



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2009-111

v.

Township of Irvington (Essex)
Custodian of Record

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

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

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

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: April 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2009-111

v.

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

Records Relevant to Complaint: On-site inspection of:

1. A list of all expenses, including all playground equipment, for the renovation of the playground at Irvington Neighborhood Improvement Corporation (“INIC”), pursuant to a grant issued to the Township of Irvington by Comcast.
2. All invoices submitted by Ward Studios (Mr. Reggie Ward) for photography services rendered to the Township of Irvington in January 2009 and February 2009.
3. A list of all expenses for the operation of Irvington Television (“ITV”) 34 from January 2007 to the date of this OPRA request.³

Request Made: March 11, 2009

Response Made: March 27, 2009

Custodian: Harold E. Weiner

GRC Complaint Filed: March 27, 2009⁴

Background

December 16, 2009

Government Records Council’s (“Council”) Interim Order. At its December 16, 2009 public meeting, the Council considered the December 9, 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. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure or certify that no records responsive to the Complainant’s OPRA request exist pursuant to the terms of the Council’s November 4, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council’s

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

² Represented by Evans Anyanwu, Esq. (Irvington, NJ).

³ Additional records were requested which are not relevant to the adjudication of this complaint.

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

Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's November 4, 2009 Interim Order and is therefore in contempt of said Order.

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

December 29, 2009

Council's Interim Order distributed to the parties.

August 23, 2010

Complaint transmitted to the Office of Administrative Law.

March 20, 2012

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

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

Therefore, the ALJ:

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

Analysis

No analysis is required.

Conclusions and Recommendations

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2009-111

v.

Township of Irvington (Essex)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 9, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure or certify that no records responsive to the Complainant's OPRA request exist pursuant to the terms of the Council's November 4, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's November 4, 2009 Interim Order and is therefore in contempt of said Order.
2. Based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of December, 2009



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: December 29, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2009-111

v.

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

Records Relevant to Complaint: On-site inspection of:

1. A list of all expenses, including all playground equipment, for the renovation of the playground at Irvington Neighborhood Improvement Corporation (“INIC”), pursuant to a grant issued to the Township of Irvington by Comcast.
2. All invoices submitted by Ward Studios (Mr. Reggie Ward) for photography services rendered to the Township of Irvington in January 2009 and February 2009.
3. A list of all expenses for the operation of Irvington Television (“ITV”) 34 from January 2007 to the date of this OPRA request.³

Request Made: March 11, 2009

Response Made: March 27, 2009

Custodian: Harold E. Weiner

GRC Complaint Filed: March 27, 2009⁴

Background

November 4, 2009

Government Records Council’s (“Council”) Interim Order. At its November 4, 2009 public meeting, the Council considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request for expenses and invoices either granting access, denying access, seeking clarification or properly 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-

¹ No legal representation listed on record.

² Represented by Willie L. Parker, Esq. (Irvington, NJ).

³ Additional records were requested which are not relevant to the adjudication of this complaint.

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

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 records or respond immediately to the Complainant's request for expenses and invoices pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007)

2. The Custodian failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. **Therefore, the Custodian shall disclose the requested records with appropriate redactions, if any, and provide the Complainant 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 March 11, 2009 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**
3. **The Custodian shall comply with Item No. 2 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 1:4-4⁵, to the Executive Director.**
4. 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.

November 6, 2009

Council's Interim Order distributed to the parties.

November 6, 2009

Memorandum from the Custodian to the Custodian's Counsel. The Custodian states that he is in receipt of the Council's November 4, 2009 Interim Order. The Custodian states that the Interim Order requires the Township to provide the requested records to the Complainant and within five (5) business days from receipt of said Order. The Custodian states that Counsel's immediate attention is required.

November 16, 2009

Custodian's certification. The Custodian certifies that he developed a system for acceptance of OPRA requests. The Custodian certifies that upon receipt of an OPRA request, records are made available to a requestor if said records are physically held by the Office of the Municipal Clerk. The Custodian certifies that because the Office of the Municipal Clerk has not maintained physical custody of any records which may be

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."

exempt under OPRA since 2002, such requests for possibly exempt records are handled differently than non-exempt records.

The Custodian certifies that requests for records not physically maintained by the Office of the Municipal Clerk are immediately forwarded to the municipal offices that may have physical custody of said records with the directive to provide any records responsive within seven (7) business days. Further, the Custodian certifies that requests for records that may be exempt under OPRA are forwarded directly to the Custodian's Counsel.

The Custodian certifies that if the OPRA request goes unanswered after the seven (7) business day time frame, a second request is forwarded to the appropriate offices. The Custodian certifies that he continues to follow up with the appropriate offices upon each notice that a response has not been sent to a requestor until which point the requestor files a complaint with either the GRC or Superior Court, at which time the entire matter is forwarded to the Custodian's Counsel.

