



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

FINAL DECISION

June 11, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-85

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council ("Council") considered the May 20, 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. While the Custodian provided the requested records to the Complainant within the five (5) business day time frame to comply, the Custodian's failure to provide the redaction index until March 16, 2009 and failure to provide certified confirmation of compliance to the GRC results in the Custodian's noncompliance of the Council's February 25, 2009 Interim Order.
2. Although the Custodian's failure to respond to the Complainant's July 14, 2006, OPRA request until twenty (20) business days after receipt resulted in a deemed denial, the Custodian's failure to respond immediately to the Complainant's request for invoices resulted in a violation of N.J.S.A. 47:1A-5.e., and the Custodian failed to comply with the Council's February 25, 2009 Interim Order by not providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director, the Custodian did provide the requested records to the Complainant within five (5) business days after receipt of the Council's Interim Order. 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 unlawful denial of access appears negligent and heedless since he

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."



is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the
Government Records Council
On The 11th 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.

Janice L. Kovach
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-85

v.

**Borough of South Bound Brook
(Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of invoices submitted to Cooper & Cooper for services rendered by the Borough Attorney for each month from August, 2005 to June, 2006.

Request Made: July 14, 2006

Response Made: August 11, 2006

Custodian: Donald E. Kazar

GRC Complaint Filed: April 21, 2008³

Background

February 25, 2009

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

1. The Custodian's failure to respond in writing to the Complainant's 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).
2. Because the Custodian failed to immediately grant or deny access to the requested invoices or respond in writing requesting additional time to respond, the Custodian has also violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007).

¹ No legal representation listed on record.

² Represented by William Cooper, Esq. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

3. The Custodian has failed to bear his burden of proof that this denial of access to the requested invoices from August, 2005 to June, 2006 was lawful under N.J.S.A. 47:1A-6. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. If no records responsive to the Complainant's July 14, 2006 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, 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 1:4-4⁴, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

March 6, 2009

Council's Interim Order distributed to the parties.

March 13, 2009

Letter from the Custodian's Counsel to the Complainant. Counsel states that pursuant to the GRC's February 25, 2009 Interim Order, the requested Cooper & Cooper invoices for 2005 and 2006 are enclosed.

March 16, 2009

E-mail from the Complainant to the GRC attaching a letter from the Custodian's Counsel to the Complainant dated March 13, 2009.

The Complainant states that paragraph No. 3 of the GRC's February 25, 2009 Interim Order orders the Custodian to "disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g."

Further, the Complainant states that paragraph No. 4 requires that the Custodian comply with paragraph No. 3 within five (5) business day from receipt of the Council's Interim Order. The Complainant emphasizes that paragraph No. 4 reiterates that a detailed document index explaining any redactions be provided to the Complainant. The

⁴ "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."
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Complainant argues that while the invoices provided contained many redactions, Counsel failed to provide a redaction index.

The Complainant contends that even after waiting for more than two (2) years to have this request fulfilled, the Custodian failed to comply even in light of the fact that the uncomplicated rules for complying with the GRC's Interim Order were very explicit. Additionally, the Complainant asserts that he cannot confirm that all records requested were provided given the disheveled nature in which the records were forwarded to the Complainant.

March 16, 2009

Letter from the Custodian's Counsel to the Complainant attaching a redaction index.

Counsel states that a redaction index with another copy of the redacted invoices is enclosed. Counsel states that this letter should satisfy the issues raised by the Complainant.

March 16, 2009

Letter from the Custodian's Counsel to the GRC. Counsel states that this letter serves as a response to the Complainant's e-mail to the GRC dated March 16, 2009. Counsel states that it should be noted that the Complainant's OPRA request was for two (2) years of invoices in which over one hundred pages were provided to the Complainant at no cost.

Counsel asserts that the redactions were minimal and, as the redaction index clearly shows, were related to personnel matters. Counsel asserts that the redactions were required to protect the identity of the employees involved in those personnel matters.

March 18, 2009

E-mail from the Complainant to the GRC attaching a letter from the Custodian's Counsel to the Complainant dated March 16, 2009.

The Complainant asserts that Counsel's March 16, 2009 letter attaching the redaction index reinforces the Complainant's argument that the Custodian had no intention of complying with the GRC's February 25, 2009 Interim Order. The Complainant contends that the redaction index was only provided to the Complainant as a response to the Complainant's March 16, 2009 e-mail, which enhances the Complainant's position that the Custodian's actions are a knowing and willful violation of OPRA.

March 24, 2009

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of Counsel's March 16, 2009 letter regarding the Complainant's assertion of noncompliance. The GRC states that, to date, the Custodian has not provided any evidence of compliance nor has the Custodian provided certified confirmation to the GRC. The GRC requests that the Custodian provide a certification immediately.

