



**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**

**January 25, 2011 Government Records Council Meeting**

Kimberly Smela  
Complainant

Complaint No. 2009-254

v.

City of Newark (Essex)  
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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, renders a final decision dismissing this complaint because the Complainant stated that she did not wish to continue this action presently pending in the Office of Administrative Law by correspondence dated November 18, 2010.

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 25<sup>th</sup> Day of January, 2011

Robin Berg Tabakin, Chair  
Government Records Council



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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: February 7, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 25, 2011 Council Meeting**

**Kimberly Smela<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-254**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:** Copy of the City of Newark Geographic Information Systems (GIS) parcel layer data.<sup>3</sup>

**Request Made:** August 7, 2009

**Responses Made:** August 11, 2009

**Custodian:** Joseph Fox, Custodian

**GRC Complaint Filed:** September 4, 2009<sup>4</sup>

**Background**

**April 8, 2010**

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian has not complied with the terms of the Council’s December 22, 2009 Interim Order and is in contempt of said Order.
  
2. Because the Custodian denied the Complainant access to the records relevant to the complaint, failed to cite a legal basis for exempting the requested records from public access and failed to submit a completed Statement of Information to the GRC when requested to do so, 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

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

<sup>2</sup> Represented by Ronald J. Ricci, Esq., of Ricci Fava L.L.C. (West Paterson, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

**April 12, 2010**

Council's Interim Order distributed to the parties.

**June 25, 2010**

Complaint transmitted to the Office of Administrative Law ("OAL").

**October 26, 2010**

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the October 19, 2010 *Reconsideration* 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 because the Custodian has failed to establish in his motion for reconsideration of the Council's April 8, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

**October 28, 2010**

Council's Final Decision distributed to the parties.

**November 18, 2010**

Letter from the Complainant to the Custodian's Counsel. The Complainant informs the Custodian's Counsel that he had an opportunity to speak with the Custodian recently and now believes the Custodian was performing his duties to the best of his ability at the time the OPRA request which formed the basis for this complaint was filed.<sup>5</sup> Accordingly, the Complainant states that she no longer wishes to pursue the instant complaint.

**November 19, 2010**

Letter from the Custodian's Counsel to the Administrative Law Judge ("ALJ"). The Complainant's Counsel informs the ALJ that the Complainant is dismissing this complaint presently pending in OAL.

**November 24, 2010**

Transmittal from OAL to the GRC. OAL forwards to the GRC the OAL Withdrawal Form for this complaint dated November 23, 2010, along with the complete OAL case file.

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<sup>5</sup> Mr. Larry Higgins replaced Kimberly Smela as the Complainant in this matter on or about November 2, 2009. *Kimberly Smela v. City of Newark (Essex)*, 2009-254 – Supplemental Findings and Recommendations of the Executive Director

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council render a final decision dismissing this complaint because the Complainant stated that she did not wish to continue this action presently pending in the Office of Administrative Law by correspondence dated November 18, 2010.

Prepared By: John E. Stewart, Esq.  
Mediator

Approved By: Catherine Starghill, Esq.  
Executive Director

January 18, 2011



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**

**October 26, 2010 Government Records Council Meeting**

Kimberly Smela  
Complainant

Complaint No. 2009-254

v.

City of Newark (Essex)  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 *Reconsideration* 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 because the Custodian has failed to establish in his motion for reconsideration of the Council’s April 8, 2010 Interim Order that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 26<sup>th</sup> Day of October, 2010



Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: October 28, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

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

**Kimberly Smela<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-254**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:** Copy of the City of Newark Geographic Information Systems (GIS) parcel layer data.<sup>3</sup>

**Request Made:** August 7, 2009

**Responses Made:** August 11, 2009

**Custodian:** Joseph Fox, Custodian

**GRC Complaint Filed:** September 4, 2009<sup>4</sup>

**Background**

**April 8, 2010**

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian has not complied with the terms of the Council’s December 22, 2009 Interim Order and is in contempt of said Order.
  
2. Because the Custodian denied the Complainant access to the records relevant to the complaint, failed to cite a legal basis for exempting the requested records from public access and failed to submit a completed Statement of Information to the GRC when requested to do so, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their

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

<sup>2</sup> Represented by Danielle P. Torok, Esq. (Newark, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.



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.

**April 12, 2010**

Council's Interim Order distributed to the parties.