The Custodian asserts that he has done everything in his power within the confines of his duties as a custodian under OPRA to provide all records responsive to the Complainant that are not within the physical possession of the Office of the Municipal Clerk.

Analysis

Whether the Custodian complied with the Council's November 4, 2009 Interim Order?

On November 6, 2009, the date the GRC distributed the Council's Interim Order to the parties via e-mail and regular mail, the Custodian forwarded the Council's Order via memorandum to Counsel and also copied the Revenue and Finance Director. In said memorandum, the Custodian requested Counsel's immediate attention and reply to said Order. The GRC has not received any additional correspondence from the Custodian in response to the Council's Interim Order.

The Council's November 4, 2009 Interim Order required the Custodian to provide access to all records responsive to the Complainant's March 11, 2009 OPRA request within five (5) business days of receipt of the Council's Order or certify to the GRC that no records responsive exist. Said 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.

To date, the GRC has not received any written notification that the Custodian provided the Complainant with the requested records. The GRC has also not received any certified confirmation of compliance from the Custodian. The GRC did receive a certification from the Custodian dated November 16, 2009; however, said certification fails to provide any specific details regarding whether the Custodian complied with the Council's November 4, 2009 Interim Order.

Therefore, because the Custodian failed to disclose to the Complainant the records ordered for disclosure or certify that no records responsive to the Complainant's OPRA request exist pursuant to the terms of the Council's November 4, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's November 4, 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 provides that:

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

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

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

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

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

- The Custodian failed 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 resulting 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).

- The Custodian failed to immediately grant or deny access to the requested expenses and invoices, request additional time to respond, or request clarification of the request, and thus violated N.J.S.A. 47:1A-5.e.
- The Custodian failed to respond to the GRC’s request for a Statement of Information (“SOI”), despite being given three (3) opportunities to provide the SOI on April 9, 2009, April 22, 2009 and July 9, 2009.
- The Custodian failed to comply with the terms of the Council’s November 4, 2009 Interim Order.

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

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure or certify that no records responsive to the Complainant’s OPRA request exist pursuant to the terms of the Council’s November 4, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council’s Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council’s November 4, 2009 Interim Order and is therefore in contempt of said Order.
2. Based on the evidence of record, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009



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

November 4, 2009 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2009-111

v.

Township of Irvington (Essex)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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 for expenses and invoices either granting access, denying access, seeking clarification or properly 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 immediate access to the requested records or respond immediately to the Complainant’s request for expenses and invoices pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007)
2. The Custodian failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6. **Therefore, the Custodian shall disclose the requested records with appropriate redactions, if any, and provide the Complainant 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 March 11, 2009 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**



3. **The Custodian shall comply with Item No. 2 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.**
4. 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 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 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
November 4, 2009 Council Meeting**

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2009-111

v.

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

Records Relevant to Complaint: On-site inspection of:

1. A list of all expenses, including all playground equipment, for the renovation of the playground at Irvington Neighborhood Improvement Corporation (“INIC”), pursuant to a grant issued to the Township of Irvington by Comcast.
2. All invoices submitted by Ward Studios (Mr. Reggie Ward) for photography services rendered to the Township of Irvington in January 2009 and February 2009.
3. A list of all expenses for the operation Irvington Television (“ITV”) 34 from January 2007 to the date of this OPRA request.³

Request Made: March 11, 2009

Response Made: March 27, 2009

Custodian: Harold E. Weiner

GRC Complaint Filed: March 27, 2009⁴

Background

March 11, 2009

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 11, 2009

Memorandum from the Custodian to Faheem J. Ra’Oof (“Mr. Ra’Oof”), Revenue and Finance Director, and Wayne Bradley (“Mr. Bradley”), Business Administrator attaching the Complainant’s OPRA request. The Custodian requests that Mr. Ra’Oof and Mr. Bradley respond directly to the Complainant within seven (7) business days and copy the Custodian with such response.

¹ No legal representation listed on record.

² Represented by Willie L. Parker, Esq. (Irvington, NJ).

³ Additional records were requested which are not relevant to the adjudication of this complaint.

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

March 27, 2009

Counsel's response to the OPRA request. Counsel, on behalf of the Custodian, responds in writing to the Complainant's OPRA request on the twelfth (12th) business day following receipt of such request. Counsel provides a list of all purchase orders for Ward Studios in response to request Item No. 2.

March 27, 2009

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

- Complainant's OPRA request dated March 11, 2009.
- Memorandum from the Custodian to Mr. Ra'Oof and Mr. Bradley dated March 11, 2009.
- List of purchase orders for Ward Studios.

