



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**June 28, 2011 Government Records Council Meeting**

John Bentz  
Complainant

Complaint No. 2008-89

v.

Borough of Paramus (Bergen)  
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 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. Pursuant to N.J.S.A. 47:1A-5.i. and Robert A. Verry v. Borough of South Bound Brook, GRC Complaint No. 2008-48 (March 2009), the Custodian’s April 15, 2008 response letter is insufficient because the Custodian failed to indicate a specific date upon which the records responsive to the OPRA request would be provided.
2. Although the Custodian violated N.J.S.A. 47:1A-5.i., by failing to indicate a specific date upon which the records responsive to the OPRA request would be provided, the Custodian certified in the Statement of Information that all records responsive to the Complainant’s OPRA request were provided to the Complainant, and the Complainant has not submitted any evidence to refute the Custodian’s certification in this regard. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

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 28<sup>th</sup> Day of June, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: July 12, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2011 Council Meeting**

**John Bentz<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2008-89**

v.

**Borough of Paramus (Bergen)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** All legal fees relating to disciplinary charges against John Bentz, including but not limited to those of Dennis Oury, Esq.,<sup>3</sup> Eric Bernstein, Esq.,<sup>4</sup> and Judge James Murphy (Hearing Officer) from August 2006 through present.

**Request Made:** March 24, 2008

**Response Made:** March 26, 2008

**Custodian:** Ian Shore

**GRC Complaint Filed:** May 6, 2008<sup>5</sup>

**Background**

**March 24, 2008**

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

**March 26, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that attorney bills are not maintained by case name and the Chief Financial Officer has requested computerized printouts of itemized billing from both Dennis Oury, Esq. and Eric Bernstein, Esq. The Custodian requests an extension of an additional fifteen (15) business days to provide the information requested by the Complainant.

**April 15, 2008**

Letter from the Custodian to the Complainant. The Custodian states that he has consulted with the Chief Financial Officer and has been advised that the Chief Financial Officer has not received itemized billing records from Dennis Oury, Esq., or Eric

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

<sup>2</sup> Represented by John Ten Hoeve, Jr., Esq. (Hackensack, NJ).

<sup>3</sup> Mr. Oury is the Borough Attorney for the Borough of Paramus.

<sup>4</sup> Mr. Bernstein is the Labor Litigation Attorney for the Borough of Paramus.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

Bernstein, Esq. The Custodian informs the Complainant that he will contact the Complainant when he has more information.

**May 6, 2008**

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

- Complainant’s OPRA request dated March 24, 2008;
- Letter from the Custodian to the Complainant dated March 26, 2008.

The Complainant states that he filed his OPRA request on March 24, 2008. The Complainant further states that several days after submitting his request, he received the billing records for Mr. Murphy.<sup>6</sup> The Complainant also states that on March 26, 2008, he received the Custodian’s request for a fifteen (15) day extension to respond to the OPRA request. The Complainant states that to date he has not received the remaining records from his records request.

The Complainant did not agree to mediate this complaint.

**June 9, 2008**

Request for the Statement of Information sent to the Custodian.

**August 15, 2008**

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on June 9, 2008 and to date the GRC has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**August 19, 2008**

Letter from the Custodian to the GRC. The Custodian states that he is only aware of one (1) Denial of Access Complaint from the Complainant (GRC Complaint No. 2008-25) and that the Custodian has already provided a Statement of Information regarding that complaint.

**August 25, 2008**

Letter from the GRC to the Custodian. The GRC states that the GRC sent the Custodian a request for a Statement of Information (“SOI”) and a copy of the Denial of Access Complaint in this matter on June 9, 2008. The GRC further states that the GRC has not received a completed SOI or a request for an extension in this matter. The GRC encloses a copy of the Denial of Access Complaint and a blank SOI form.

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<sup>6</sup> Neither the Complainant nor the Custodian provided any additional information regarding the date upon which the billing records for Mr. Murphy were provided to the Complainant.

