilege and also constituted intra-agency advisory, consultative or deliberative material in light of the ongoing investigation. Counsel asserts that under all said circumstances, the requested report is not subject to disclosure under OPRA.

January 8, 2009

Letter from GRC to Custodian. The GRC requests a certification from either the Custodian or the Custodian's Council, whoever has personal knowledge of the facts at issue regarding the following:

1. The date on which the Township requested Bruce Seidman, Esq., to prepare the report at issue in this Denial of Access Complaint
2. The date on which Bruce Seidman, Esq., submitted said report to the Township and the name of the employee to whom said report was submitted
3. The date on which the Union County Prosecutor's Office commenced its investigation in which the requested report is involved

January 9, 2009

Custodian Counsel's Certification. Counsel certifies that the Township retained Bruce Seidman, Esq., by professional services resolution dated December 11, 2007. Counsel certifies that Mr. Seidman's report was submitted to him on December 7, 2007. Counsel certifies that he has no personal knowledge as to the specific date on which the Union County Prosecutor's Office began its investigation; however, Counsel certifies that on March 27, 2008 the Township received a subpoena from that office concerning this matter. Counsel suggests that on December 7, 2007, at the time that said report was issued to the Township Committee, the circumstances surrounding the firefighter exam were under internal investigation by the Committee rendering Mr. Seidman's report an intra-agency deliberative document if not also attorney-client privileged. Counsel certifies that the report has subsequently been made public although the Township maintains its position that the record is not required to be released. Counsel attaches a copy of said record to his certification.

January 14, 2009

Letter from GRC to Custodian. The GRC requests a certification from the Custodian indicating whether the Township's outside Counsel maintains a contract for Dr. Michael Gerson awarded since January 1, 2007.

January 14, 2009

Custodian Counsel's Certification. The Custodian's Counsel certifies on this date that he spoke to the Township's Labor Counsel, Mark S. Ruderman, Esq., who indicated that his office does not maintain a written contract with Dr. Michael Gerson.

March 12, 2009

Letter from GRC to Custodian's Counsel. The GRC requests a certification from either the Custodian or the Custodian's Counsel indicating the following:

1. The date on which the Township became aware that it was the subject of potential litigation regarding the potential improprieties in the Fire Department's hiring exam.
2. The date on which the Township began and ceased its investigation (if any) of potential improprieties in the Fire Department's hiring exam.
3. The name and contact information for the person or persons at the Union County Prosecutor's Office who are involved with or are conducting an investigation regarding the Fire Department's hiring exam.

March 18, 2009⁸

Custodian Counsel's Certification. The Custodian certifies that on January 25, 2008 he received and acknowledged service of a Verified Complaint and Order to Show Cause in the matter of D'Angelo v. Township of Springfield and Wayne Masiello. Counsel certifies that he does not have an independent recollection nor are there any other documents which would indicate any informal knowledge of the suit prior to January 25, 2008. Counsel asserts that this does not mean that there may not have been threats of suits or statements made by others that a lawsuit had or would be filed.

Counsel also certifies that at the Township Council's November 13, 2007 meeting, the Township discussed issues regarding the Fire Department hiring and possible litigation. Counsel certifies that from said date onward, the Township conducted an investigation of the hiring procedure. Counsel certifies that at the Township's meeting on November 27, 2007, the Township discussed retaining an outside attorney to serve as "fact finder." Counsel certifies that said attorney was Mr. Seidman who was formally retained by the Township via resolution dated December 11, 2007. Counsel certifies that Mr. Seidman's report was the beginning of an internal investigation, which included Counsel's investigation in preparation for possible litigation. Counsel certifies that the Township's investigation culminated via resolution on February 25, 2008 rescinding the prior hiring list due to possible improprieties in the testing.

Additionally, Counsel certifies that Detective Cassie Kim was the individual within the Union County Prosecutor's Office who served a subpoena upon the Township.

⁸ Additional correspondence submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.

Counsel also certifies that said subpoena also contained the name of A.P. William Kolano.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.?

OPRA states that:

“[i]mmediate access ordinarily shall be granted to...contracts, including collective negotiations agreements and individual employment contracts.” N.J.S.A. 47:1A-5.e.