**April 26, 2010**

Request for reconsideration. The Custodian's Counsel requests the Council reconsider its April 8, 2010 Interim Order pursuant to *N.J.A.C. 5:105.2.10* based upon mistake and extraordinary circumstances. Counsel attaches to her request for reconsideration a legal certification of the Custodian dated April 26, 2010.

Specifically, Counsel asserts that:

1. Upon receipt of the OPRA request upon which this complaint is based, the Custodian e-mailed the Complainant to determine if the Complainant was filing the request on behalf of an educational institution or non-profit organization.<sup>5</sup> Counsel further argues that when the Custodian never received a response from the Complainant, he thought the Complainant was no longer interested in obtaining the record.
2. Counsel states that the Custodian received the GRC's no defense letter dated September 22, 2009 which referenced a Statement of Information ("SOI") request dated September 11, 2009. Counsel states that the Custodian alleged that he never received the original SOI request and that although he asked the GRC for another copy of the SOI form he never received it. Counsel states that the Custodian works for the Engineering Department and suggests that may be the reason the Custodian never received the SOI request.<sup>6</sup> Counsel asserts that because the Custodian did not receive another copy of the SOI form from the GRC, the GRC did not consider a response to the complaint from the Custodian.<sup>7</sup>
3. The Custodian's Counsel alleges that the Custodian, after receiving the Council's April 8, 2010 Interim Order, thought that he was only being ordered to provide the record to the Complainant, which he did on February 2, 2010. Counsel states that on that same date the GRC e-mailed the Custodian to inform him he also must provide a certification and to consult with his legal counsel if he had any questions. Counsel states that the Custodian did e-mail an attorney in the agency's Law Department for assistance; however, the Custodian did not know

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<sup>5</sup> Counsel states that the Custodian thought that the City of Newark does not produce GIS data sets unless the entity requesting the information is an educational institution or non-profit organization.

<sup>6</sup> The GRC sent via UPS Next Day Air® a duplicate copy of the SOI request. The correspondence was sent to the Custodian in Room 101 of the Engineering Department and the UPS proof of delivery shows same was received on September 28, 2009 at 10:23 am.

<sup>7</sup> Counsel fails to state that the Custodian never prepared and submitted anything to the GRC in response to the Complainant's allegations.

that the attorney was on extended medical leave. Consequently, Counsel states that the certification was never filed.<sup>8</sup>

The Custodian's Counsel argues that the Custodian admits to "missteps" throughout the OPRA request and complaint process but states that such missteps do not rise to the level of a knowing and willful violation of OPRA. Counsel cites D'Antonio v. Borough of Allendale, GRC Complaint No. 2005-20 (August 2006) in support of her position. Counsel argues that the Custodian always acted in good faith. Counsel further argues that by ultimately providing the certification the Custodian has complied with that provision of the Council's April 8, 2010 Interim Order and that the Custodian's actions were not intentional and deliberate but rather a result of extraordinary circumstances.

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council's April 8, 2010 Interim Order?**

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Council's April 8, 2010 Interim Order was distributed via overnight delivery to the parties on the same date it was rendered. Custodian's Counsel submitted a request for reconsideration of said Order on April 26, 2010. Accordingly, the Custodian's request for reconsideration of the Council's Interim Order was filed with the GRC nine (9) business days from receipt of the Council's decision.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or

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<sup>8</sup> Counsel attaches to her request for reconsideration a certification from the Custodian dated April 26, 2010.

unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of the Custodian’s motion for reconsideration, the Custodian’s Counsel asserts that mistake and extraordinary circumstances require reconsideration of the Council’s April 8, 2010 decision. However, Counsel does not assert that the Council made a mistake in the adjudication of the complaint, but rather that the Custodian made several mistakes when responding to the OPRA request, Denial of Access Complaint and Interim Order. Counsel lists the mistakes the Custodian made as (a) erroneously assuming that when the Complainant did not reply to his queries she was no longer interested in obtaining the requested records, (b) erroneously believing that GIS data files could only be disclosed to an educational institution or non-profit organization and therefore failing to disclose said records, (c) failing to submit a response to the Complainant’s denial of access allegations and (d) misunderstanding the requirements set forth in the Council’s Interim Order. Counsel asserts the Custodian encountered extraordinary circumstances when he (a) failed to receive the SOI request from the GRC and (b) failed to realize that the attorney he was attempting to contact was on medical leave.