**September 2, 2008**

Custodian's SOI, attaching a letter from the Custodian to the Complainant dated April 15, 2008. The Custodian certifies that he responded to the Complainant's OPRA request on March 26, 2008 and April 15, 2008.<sup>7</sup>

**September 24, 2008**

Supplement to the Custodian's SOI with the following attachments:

- Letter from the Custodian to the Complainant dated March 26, 2008
- Letter from the Custodian to the Complainant dated April 15, 2008
- Invoice #14508 from Eric Bernstein, Esq., to the Borough of Paramus dated February 5, 2007 (2 pages)
- Invoice #14667 from Eric Bernstein, Esq., to the Borough of Paramus dated March 2, 2007 (1 page)
- Invoice #14857 from Eric Bernstein, Esq., to the Borough of Paramus dated April 5, 2007 (3 pages)
- Invoice #14860 from Eric Bernstein, Esq., to the Borough of Paramus dated April 5, 2007 (1 page)
- Invoice #15038 from Eric Bernstein, Esq., to the Borough of Paramus dated May 2, 2007 (1 page)
- Invoice #15041 from Eric Bernstein, Esq., to the Borough of Paramus dated May 2, 2007 (1 page)
- Invoice #36509 from Dennis Oury, Esq., to the Borough of Paramus dated May 7, 2007 (2 pages)
- Invoice #15209 from Eric Bernstein, Esq., to the Borough of Paramus dated June 4, 2007 (2 pages)
- Invoice #15212 from Eric Bernstein, Esq., to the Borough of Paramus dated June 4, 2007 (1 page)
- Invoice #36616 from Dennis Oury, Esq., to the Borough of Paramus dated June 6, 2007 (2 pages)
- Invoice #15395 from Eric Bernstein, Esq., to the Borough of Paramus dated July 5, 2007 (2 pages)
- Invoice #15397 from Eric Bernstein, Esq., to the Borough of Paramus dated July 5, 2007 (2 pages)
- Invoice #36726 Dennis Oury, Esq., to the Borough of Paramus dated July 9, 2007 (1 page)
- Invoice #15561 from Eric Bernstein, Esq., to the Borough of Paramus dated August 6, 2007 (1 page)
- Invoice #15563 from Eric Bernstein, Esq., to the Borough of Paramus dated August 6, 2007 (1 page)
- Invoice #15749 from Eric Bernstein, Esq., to the Borough of Paramus dated September 5, 2007 (1 page)
- Invoice #15752 from Eric Bernstein, Esq., to the Borough of Paramus dated September 5, 2007 (1 page)

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<sup>7</sup> No further information was provided by the Custodian.

- Invoice #15929 from Eric Bernstein, Esq., to the Borough of Paramus dated October 2, 2007 (2 pages)
- Invoice #15933 from Eric Bernstein, Esq., to the Borough of Paramus dated October 2, 2007 (2 pages)
- Invoice #16105 from Eric Bernstein, Esq., to the Borough of Paramus dated November 2, 2007 (2 pages)
- Invoice #16299 from Eric Bernstein, Esq., to the Borough of Paramus dated December 4, 2007 (1 page)
- Invoice #16529 from Eric Bernstein, Esq., to the Borough of Paramus dated January 2, 2008 ( 1 page)
- Invoice #16532 from Eric Bernstein, Esq., to the Borough of Paramus dated January 2, 2008 (2 pages)
- Invoice #16669 from Eric Bernstein, Esq., to the Borough of Paramus dated February 4, 2008 (1 page)
- Invoice # 16672 from Eric Bernstein, Esq., to the Borough of Paramus dated February 4, 2008 (1 page)
- Invoice # 16866 from Eric Bernstein, Esq., to the Borough of Paramus dated March 3, 2008 (2 pages)
- Invoice # 17063 from Eric Bernstein, Esq., to the Borough of Paramus dated April 3, 2008 (2 pages)
- Invoice #17270 from Eric Bernstein, Esq, to the Borough of Paramus dated May 2, 2008 ( 4 pages)
- Invoice # 17273 from Eric Bernstein, Esq., to the Borough of Paramus dated May 2, 2008 (1 page)
- Invoice #17479 from Eric Bernstein, Esq., to the Borough of Paramus dated June 3, 2008 (2 pages)
- Invoice #17695 from Eric Bernstein, Esq., to the Borough of Paramus dated July 2, 2008 (1 page)
- Invoice #17903 from Eric Bernstein, Esq., to the Borough of Paramus dated August 4, 2008 ( 3 pages)
- Invoice # 17905 from Eric Bernstein, Esq., to the Borough of Paramus dated August 4, 2008 (2 pages)
- Invoice #18151 from Eric Bernstein, Esq., to the Borough of Paramus dated September 3, 2008 ( 2 pages)
- Invoice #18153 from Eric Bernstein, Esq., to the Borough of Paramus dated September 3, 2008 (1 page)