The Complainant states that she submitted a request to the Custodian on March 11, 2009. The Complainant states that the Custodian copied her on a memorandum to Mr. Ra'Oof and Mr. Bradley requesting that they provide a response to the Complainant within seven (7) business days.

The Complainant states that she received a list of purchase orders in response to request Item No. 2 that identifies that Ward Studios worked for the Township once in February 2009, but that the Township had failed to provide the actual invoice as requested. Additionally, the Complainant states that she has not received a response regarding request Items No. 1 and No. 3.

The Complainant does not agree to mediate this complaint.

April 9, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.⁵

April 22, 2009

Letter from GRC to the Custodian. The GRC indicates that the GRC provided the Custodian with a request for a Statement of Information on April 9, 2009 and to date 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.

April 13, 2009

E-mail from Audrey Jackson ("Ms. Jackson"), Irvington Legal Department, to the Complainant. Ms. Jackson states that no invoices responsive to request Item No. 2 were provided but that the Complainant was provided with a list of all purchase orders for Ward Studios. Further, Ms. Jackson requests that the Complainant note that the list does not identify any purchase orders for the month of January 2009.

⁵ The Custodian forwarded the GRC's request for a Statement of Information to Counsel on April 9, 2009. Jacqueline Andrews v. Township of Irvington (Essex), 2009-111 – Findings and Recommendations of the Executive Director

April 13, 2009

E-mail from the Complainant to the Custodian’s Counsel. The Complainant states that she requested actual invoices but was not provided with such. The Complainant avers that even though she acknowledges in the Denial of Access Complaint that she received the list of purchase orders for Ward Studios, the Complainant still believes the Township’s response was deficient. Additionally, the Complainant acknowledges that the list of purchase orders does not identify one for January 2009.

April 20, 2009

E-mail from the Complainant to the Custodian’s Counsel. The Complainant states that she will not accept the list of purchase orders for Ward Studios as a valid response to request Item No. 2. The Complainant further avers that upon closer inspection of the list of purchase orders, which contains order dates that do not correspond with the actual dates of events, the Complainant is not satisfied with the Township’s assertion that Ward Studios did not conduct business with the Township in January 2009.

May 15, 2009

E-mail from the Complainant to the GRC. The Complainant reiterates that the list of purchase orders for Ward Studios is not responsive to request Item No. 2. Additionally, the Complainant states that she received no response in regards to request Item No. 1 and No. 3.⁶

July 9, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC states that the Township has had two (2) previous opportunities to provide the GRC with an SOI. The GRC states that Counsel shall submit the SOI by no later than July 16, 2009 and that no additional time will be given. Finally, the GRC states that if no SOI is received by said date, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.⁷

Analysis

Whether the Custodian failed to respond in a timely manner to the Complainant’s March 11, 2009 OPRA request?

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:

⁶ The Complainant asserts that there were several communications between the Township’s Legal Department and herself starting on March 11, 2009; however, the Complainant does not provide evidence of such correspondence.

⁷ The Custodian forwarded the GRC’s request for a Statement of Information to Counsel on July 9, 2009. Jacqueline Andrews v. Township of Irvington (Essex), 2009-111 – Findings and Recommendations of the Executive Director

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

OPRA also 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 further provides that:

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

OPRA also states that:

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

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

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

OPRA 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.⁸ 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 budgets, bills and vouchers. N.J.S.A. 47:1A-5.e.

The records requested are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “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.

In the instant complaint, the Complainant requested expenses for the renovation of a playground and the operation of Irvington Television (“ITV”) 34 and invoices submitted by Ward Studios for January and February 2009. Although the Complainant was provided with a list of purchase orders in response to request Item No. 2 on March 27, 2009, the Custodian failed to provide actual invoices. Additionally, the Custodian failed to respond to request Item No. 1 and No. 3.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request for expenses and invoices either granting access, denying access, seeking clarification or properly 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 immediate access to the requested records or respond immediately to the Complainant’s request for expenses and invoices pursuant to Herron, supra.

Additionally, the Custodian failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6. Therefore, 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

⁸ 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.g. If no records responsive to the Complainant's OPRA request exist, the Custodian must provide a certification stating as such to the GRC.

Whether the Custodian's denial of 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 for expenses and invoices either granting access, denying access, seeking clarification or properly 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 immediate access to the requested records or respond immediately to the Complainant's request for expenses and invoices pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007)
2. The Custodian failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. **Therefore, the Custodian shall disclose the requested records with appropriate redactions, if any, and provide the Complainant 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 March 11, 2009 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**
3. **The Custodian shall comply with Item No. 2 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 1:4-4⁹, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009