



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Michael Lakavitch
Complainant

Complaint No. 2010-230

v.

Township of Toms River (Ocean)
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 voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s February 28, 2012 Interim Order by providing the responsive records to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order.
2. Because the Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s February 28, 2012 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, said request for reconsideration is denied. 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).
3. Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing to the Complainant’s two (2) OPRA requests for contracts and further failed to bear his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the 80 responsive contracts, the Custodian timely complied with the Council’s February 28, 2012 Interim Order by providing the responsive records to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 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 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael Lakavitch¹
Complainant**

GRC Complaint No. 2010-230

v.

**Township of Toms River (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

May 3, 2010 OPRA request: Copies of signed contracts of all Shore Riptide Hockey League (“Shore Riptide”) members with all personal information redacted.³

June 24, 2010 OPRA request: Copies of signed contracts of all Shore Riptide members with names, town of residence and fee paid. All financial information and street addresses can be redacted.⁴

Request Made: May 3, 2010 and June 24, 2010

Response Made: May 12, 2010 and July 6, 2010

Custodian: J. Mark Mutter

GRC Complaint Filed: August 31, 2010⁵

Background

February 28, 2012

Government Records Council’s (“Council”) Interim Order. At its February 28, 2012 public meeting, the Council considered the February 21, 2012 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 immediately respond in writing to the Complainant’s two (2) OPRA requests for contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Thus, the Custodian failed to timely respond to the Complainant’s OPRA requests. *See* Ghana v. New

¹ No legal representation listed on record.

² Represented by Anthony Merlino, Esq. (Toms River, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The Complainant requested additional records that are not at issue in the instant complaint.

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

Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. The Custodian has unlawfully denied access to the contracts responsive to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. **Thus, the Custodian must provide all responsive contracts to the Complainant. However, the Custodian shall redact the names and signatures of all minors and their parents contained on the form.**
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 1:4-4⁶, to the Executive Director.⁷**
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.

February 29, 2012

Council's Interim Order distributed to the parties.

March 6, 2012

Custodian's response to the Council's Interim Order. The Custodian certifies that on March 6, 2012 he sent the Complainant via U.S. Mail a CD containing copies of the requested records with the appropriate redactions and a copy of the certified confirmation of compliance submitted to the Executive Director simultaneously.

March 6, 2012

Custodian's request for reconsideration with the following attachments:

- "Youth Travel Hockey Program Player and Parent(s)/Guardian(s) Contract 2010-2011 Season Form."
- "Winding River Skating Center – Travel Hockey Program Fees 2010-2011."
- "Winding River Skating Center – Travel Hockey Program Revenue (July 2, 2010)."
- "Youth Travel Hockey Program Player and Parent(s)/Guardian(s) Contract 2010-2011 Season Form" (with redactions).

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

The Custodian's Counsel requests that the Council reconsider its February 28, 2012 Interim Order based on a mistake. Counsel disputes the Council's holding that the Custodian violated N.J.S.A. 47:1A-5.e. and unlawfully denied access to the responsive records.

Counsel asserts that the Township of Toms River's ("Township") main objective was to safeguard from public access the names of the juveniles contained on the responsive contracts. Counsel states that the Council's Interim Order requiring disclosure of the contracts with redactions accomplishes this goal. Counsel contends that the Council's Order is inconsistent with its conclusion that the Custodian unlawfully denied access to said records. Counsel argues that the conclusion also misinterprets OPRA and the factual record and that these authorities do not support the Council's conclusions.

Counsel recapitulates the facts of this complaint and notes that the Custodian denied access to the actual contracts because they contained personal information. Counsel further notes that the Custodian provided to the Complainant a form copy of the contract as an accommodation. Counsel notes the form contract contained essentially the same information as the redacted copies that the Council ordered the Custodian to provide to the Complainant.

Immediate Access

Counsel first contends that the Council erred in determining that the Custodian violated N.J.S.A. 47:1A-5.e. and expanded OPRA beyond its stated reach. Counsel contends that N.J.S.A. 47:1A-5.e. does not impose a blanket immediate access requirement but a qualified one: immediate access shall "ordinarily" be granted to certain records. Counsel contends that the wording of the provision contemplates extraordinary circumstances in which immediate access is impossible or impractical, either because the records are not readily available or implicates other legitimate concerns that should be addressed prior to disclosure. Counsel argues that this case presents the type of extraordinary situation in which immediate access is impossible or impractical.