The Custodian certifies that he received the Complainant's OPRA request on March 24, 2008, and that he responded to such request on March 26, 2008 and April 15, 2008. The Custodian further certifies that he was unable to provide the requested records promptly because the Borough did not have a way to separate attorney billing information on the basis of case name. The Custodian certifies that he requested that the attorneys whose records were sought provide the responsive records to the Custodian. The Custodian also certifies that one of the attorneys responded on April 30, 2008. The Custodian certifies that he received a similar request to the one at issue from a Borough police officer and provided such records to the requestor in that matter, rather than to the Complainant herein. The Custodian also certifies that Eric Bernstein, Esq., provided

responsive records. The Custodian states that all requested records have now been provided. The Custodian states that the delay in providing responsive records was caused by an oversight and the difficulty in securing specific billing information.

### 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 provides that:

“Immediate 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.” N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If 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.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“The 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.” 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.

The evidence of record indicates that the Custodian responded to the Complainant’s OPRA request on March 26, 2008, the second (2<sup>nd</sup>) business day following receipt of the Complainant’s OPRA request, requesting a fifteen (15) business day extension to obtain the records requested. Moreover, the evidence of record also shows that on April 15, 2008, the fifteenth (15<sup>th</sup>) business day of the extension requested by the Custodian, the Custodian informed the Complainant that although the agency had requested additional invoices from Dennis Oury, Esq. and Eric Bernstein, Esq. showing only the legal fees associated with the disciplinary charges against John Bentz, such records had not yet been received. The Custodian informed the Complainant that he would contact the Complainant when he had more information. The Custodian did not provide a date certain when the Complainant could expect resolution of his OPRA request.

In Robert A. Verry v. Borough of South Bound Brook, GRC Complaint No. 2008-48 (March 2009), the custodian sought in writing an extension of time to respond to Request Item No. 2 on the same business day as receipt of the complainant’s OPRA request, but failed to provide a specific date upon which the complainant would be provided with the record responsive to request Item No. 2. The GRC held that because the custodian failed to provide within the statutorily mandated seven (7) business days a specific date upon which the record responsive to Request Item No. 2 would be provided, the custodian’s response to the complainant requesting an extension of time was insufficient under N.J.S.A. 47:1A-5.i.

Like the custodian in Verry, the Custodian in the instant matter sought an extension of time to respond to the Complainant’s OPRA request, but upon expiration of that extension, the Custodian failed to provide the records requested to the Complainant.

Therefore, pursuant to N.J.S.A. 47:1A-5.i and Robert A. Verry v. Borough of South Bound Brook, GRC Complaint No. 2008-48 (March 2009), the Custodian’s April 15, 2008 response letter is insufficient because the Custodian failed to indicate a specific date upon which the records responsive to the OPRA request would be provided.

Because the Custodian certified in the SOI that all records responsive to the Complainant’s OPRA request have been provided, and because the Complainant has not submitted any evidence to refute the Custodian’s certification in this regard, the Council declines to order disclosure of the responsive records in this matter.



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

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

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

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

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

Although the Custodian violated N.J.S.A. 47:1A-5.i., by failing to indicate a specific date upon which the records responsive to the OPRA request would be provided, the Custodian certified in the SOI that all records responsive to the Complainant’s OPRA request were provided to the Complainant, and the Complainant has not submitted any evidence to refute the Custodian’s certification in this regard. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.i. and Robert A. Verry v. Borough of South Bound Brook, GRC Complaint No. 2008-48 (March 2009), the Custodian’s

April 15, 2008 response letter is insufficient because the Custodian failed to indicate a specific date upon which the records responsive to the OPRA request would be provided.

2. Although the Custodian violated N.J.S.A. 47:1A-5.i., by failing to indicate a specific date upon which the records responsive to the OPRA request would be provided, the Custodian certified in the Statement of Information that all records responsive to the Complainant's OPRA request were provided to the Complainant, and the Complainant has not submitted any evidence to refute the Custodian's certification in this regard. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

Approved By: Catherine Starghill, Esq.  
Executive Director

June 21, 2011