OPRA also states that:

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

Additionally, OPRA provides that:

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

OPRA 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. Said provision also provides that a custodian shall advise the requestor when a record can be made available. 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. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, OPRA provides that a custodian shall ordinarily provide immediate access to contracts, including collective negotiations agreements and individual employment contracts. N.J.S.A. 47:1A-5.e.

Complainant's February 1, 2008 OPRA Request

The Custodian certified that she received the Complainant's OPRA request on February 1, 2008. The Custodian provided a written response to said request on February 8, 2008, the fifth (5th) business day following receipt of said request. The Custodian's response is detailed below:

Complainant's Request	Custodian's Response
Contract records for Peter A. Fico	See Resolution No. 2007-118, contract and COAF (provided by fax). The Custodian is attempting to locate the Affidavit of Publication and requests additional time to respond.
Contract records for FMBA	This record is exempt from disclosure because it involved collective negotiations.
Contract records for Michael Gerson	See Resolution No. 2007-49 (provided by fax). The contract would be this resolution and a statement by the other party to the contract indicating that he accepts this resolution as the contract. Said records, COAF and Affidavit of Publication have not been located. The Custodian requests additional time to respond.
Contract records for The Institute of Forensic Psychology	No response.
Any reports of other records on file by or on behalf of Bruce Seidman regarding any investigation he conducted	Denied as attorney-client privileged.

On February 11, 2008, the sixth (6th) business day following the Custodian's receipt of the request, the Complainant agreed to an extension of time, in writing, until February 18, 2008 in order for the Custodian to respond to his OPRA request. On the same date, the Custodian's Counsel confirmed the Township's need for said extension of time in writing to the Complainant due to the death of a Township employee. On February 15, 2008, the ninth (9th) business day following receipt of the request, the Custodian released the Professional Services Resolution for Dr. Gerson to the Complainant and stated that no written contract exists because Dr. Gerson was retained by outside counsel. The Custodian did not provide any further response to the Complainant's request until she submitted her SOI to the GRC on April 28, 2008.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to the Complainant's OPRA request on the seventh (7th) business day following receipt of said request. In said response, the Custodian requested an extension of time to respond to said

request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

The facts in Hardwick are similar to the facts in this instant complaint; specifically, that the Custodian provided a written response to the Complainant's request within the statutorily mandated seven (7) business days. In said response, the Custodian requested an extension of time but failed to provide an anticipated deadline date upon which the records would be provided. Additionally, the Custodian's Counsel provided a subsequent response to the Complainant's request within the statutorily mandated seven (7) business days stating that the Township will make every attempt to respond to the Complainant's request as soon as possible but that he appreciates the Complainant's understanding if said response takes an additional day or two due to the circumstances.

Therefore, although both the Custodian and the Custodian's Counsel provided written responses to the Complainant's OPRA request dated February 1, 2008 requesting an extension of time within the statutorily mandated seven (7) business days, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, supra, because they fail to provide an anticipated deadline date upon which the requested records will be provided.

However, the Complainant offered an extension of time until February 18, 2008 in order for the Custodian to respond to his request. The Custodian's Counsel released the requested resolution for Dr. Gerson on February 15, 2008 and stated that no contract exists. The Custodian did not provide any further response to the Complainant's request until she submitted her SOI to the GRC on April 28, 2008.

Therefore, the Custodian's failure to respond in writing to the Complainant's February 1, 2008 OPRA request for the Fico, Gerson and Institute of Forensic Psychology contracts either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days, as well as the Custodian's failure to grant or deny access to said records within the Complainant's offered extension of time results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contracts or an immediate response to the Complainant's request for contracts.

Complainant's February 18, 2008 OPRA Request

The Custodian certified that she received the Complainant's OPRA request on February 18, 2008. The Custodian provided a written response to the Complainant's request on March 4, 2008, the eleventh (11th) business day following the Custodian's receipt of said request. In said written response, the Custodian denied access to the requested contract on the basis that no contract exists. The Custodian did not respond to the Complainant's request for a letter proposal as referred to by Resolution No. 2007-49.

Therefore, the Custodian's failure to respond in writing to the Complainant's February 18, 2008 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide an immediate response to the Complainant's request for Dr. Gerson's contract.