Pursuant to OPRA, a custodian is vested with the legal responsibility of granting and denying access in accordance with the law. *See N.J.S.A. 47:1A-5.i.* However, OPRA does not expect the custodian to properly perform his/her legal duties in a vacuum, without guidance or assistance. Under OPRA, the GRC is tasked with the responsibility of providing such guidance and assistance to the custodian.

Specifically, OPRA provides that:

“The GRC shall...prepare guidelines and an informational pamphlet for use by *records custodians* in complying with the law governing access to public records...prepare lists for use by *records custodians* of the types of records in the possession of public agencies which are government records...make training opportunities available for *records custodians*...which explain the law governing access to public records...operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including *records custodians*, to call for information regarding the law governing access to public records...” (Emphasis added.) N.J.S.A. 47:1A-7.b.

The GRC has complied with the provisions of OPRA by providing such resources for records custodians. Each of the Custodian’s mistakes articulated by Counsel could have been prevented or rectified if the Custodian took advantage of the resources

provided through the GRC as mandated by OPRA for the benefit of records custodians. Instead, the Custodian failed to consult the GRC case manager, check the GRC website or call the toll-free helpline for assistance. The evidence of record is clear that on the one occasion the Custodian did e-mail the GRC seeking an SOI form, the form was immediately sent to him via overnight delivery service. The GRC received a proof of delivery and therefore had no reason to believe the Custodian did not receive the SOI form. However, if the Custodian failed to receive the requested SOI form within a reasonable period of time he could have again contacted the GRC or printed the SOI form from the GRC website. Instead, the Custodian elected not to submit any response to the Complainant's allegations.

Here, in support of his request for reconsideration, the Custodian did not offer proof that the Council's decision was based upon a palpably incorrect or irrational basis or that the Council did not consider or failed to appreciate the significance of probative, competent evidence. Rather, the Custodian offered excuses for his errors and omissions under the guise of "extraordinary circumstances" with the expectation that they should warrant reconsideration of the Council's decision.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Custodian failed to do so. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. *See D'Atria, supra*.

Therefore, because the Custodian has failed to establish in his motion for reconsideration of the Council's April 8, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings, supra, D'Atria, supra, and Comcast Cablevision, supra*.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in his motion for reconsideration of the Council's April 8, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.  
Executive Director

October 19, 2010



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Acting Commissioner*

**INTERIM ORDER**

**April 8, 2010 Government Records Council Meeting**

Kimberly Smela  
Complainant

Complaint No. 2009-254

v.

City of Newark (Essex)  
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian has not complied with the terms of the Council’s December 22, 2009 Interim Order and is in contempt of said Order.
2. Because the Custodian denied the Complainant access to the records relevant to the complaint, failed to cite a legal basis for exempting the requested records from public access and failed to submit a completed Statement of Information to the GRC when requested to do so, 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.

Interim Order Rendered by the  
Government Records Council  
On The 8<sup>th</sup> Day of April, 2010



Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: April 12, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 8, 2010 Council Meeting**

**Kimberly Smela<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-254**

**v.**

**City of Newark (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the City of Newark Geographic Information Systems (GIS) parcel layer data.<sup>3</sup>

**Request Made:** August 7, 2009

**Responses Made:** August 11, 2009

**Custodian:** Joseph Fox, Custodian

**GRC Complaint Filed:** September 4, 2009<sup>4</sup>

**Background**

**January 26, 2010**

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 20, 2010 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 meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian shall disclose the records relevant to this complaint.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide certified**

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

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

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.



**confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>5</sup>, to the Executive Director.**

3. 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.

**January 27, 2010**

Council's Interim Order distributed to the parties.

**February 2, 2010**

E-mail from the Custodian to the Complainant.<sup>6</sup> The Custodian informs the Complainant that he is mailing a parcel containing a copy of the record to the Complainant pursuant to the Council's Interim Order dated January 27, 2010.<sup>7</sup> The Custodian includes an invoice wherein a \$25.00 special service charge is waived, but an Express Mail® postage fee of four dollars and ninety-nine cents (\$4.99) is payable to the City of Newark.<sup>8</sup> The Custodian provides the Complainant with a United States Postal Service tracking number for the parcel.

**February 2, 2010**

E-mail from the GRC to the Custodian. The GRC informs the Custodian that he must put the statements contained in his e-mail dated February 2, 2010 in the form of a certification pursuant to R. 1:4-4 and deliver it to the GRC by February 4, 2010; however, the Custodian failed and refused to do so.