Counsel argues that the responsive contracts were not the type of contracts contemplated under N.J.S.A. 47:1A-5.e. Counsel asserts that this situation is unusual because the contracts at issue are not ordinary contracts between municipalities and a public vendor or employee that involves the allocation of Township resources or expenditure of public funds. Counsel contends that the contracts at issue herein are instruments used by the Township to collect necessary information, record payments and disclose the requirements to participate in a recreational program. Counsel argues that the contracts are thus more akin to enrollment forms or sign-up sheets rather than contracts for the purchase of goods and services or employment agreements. Counsel contends that the latter would not contain information that would compromise an individual's safety and privacy, whereas the former certainly contained information that the Council determined should be redacted under N.J.S.A. 47:1A-1.

Counsel further argues that the Council erred in determining that the Custodian should have immediately responded in writing to the Complainant's OPRA requests. Counsel argues that the Council is presumably holding that even if the Custodian was

reluctant to immediately disclose the requested contracts, the Custodian should have responded in writing stating that the matter is under review and that a response will be forthcoming. Counsel contends that this holding is not consistent with OPRA, which requires immediate access and not an immediate response. Counsel thus argues that the only appropriate response under N.J.S.A. 47:1A-5.e. is the disclosure of records: responding in writing immediately is not sufficient. Counsel contends that the Council appears to have confused N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.i., which allows custodians to seek an extension of time if records are archived or in storage provided “the requestor ... be so advised within seven business days after the custodian receives the request.” *Id.* Counsel thus contends that the Council’s holding essentially faults the Custodian for failing to take action that would not have satisfied N.J.S.A. 47:1A-5.e.

Counsel argues that because N.J.S.A. 47:1A-5.e. does not apply here, the Council should have applied N.J.S.A. 47:1A-5.i. Counsel asserts that under this provision, the Custodian’s response was timely because he responded in writing to the Complainant denying access to the responsive records and providing him with a form copy of the contract within the statutorily mandated seven (7) business day time frame.

Denial of Access

Counsel next contends that the Council misconstrued or overlooked important elements of the record when concluding that the Custodian unlawfully denied access to the responsive records. Counsel contends that although the Custodian denied the Complainant access to the responsive contracts, the Custodian made a reasonable accommodation pursuant to N.J.S.A. 47:1A-5.g. by providing to the Complainant a form copy of the contract and two (2) reports detailing the hockey program fees and revenues generated to date. Counsel contends that together these records would have given the Complainant precisely the information he sought without revealing the identities of the juvenile participants of the Shore Riptide.

Counsel contends that the Custodian’s accommodation was functionally no different from the Council’s Order to disclose all the contracts with redactions. Counsel argues that the contracts, once redacted, are virtually the same as the form contract. Counsel asserts that a comparison of the redacted contracts and the form contracts indicates that this is true, with the only difference being the presence of the redactions. Counsel contends that the Custodian’s response was only significantly different from the Council’s Order in that the Custodian provided seven (7) pages of records to the Complainant whereas compliance amounted to more than 600 pages of records. Counsel thus argues that the Custodian could not have unlawfully denied access when he timely provided records responsive to the Complainant’s OPRA requests that were the functional equivalent to the Council’s Order.

Knowing & Willful Violation

Counsel finally contends that the evidence of record does not indicate that the Custodian knowingly and willfully violated OPRA. Counsel contends that the Custodian did not violate N.J.S.A. 47:1A-5.e. because the responsive records were not traditional contracts. Counsel contends that N.J.S.A. 47:1A-5.i. is best applied to this complaint, in

which case the Custodian lawfully responded denying access to the responsive contracts. Counsel further contends that this complaint was one of first impression. Counsel contends that the Custodian reasonably sought advice of Counsel and crafted a response that was satisfactory to the Complainant's OPRA request without compromising the safety or privacy of the Shore Riptide participants. Counsel asserts that the Council struck this same balance, albeit by ordering disclosure of 80 contracts with redactions.

Counsel thus requests that the Council reconsider its February 28, 2012 Interim Order and reverse its determination that the Custodian violated N.J.S.A. 47:1A-5.e. and unlawfully denied access to the requested records. Moreover, Counsel reiterates that because the facts of this complaint do not support a conclusion that the Custodian knowingly and willfully violated OPRA, the Council should reverse its holding deferring the issue and render a final determination that the Custodian acted appropriately under OPRA.

Analysis

Whether the Custodian complied with the Council's February 28, 2012 Interim Order?