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...*The terms shall not include inter-agency or intra-agency advisory, consultative or deliberative material. A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]...any record within the attorney-client privilege...information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"...where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to [OPRA]." N.J.S.A. 47:1A-3.a.

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.

Complainant’s February 1, 2008 OPRA Request

In the Custodian’s February 7, 2008 response to the Complainant’s OPRA request, the Custodian released Resolution No. 2007-118, a contract and Certificate of Available Funds regarding Peter A. Fico and requested additional time to locate the Affidavit of Publication. The Custodian, in her SOI dated April 28, 2008, certified that she searched all appropriate locations where the Affidavit of Publication would be located and has not been able to locate said record. The Custodian believes that no such publication took place.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that there was no unlawful denial of access to the requested record because the Custodian certified that no records responsive existed.

Therefore, because the Custodian in this complaint certified that there are no records responsive to the Complainant’s request for the Affidavit of Publication regarding Peter A. Fico’s contract and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian responded in writing within the statutorily mandated seven (7) business days.

Additionally, in the Custodian’s February 7, 2008 written response, the Custodian denied access to the requested FMBA records on the basis that said records are exempt from public access because said records involved collective negotiations. The Custodian certifies that no contract exists responsive to the Complainant’s request. The Custodian certifies that the notation in the Township’s meeting minutes dated March 27, 2007 does not refer to the approval of a final contract but rather refers to the approval of the final bargaining position to be taken by the Township during ongoing negotiations. The Custodian certifies that to date, the Township has not entered into a contract with FMBA for the time period beginning January 1, 2007.

The Complainant contends that immediate access shall be provided to collective negotiations agreements pursuant to N.J.S.A. 47:1A-5.e. However, N.J.S.A. 47:1A-1.1 exempts from public access “information generated by or on behalf of public employers

or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position.”

Therefore, because the Custodian certified that the requested FMBA records relate to the Township’s final bargaining position to be taken by the Township during ongoing negotiations and that no final agreement or contract exists, the requested FMBA records are not government records subject to public access pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian has carried her burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.

As for the requested contract records for Dr. Michael Gerson, the Custodian released Resolution No. 2007-49 on February 7, 2008 and stated that she needed more time to locate the Certificate of Available Funds, as well as the Affidavit of Publication. The Custodian released the Certificate of Available Funds with her SOI on April 28, 2008. The Custodian certified that the Township Attorney located said record during his preparation of the SOI. The Custodian certified that there are no other records responsive to this portion of the Complainant’s request.

Therefore, because the Custodian certified that there are no records responsive to the Complainant’s request for the Affidavit of Publication regarding Dr. Michael Gerson’s contract, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian responded in writing within the statutorily mandated seven (7) business days.

Additionally, the Complainant’s Counsel contends that because Dr. Gerson was retained with public funds and was awarded a professional services contract in accordance with Local Public Contracts Law, N.J.S.A. 40A:11-5(1)(a)(i) requires that a copy of the contract be “available for public inspection in the office of the clerk.” Counsel asserts that, although the Council has not addressed the issue, it appears as though the Township’s outside counsel falls within the meaning of “an officer, commission or agency or authority of” the Township whose records are government records subject to public access because the outside counsel acted as the Township’s agent by retaining Dr. Gerson. However, the Custodian’s Counsel certified that the Township’s outside counsel informed him that the outside counsel’s office does not maintain a written contract for Dr. Gerson.

Therefore, because the Custodian’s Counsel certified that the Township’s outside counsel also does not maintain a contract for Dr. Michael Gerson, the Council need not address whether the Township’s outside counsel is “an officer, commission or agency or authority of” the Township whose records are government records subject to public access under OPRA.