**Analysis**

**Whether the Custodian complied with the Council's January 26, 2010 Interim Order?**

At its January 26, 2010 public meeting, the Council found that the Custodian failed to bear his burden of proof that the denial of access to the requested records was authorized by law, therefore the Council ordered the Custodian within five (5) business days from receipt of the Council's Interim Order to disclose to the Complainant the records relevant to this complaint and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

Contrary to the terms of the Council's Interim Order, the Custodian sent an e-mail dated February 2, 2010 to the Complainant which stated that he was mailing a parcel containing a copy of the record to the Complainant. The only communication from the

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<sup>5</sup> "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."

<sup>6</sup> The Custodian copied the GRC with this e-mail.

<sup>7</sup> The Custodian copied the record onto a compact disk.

<sup>8</sup> The Complainant stated that her preferred means of delivery of the requested records was via U.S. Mail.

Custodian to the GRC was via delivery of a copy of said e-mail. The GRC notified the Custodian by e-mail dated February 2, 2010, that he was required to forward a certification pursuant to N.J. Court Rule 1:4-4 attesting to his compliance with the terms of the Council's Interim Order; however, the Custodian failed and refused to do so.

Accordingly, because the Custodian failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council's Interim Order, the Custodian has not complied with the terms of the Council's January 26, 2010 Interim Order and is in contempt of said 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, 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).

Here, the Custodian denied the Complainant access to the records relevant to the complaint and failed to cite a legal reason for not disclosing said records. The GRC sent

a request for the Statement of Information (“SOI”) to the Custodian on September 11, 2009, so that the Custodian could respond to the complaint and provide the GRC with any information and documents that the Custodian wanted the GRC to consider. When the Custodian failed to return the completed SOI to the GRC by the due date, the GRC sent a letter to the Custodian dated September 22, 2009 wherein the GRC informed the Custodian that if the completed SOI was not submitted to the GRC within three (3) business days, the GRC would adjudicate the complaint based solely on the information provided by the Complainant. By e-mail dated September 25, 2009, the Custodian informed the GRC that he never received the referenced SOI request. The GRC on that same date sent via overnight delivery service another request for the SOI but the Custodian failed to submit a completed SOI to the GRC.<sup>9</sup>

N.J.S.A. 47:1A-1.1. 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. In the instant complaint, the Custodian denied the Complainant access to the records relevant to the complaint and failed to cite a legal basis for exempting the requested records from public access.

Because the Custodian denied the Complainant access to the records relevant to the complaint, failed to cite a legal basis for exempting the requested records from public access and failed to submit a completed SOI to the GRC when requested to do so, 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed and refused to forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian has not complied with the terms of the Council’s December 22, 2009 Interim Order and is in contempt of said Order.
2. Because the Custodian denied the Complainant access to the records relevant to the complaint, failed to cite a legal basis for exempting the requested records from public access and failed to submit a completed Statement of Information to the GRC when requested to do so, 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,

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<sup>9</sup> The GRC received a United Parcel Service Next Day Air proof of delivery notice which confirms delivery of the request for the SOI to the Custodian’s address on September 28, 2009 at 10:23 a.m. The parcel was received by Rodriguez.

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.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010



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

INTERIM ORDER

January 26, 2010 Government Records Council Meeting

Kimberly Smela  
Complainant

Complaint No. 2009-254

v.

City of Newark (Essex)  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council ("Council") considered the January 20, 2010 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 meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian shall disclose the records relevant to this complaint.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**
3. 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 26<sup>th</sup> Day of January, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

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<sup>1</sup> "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."

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: January 27, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Kimberly Smela<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-254**

**v.**

**City of Newark (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the City of Newark Geographic Information Systems (GIS) parcel layer data.<sup>3</sup>

**Request Made:** August 7, 2009

**Responses Made:** August 11, 2009

**Custodian:** Joseph Fox, Custodian

**GRC Complaint Filed:** September 4, 2009<sup>4</sup>

**Background**

**August 7, 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.

**August 11, 2009**

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 acknowledges receipt of the Complainant's OPRA request and asks the Complainant to contact him to further discuss the OPRA request.

**September 4, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's undated OPRA request.

The Complainant states that she prepared the OPRA request that formed the basis for this complaint on August 7, 2009 and provided it to the Custodian on that same date. The Complainant also states that the Custodian responded to her OPRA request via e-

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

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

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

mail dated August 11, 2009. The Complainant states that the Custodian acknowledged receipt of the Complainant's request and also asserts that the Custodian stated he would discuss the request with the Complainant. The Complainant contends that the Custodian failed to disclose the requested record.