March 26, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that he received the Council's February 25, 2009 Interim Order on March 9, 2009. The Custodian certifies that the Law Office of Cooper & Cooper made the requested invoices available to the Complainant on March 13, 2009. Further, the Custodian certifies that following the Complainant's objection that a redaction index was not furnished with the requested records, such index was provided to the Complainant on March 16, 2009. The Custodian avers that he has fully complied with the Council's February 25, 2009 Interim Order.

Analysis

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

The Custodian certified to providing redacted copies of the requested invoices to the Complainant on March 13, 2009, five (5) business days after receipt of the Council's Interim Order. However, the Custodian failed to provide a redaction index with the invoices until March 16, 2009 and failed to provide certified confirmation of compliance to the GRC until March 26, 2009.

Therefore, while the Custodian provided the requested records to the Complainant within the five (5) business day time frame to comply, the Custodian's failure to provide the redaction index until March 16, 2009 and failure to provide certified confirmation of compliance to the GRC results in the Custodian's noncompliance with the Council's February 25, 2009 Interim Order.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of

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

Although the Custodian’s failure to respond to respond to the Complainant’s July 14, 2006, OPRA request until twenty (20) business days after receipt resulted in a deemed denial, the Custodian’s failure to respond immediately to the Complainant’s request for invoices resulted in a violation of N.J.S.A. 47:1A-5.e., and the Custodian failed to comply with the Council’s February 25, 2009 Interim Order by not providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director, the Custodian did provide the requested records to the Complainant within five (5) business days after receipt of the Council’s Interim Order. 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 unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While the Custodian provided the requested records to the Complainant within the five (5) business day time frame to comply, the Custodian’s failure to provide the redaction index until March 16, 2009 and failure to provide certified confirmation of compliance to the GRC results in the Custodian’s noncompliance of the Council’s February 25, 2009 Interim Order.
2. Although the Custodian’s failure to respond to the Complainant’s July 14, 2006, OPRA request until twenty (20) business days after receipt resulted in a deemed denial, the Custodian’s failure to respond immediately to the Complainant’s request for invoices resulted in a violation of N.J.S.A. 47:1A-5.e., and the Custodian failed to comply with the Council’s February 25, 2009 Interim Order by not providing certified confirmation

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

of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director, the Custodian did provide the requested records to the Complainant within five (5) business days after receipt of the Council's Interim Order. 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 unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2009

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."
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GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-85

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

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

1. The Custodian’s failure to respond in writing to the Complainant’s 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).
2. Because the Custodian failed to immediately grant or deny access to the requested invoices or respond in writing requesting additional time to respond, the Custodian has also violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007).
3. The Custodian has failed to bear his burden of proof that this denial of access to the requested invoices from August, 2005 to June, 2006 was lawful under N.J.S.A. 47:1A-6. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. If no records responsive to the Complainant’s July 14, 2006 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**



4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 6, 2009

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-85

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of invoices submitted to Cooper & Cooper for services rendered by the Borough Attorney for each month from August, 2005 to June, 2006.

Request Made: July 14, 2006

Response Made: August 11, 2006

Custodian: Donald E. Kazar

GRC Complaint Filed: April 21, 2008³

Background

July 14, 2006

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

July 26, 2006

E-mail from the Complainant to the Custodian. The Complainant states that he submitted an OPRA request eight (8) days earlier on July 14, 2006. The Complainant states that if he does not receive a response from the Custodian within twenty-four (24) hours, the Custodian's failure to respond will be considered a denial of access and the Complainant will be forced to challenge the Custodian's decision.

August 11, 2006

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the twentieth (20th) business day following receipt of such request. The Custodian requests additional time to process the Complainant's OPRA request.⁴

¹ No legal representation listed on record.

² Represented by William Cooper, Esq. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant acknowledges in his August 23, 2006 e-mail to the Custodian that the Custodian verbally requested an extension of time to respond to the Complainant's request on August 11, 2006. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-85 – Findings and Recommendations of the Executive Director

August 23, 2006

E-mail from the Complainant to the Custodian. The Complainant confirms that the Custodian verbally requested an extension of time to comply with the Complainant's OPRA request. The Complainant requests that the Custodian provide a specific date on which the requested records can be made available in order to avoid the extension of time from becoming infinite.

August 30, 2006

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian has failed to comply with the statutorily mandated seven (7) business day time frame in which to respond to the Complainant's OPRA request. The Complainant further states that although the Custodian requested an extension of time to comply with the Complainant's request, no response has been received to date. The Complainant states that if no records are received by September 1, 2006, the Complainant will instruct his attorney to file a complaint which may include a request for attorney's fees.

October 19, 2006

E-mail from the Complainant to the Custodian. The Complainant reminds the Custodian that the records responsive to the July 14, 2006 OPRA request have not been provided to the Complainant.