Further, the Custodian denied access to the requested report authored by Bruce Seidman, Esq. in her response to the Complainant dated February 7, 2008 on the basis that said report constitutes attorney-client privileged information and is exempt from public access. The Custodian’s Counsel states that at the time the Township requested the report to be prepared, the Township was the subject of threatened or actual civil

litigation concerning the hiring exam. Counsel certifies that at the Township Council's November 13, 2007 meeting, the Township discussed issues regarding the Fire Department's hiring exam and possible litigation. Counsel certifies that from said date onward, the Township conducted an investigation of the hiring procedure. Counsel certifies that at the Township's meeting on November 27, 2007, the Township discussed retaining an outside attorney to serve as "fact finder." Counsel certifies that said attorney was Mr. Seidman who was formally retained by the Township via resolution dated December 11, 2007. The Custodian's Counsel certifies that Bruce Seidman, Esq., submitted the requested report to Counsel on December 7, 2007. Counsel certifies that Mr. Seidman's report was the beginning of an internal investigation, which included Counsel's investigation in preparation for possible litigation. Counsel certifies that the Township's investigation culminated via resolution on February 25, 2008 rescinding the prior hiring list due to possible improprieties in the testing.

In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20* and *Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged...." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. *The Press of Atlantic City v. Ocean County Joint Insurance Fund*, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. *In Re Environmental Ins. Actions*, 259 N.J. Super. 308, 317 (App. Div. 1992).

The New Jersey Supreme Court has further addressed the specific set of circumstances required for the attorney-client privilege to apply. In *Payton v. NJ Turnpike Authority*, 148 N.J. 524 (1997), the court stated that:

"a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essentially nonlegal duties. An attorney who is not performing legal services or providing legal advice in some form does not qualify as a "lawyer" for purposes of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable. United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 563, 483 A.2d 821 (App.Div.1984). *That result obtains even where litigation may eventually arise from the subject of the attorney's activities. Ibid. [Emphasis added].*

The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegations of sexual harassment. If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was simply to enforce defendant's anti-

harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.

Although, given the state of the record and the trial court's failure to conduct an in camera review of the documents at issue, we are unable to draw conclusions regarding specific documents, we do not perceive the investigation that defendant performed as being one that generally is covered by the privilege. Defendant allegedly initiated the investigation months before plaintiff brought suit against it. The timetable thus suggests that defendant began to investigate in order to comply with its internal policies and to fulfill its legal duty under [Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 626 A.2d. 445 (1993)]. Although any internal sexual-harassment complaint has the potential to balloon into a lawsuit, effective internal remediation is independently necessary and may prevent such an eventuality. Thus, it is unclear, and perhaps unlikely, that the attorneys involved in the investigation were truly or primarily acting in their legal capacities. We agree with the statement that '[i]f all activities of a lawyer are to be classified as warranting the bar of discovery proceedings because of the attorney-client privilege, then it would be appropriate for clients to retain lawyers as investigators, custodians of records and the like, thereby turning the shield of the privilege into the sword of injustice.' [Metalsalts Corp. v. Weiss, 76 N.J. Super. 291, 299, 184 A.2d 435 (Ch.Div.1962).]

A substantial number of sexual-harassment lawsuits raise the issue of the employer's response to the employee's internal complaint. If the attorney-client privilege were to apply broadly to any internal investigation of this type undertaken by an attorney, regardless of the pendency of litigation or the provision of legal advice, then all employers would commission attorneys as investigators, thus defeating the paramount public interest in eradicating discrimination as expressed in the LAD and as interpreted in Lehmann and [Dixon v. Rutgers Univ., 110 N.J. 432, 446-47, 541 A.2d. 1046 (1988)]. The Appellate Division expressed this point: "We deem it unlikely that . . . Lehmann, having defined a cause of action against an employer based in part on the employer's response to a harassment complaint, [may be read] to permit an employer to immunize its response from inquiry by assigning a lawyer to investigate the complaint." 292 N.J. Super. at 50, 678 A.2d 279."

Similarly, in Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), the court held that "[i]n order to receive the protection of the work-product doctrine, a document must have been prepared primarily in anticipation of litigation. The anticipated litigation need not be imminent, as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." The court also held that "Cooper's Mission Statement/Charge made it clear that, even though one of the Committee's duties was to make recommendations as to possible future legal action, the primary motivation for drafting the report was not in anticipation of litigation. Litigation was merely one of many stated goals which prompted the creation of the Committee and the drafting of the Report."