The Complainant does not agree to mediate this complaint.

**September 11, 2009**

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

**September 22, 2009**

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 SOI on September 11, 2009, but to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**September 25, 2009**

E-mail from the Custodian to the GRC. The Custodian states that he received the letter the GRC sent to him on September 22, 2009, but that he did not receive the GRC's earlier request for the SOI. The Custodian states that, because he did not receive the SOI form from the GRC, he is unable to complete and return the SOI within the five (5) business day time period. The Custodian requests that the GRC send another SOI form to him. The Custodian also contends that he did not deny the Complainant access to the requested records. The Custodian states that he made a reasonable attempt to contact the Complainant to discuss her OPRA request. The Custodian informs the GRC to advise the Complainant to contact the Custodian so that the Custodian can continue his discussion with the Complainant about her OPRA request.

**September 25, 2009**

A second request for the SOI is sent to the Custodian via overnight delivery.

**September 29, 2009**

E-mail from the Complainant to the GRC. The Complainant states that she made a mistake on the Denial of Access Complaint by checking the wrong box to indicate whether or not she received a reply to her OPRA request. The Complainant states that she checked the "No" box, but should have checked the "Yes" box. The Complainant further states that although the Custodian did respond to her OPRA request, the response was not complete. The Complainant also states that on this date she returned a telephone call to Cheryl from the City of Newark. The Complainant contends that Cheryl informed her that the records relevant to the complaint are government records and that the Custodian would rectify the problem.<sup>5</sup>

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<sup>5</sup> Cheryl Coxson is an employee in the City Clerk's Office.



**October 16, 2009<sup>6</sup>**

E-mail from the Complainant to the GRC. The Complainant states that the Custodian still has not disclosed the records relevant to the complaint and requests the GRC adjudicate the complaint.

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

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

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

In the instant complaint, the Complainant stated that she filed an OPRA request on August 7, 2009 for City of Newark map records but never received the requested GIS parcel layer data. It is undisputed between the parties that the Custodian responded to the OPRA request in writing on August 11, 2009, acknowledging the request and informing the Complainant to contact the Custodian to discuss the request in further detail. After the Complainant filed a Denial of Access Complaint on September 4, 2009, the

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<sup>6</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

Complainant stated that she spoke with Cheryl Coxson in the Clerk's Office and discussed the GIS parcel layer data; however, despite the representation of Ms. Coxson that she would rectify the problem with the Custodian, the Complainant asserted that the Custodian continued to deny her access to the records.

The GRC repeatedly tried to obtain a completed SOI from the Custodian. The GRC sent a request for the SOI to the Custodian on September 11, 2009. After the Custodian failed to return the completed SOI to the GRC, the GRC sent a letter to the Custodian dated September 22, 2009, wherein the GRC informed the Custodian that if the completed SOI was not submitted to the GRC within three (3) business days, the GRC would adjudicate the complaint based solely on the information provided by the Complainant. By e-mail dated September 25, 2009, the Custodian informed the GRC that he never received an SOI request. The GRC on that same date sent via overnight delivery service another request for the SOI but the Custodian failed to submit a completed SOI to the GRC.<sup>7</sup>

The record reveals that the Custodian disclosed some of the records the Complainant requested; however, the Custodian failed to disclose the records relevant to this complaint and there is no evidence in the record that the Custodian cited a legal reason for denying the Complainant access to said records. Moreover, the Custodian failed to either request an extension of time or seek clarification of the request.<sup>8</sup> See Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004).

N.J.S.A. 47:1A-1.1 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, and in the instant complaint the Custodian failed to cite a legal basis for exempting any of the requested records from public access.

Accordingly, because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian shall disclose the records relevant to this complaint.

**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.

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<sup>7</sup> The GRC received a United Parcel Service Next Day Air proof of delivery notice which confirms delivery of the request for the SOI to the Custodian's address on September 28, 2009 at 10:23 a.m. The parcel was receipted by Rodriguez.

<sup>8</sup> Although Cheryl Coxson discussed the request with the Complainant on September 29, 2009, Ms. Coxson either did not subsequently report back to the Custodian or the Custodian failed to act upon the information communicated by Ms. Coxson.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian shall disclose the records relevant to this complaint.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, to the Executive Director.**
3. 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: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

January 20, 2010

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<sup>9</sup> "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."