April 21, 2008

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

- Complainant's OPRA request dated July 14, 2006.
- Letter from the Complainant to the Custodian dated July 26, 2006.
- Letter from the Complainant to the Custodian dated August 23, 2006.
- Letter from the Complainant to the Custodian dated August 30, 2006.
- Letter from the Complainant to the Custodian dated October 19, 2006.

The Complainant states that he submitted an OPRA request to the Custodian on July 14, 2006. The Complainant states that he inquired as to the status of the request on July 26, 2006. The Complainant further states that the Custodian responded verbally on August 11, 2006 requesting additional time to respond to the Complainant's request, but failed to provide access even after three (3) reminders from the Complainant on August 23, 2006, August 30, 2006 and October 19, 2006.

The Complainant states that OPRA provides that a requestor is entitled to receive a response either granting or denying access to requested records within the statutorily mandated seven (7) business day response time. The Complainant states that the Custodian's failure to respond providing or denying access to the requested records for nearly two (2) years amounts to a knowing and willful violation of OPRA.

The Complainant did not agree to mediate this complaint.

July 1, 2008

Request for the Statement of Information sent to the Custodian.

July 7, 2008

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 11, 2008 to submit the Statement of Information because he was not in the office the prior week.

July 7, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension of time until July 11, 2008 to submit the Statement of Information.

July 11, 2008

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated July 14, 2006.

The Custodian certifies that his search for the requested records involved searching for purchase orders on the computer to see if the records existed and where they would be filed in the finance office.

The Custodian states that the Complainant was an employee with the Borough at the time of this request and would often sit in the Custodian's office and ask about the records requested. The Custodian contends that the Complainant was aware that the Custodian's position with the Borough was only part-time and the Complainant stated that he would wait to receive the requested records. The Custodian asserts that at one point the Complainant offered to help retrieve the requested records, but that the Complainant subsequently stated he would wait until the Custodian had time to obtain the records.

The Custodian questions why the Complainant waited so long to file a complaint. The Custodian wonders why the Complainant took nearly two (2) years to file a complaint with the GRC if the Complainant felt that a violation of OPRA occurred ten (10) days after submission of the request. Finally, the Custodian asserts that he provided the Complainant with records in the past even without an OPRA request form based on the assertion that both parties had an understanding separate from the provisions of OPRA.

August 6, 2008

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian's own words prove that this denial of access was not only knowing and willful, but also deliberate. The Complainant contends that the Custodian attempted to excuse his wrong-doing through the Complainant's willingness to be flexible with the statutorily mandated time frame prescribed by OPRA.

The Complainant asserts that, assuming the Custodian's statement that the Complainant used to sit in the Custodian's office and ask about this request is accurate, the statement proves that the Complainant pled many times for the requested records. The Complainant states that the Custodian did request additional time on August 11,

2006, but that three (3) additional follow-up letters from the Complainant regarding the status of the request were ignored by the Custodian.

The Complainant states that the Custodian admits and confirms that a request was made on July 14, 2006, or two (2) years prior, but that the Custodian has yet to provide any records responsive to this request.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

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

OPRA also provides that:

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

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the

record is currently available and not in storage or archived....” N.J.S.A. 47:1A-5.i.

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

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

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

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

In this complaint, the Complainant states that the Custodian verbally requested additional time to respond to the Complainant’s July 14, 2006 OPRA request on August 11, 2006, but to date has failed to provide any records responsive or any reason for the denial of access. Conversely, the Custodian asserts that he believed that the Custodian and Complainant had an understanding separate from the provisions of OPRA. Regardless of any verbal agreement that may have been struck between the Custodian and Complainant, N.J.S.A. 47:1A-5.i. is specific regarding the duty of a custodian to respond in writing within the statutorily mandated seven (7) business day time frame when responding to an official OPRA request for government records.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g.,

⁵ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, the invoices requested are specifically classified as records to which immediate access must be granted pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Therefore, because the Custodian failed to immediately grant or deny access to the requested invoices or respond in writing requesting a specific amount of additional time to respond, the Custodian has also violated N.J.S.A. 47:1A-5.e. See Herron, *supra*.

Further, the Custodian has failed to bear his burden of proof that this denial of access to the requested invoices from August, 2005 to June, 2006 was lawful under N.J.S.A. 47:1A-6. The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. If no records responsive to the Complainant’s July 14, 2006 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.

Additionally, the Custodian’s contention that the Complainant waited too long to file this Denial of Access Complaint is irrelevant because there is no statute of limitations under OPRA on Denial of Access Complaints filed with the GRC.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s 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).

2. Because the Custodian failed to immediately grant or deny access to the requested invoices or respond in writing requesting additional time to respond, the Custodian has also violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007).
3. The Custodian has failed to bear his burden of proof that this denial of access to the requested invoices from August, 2005 to June, 2006 was lawful under N.J.S.A. 47:1A-6. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. If no records responsive to the Complainant's July 14, 2006 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009

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."