In this instant complaint, the Custodian's Counsel certifies that the Township Council decided at its November 13, 2007 meeting to investigate alleged improprieties in the Fire Department's hiring exam. Counsel also certified that Bruce Seidman, Esq. was retained to be a fact finder in said investigation. The specific wording of the Professional Services Resolution used to retain Seidman's services states that "the Township of Springfield is in need of contracting for an outside party to perform an independent, special investigation, within the Township..." Additionally, the resolution states that Seidman was retained "to serve as independent investigator." Further, Counsel certifies that he does not have any independent knowledge or any documents indicating informal knowledge of the lawsuit that was filed against the Township on January 25, 2008 regarding the hiring exam.

Therefore, because the primary purpose of the investigatory report authored by Bruce Seidman, Esq. was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, the attorney-client privilege does not apply pursuant to Payton, *supra*, Cooper, *supra*, and N.J.S.A. 47:1A-1.1.

Additionally, the Custodian's Counsel asserts that said report constitutes intra-agency advisory, consultative or deliberative material which is not considered a government record pursuant to N.J.S.A. 47:1A-1.1.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). Federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

"[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption

of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

"[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies." In Re Liquidation of Integrity, supra, 165 N.J. at 88, citing McClain, supra, 99 N.J. at 361-62, 492 A.2d 991.

In In Re Liquidation of Integrity, supra, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.

- d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*
- e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

In this instant complaint, the GRC had the opportunity to review the requested report without having to order an *in camera* review because the Custodian's Counsel provided said report to the GRC voluntarily. In said report, Bruce Seidman, Esq. discusses the interviews he conducted with four (4) individuals regarding the Fire Department's hiring exam. The text of the report is purely factual and does not contain any advice or recommendations. Therefore, said report is not exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.⁹

Further, the Custodian's certification in her SOI dated April 28, 2008 indicates that the report authored by Bruce Seidman, Esq. is involved in an ongoing criminal investigation with the Union County Prosecutor's Office. Counsel certifies that he does not have any personal knowledge as to the specific date on which the Union County Prosecutor's Office began its investigation.

OPRA exempts from public access records that pertain to an investigation in progress by any public agency, with the exception that records which were subject to public access prior to the investigation shall not be withheld. N.J.S.A. 47:1A-3.a.

Although the Custodian and the Custodian's Counsel assert that the report authored by Bruce Seidman, Esq. pertains to an ongoing investigation by the Union County Prosecutor's Office, said report actually pertains to an ongoing investigation conducted by the Township itself. Specifically, the Township decided to investigate alleged improprieties in the Fire Department's hiring exam and hired Bruce Seidman, Esq. to act as a fact finder in said investigation. The Custodian's Counsel certifies that the Township concluded its investigation via resolution on February 25, 2008 which rescinded the prior hiring list due to possible improprieties in the testing. The Complainant submitted his OPRA request for said report on February 1, 2008 while the Township's investigation was ongoing.

Therefore, because the requested report authored by Bruce Seidman, Esq. pertained to an ongoing investigation conducted by the Township, and because the Complainant submitted his OPRA request while said investigation was ongoing, as well

⁹ In Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009) the court held that "a record that contains or involves factual components is entitled to deliberative-process protection under...[OPRA] when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process." The Supreme Court's decision reversed the Appellate Division's decision from 2007. Thus, at the time of the Complainant's OPRA request which gave rise to this instant complaint, this area was unsettled in law. The GRC declines to retroactively apply the Supreme Court's decision in this instant complaint.

as because said report could not have been subject to public access prior to the investigation since said report was created after the Township commenced its investigation, said report is exempt from public access pursuant to N.J.S.A. 47:1A-3.a.

Further, because the Custodian denied access to said report in her written response to the Complainant's request on the basis that said report constituted attorney-client privilege, and because the attorney-client privilege does not apply to the requested report authored by Bruce Seidman, Esq., since the primary purpose of said report was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, pursuant to Payton, *supra*, Cooper, *supra*, and N.J.S.A. 47:1A-1.1, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6 since she failed to identify the proper legal basis for said denial. However, the Custodian did not unlawfully deny access to said report because said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a because of the Township's ongoing investigation at the time of the request.

Regarding the Complainant's request for The Institute of Forensic Psychology records, the Custodian certified in her SOI dated April 28, 2008 that no records responsive exist.

Therefore, because the Custodian certified that there are no records responsive to the Complainant's request for The Institute of Forensic Psychology records, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*, had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.

Complainant's February 18, 2008 OPRA Request

In the Custodian's March 4, 2008 written response to the Complainant's OPRA request, the Custodian denied access to the requested contract with Dr. Michael Gerson on the basis that no contract exists. The Custodian also certified in her SOI dated April 28, 2008 that no contract exists and there is no evidence in the record to refute the Custodian's certification.

Therefore, because the Custodian certified that there are no records responsive to the Complainant's request for Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access to the Complainant's OPRA request dated February 18, 2008 was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*, had the Custodian responded within the statutorily mandated seven (7) business day response time.

Additionally, the Complainant requested the letter proposal referred to by Resolution No. 2007-49. The Custodian failed to provide any response to the Complainant regarding this requested record. The Custodian also failed to provide any response to the GRC regarding said record.

Therefore, the Custodian failed to carry her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested letter proposal referred to by Resolution No. 2007-49. As such, the Custodian shall release said record to the Complainant with appropriate redactions, if any.

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.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a prevailing party 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 both the Custodian and the Custodian's Counsel provided written responses to the Complainant's OPRA request dated February 1, 2008 requesting an extension of time within the statutorily mandated seven (7) business days, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. The Custodian's failure to respond in writing to the Complainant's February 1, 2008 OPRA request for the Fico, Gerson and Institute of Forensic Psychology contracts either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days, as well as the Custodian's failure to grant or deny access to said records within the Complainant's offered extension of time results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contracts or an immediate response to the Complainant's request for contracts.
3. The Custodian's failure to respond in writing to the Complainant's February 18, 2008 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v.

Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide an immediate response to the Complainant's request for Dr. Gerson's contract.

4. Because the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Peter A. Fico's contract and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
5. Because the Custodian certified that the requested Fireman's Mutual Benevolent Association records relate to the Township's final bargaining position to be taken by the Township during ongoing negotiations and that no final agreement or contract exists, the requested Fireman's Mutual Benevolent Association records are not government records subject to public access pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian has carried her burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. Because the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
7. Because the Custodian's Counsel certified that the Township's outside counsel also does not maintain a contract for Dr. Michael Gerson, the Council need not address whether the Township's outside counsel is "an officer, commission or agency or authority of" the Township whose records are government records subject to public access under OPRA.
8. Because the primary purpose of the investigatory report authored by Bruce Seidman, Esq., was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, the attorney-client privilege does not apply pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1.
9. Because the text of the report authored by Bruce Seidman, Esq., is purely factual and does not contain any advice or recommendations, said report is not exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

10. Because the requested report authored by Bruce Seidman, Esq., pertained to an ongoing investigation conducted by the Township, and because the Complainant submitted his OPRA request while said investigation was ongoing, as well as because said report could not have been subject to public access prior to the investigation since said report was created after the Township commenced its investigation, said report is exempt from public access pursuant to N.J.S.A. 47:1A-3.a.
11. Because the Custodian denied access to the report authored by Bruce Seidman, Esq., in her written response to the Complainant's request on the basis that said report constituted attorney-client privilege, and because the attorney-client privilege does not apply to the requested report since the primary purpose of said report was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6 since she failed to identify the proper legal basis for said denial. However, the Custodian did not unlawfully deny access to said report because said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because of the Township's ongoing investigation at the time of the request
12. Because the Custodian certified that there are no records responsive to the Complainant's request for The Institute of Forensic Psychology records, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
13. Because the Custodian certified that there are no records responsive to the Complainant's request for Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access to the Complainant's OPRA request dated February 18, 2008 was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
14. The Custodian failed to carry her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested letter proposal referred to by Resolution No. 2007-49. As such, the Custodian shall release said record to the Complainant with appropriate redactions, if any.
15. **The Custodian shall comply with item # 14 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 1:4-4¹⁰, to the Executive Director. If no record responsive exists, the Custodian must certify to this fact.

16. 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.
17. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009

¹⁰ "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."
John Paff v. Township of Springfield (Union), 2008-77 – Findings and Recommendations of the Executive Director