At its February 28, 2012 public meeting, the Council ordered the Custodian to "... provide all responsive contracts to the Complainant..." redacting "...the names and signatures of all minors and their parents contained on the form." The Council therefore ordered the Custodian to provide the redacted records to the Complainant within five (5) business days of receipt of the Council's Interim Order or by March 7, 2012.

The Custodian certified to the GRC on March 6, 2012 that on the same date, he provided redacted copies of the responsive records to the Complainant on a CD via U.S. Mail, in accordance with the Council's Order and simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian timely complied with the Council's February 28, 2012 Interim Order by providing the responsive records to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order.

Whether the Custodian has met the required standard for reconsideration of the Council's February 28, 2012 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 Custodian's Counsel filed the request for reconsideration of the Council's February 28, 2012 Order five (5) business days after receipt of the Council's Order. In said request for reconsideration, Counsel argued that this complaint presents the type of extraordinary situation in which immediate access is impossible or impractical because the responsive contracts are not the type of contracts contemplated under N.J.S.A. 47:1A-5.e. Counsel further argued that the Council erred in determining that the Custodian should have immediately responded in writing to the Complainant's OPRA requests for contracts because the only way to satisfy N.J.S.A. 47:1A-5.e is by providing access immediately. Counsel also argued that the Council ignored important evidence when concluding that the Custodian unlawfully denied access to the responsive records. Counsel finally argued that the record cannot support a knowing and willful violation and that the Council should reverse its decision to defer this issue. Counsel thus requested that the Council reconsider its February 28, 2012 Interim Order and reverse its determination that the Custodian violated N.J.S.A. 47:1A-5.e and unlawfully denied access to the requested records.

Immediate Access

With regard to the contracts at issue herein, Counsel argued that that the contracts at issue presented an extraordinary circumstance in which immediate access is impossible or impractical. Counsel argued that the responsive contracts are different from a typical contract that involves the allocation of Township resources or expenditure of public funds. Counsel argued that these contracts are instruments used by the Township to collect necessary information, record payments and disclose the requirements to participate in a recreational program. Counsel further contended that the contracts are more like enrollment forms or sign-up sheets rather than contracts purchasing goods and services or employment agreements. Counsel contends that the difference is that a typical contract would not include personal information subject to redaction while the contracts at issue herein contain exempted personal information.

A close review of OPRA indicates that N.J.S.A. 47:1A-5.e does not specifically define the term "contract." Moreover, the responsive record is titled "Youth Travel Hockey Program Player and Parent(s)/Guardian(s) Contract." Thus, the records are contracts as identified by the Township itself and are thus subject to immediate access under N.J.S.A. 47:1A-5.e. Additionally, a review of the contract form shows that the contract contains sixteen (16) provisions that parents or guardians must commit to in order for their child to participate in the Shore Riptide Hockey League. These provisions include a payment schedule, parent/guardian conduct and player conduct. The only other information the contract contains is a space for the child participant's name and signature, parent/guardian name and signature, the Hockey Director's signature and dates. The contract form does not contain any personally identifying information such as mailing address, e-mail address, social security number, or any descriptive information on the children participants.

The facts of this matter do not support a conclusion that the instant OPRA request presented an extraordinary situation that relieved the Custodian of the responsibility to conform with N.J.S.A. 47:1A-5.e. Specifically, the records in question are clearly identified as contracts. Moreover, the evidence of record supports a conclusion that the

Custodian quickly identified a possible issue regarding the disclosure of personal information contained within the contracts because he acknowledged in his response to the Complainant's first (1st) OPRA request that the safety concerns with disclosing the responsive records "are obvious." See Lakavitch v. Township of Toms River (Ocean), GRC Complaint No. 2010-230 (Interim Order dated February 28, 2012) at pg. 1. This is even more so with the Complainant's second (2nd) OPRA request, which sought the same records; yet, the Custodian still did not respond to such request until the fifth (5th) business day.

With regard to the Council's determination in the Interim Order that the Custodian should have responded immediately to the Complainant's request for immediate access records, Counsel argued that N.J.S.A. 47:1A-5.e. only requires immediate disclosure and not an immediate response to an OPRA request seeking immediate access records. Counsel contended that this holding appears to confuse N.J.S.A. 47:1A-5.e. with N.J.S.A. 47:1A-5.i. (allowing custodians to seek extensions of time if records are storage or archived). Counsel further argued that the Council should have viewed the facts within the framework of N.J.S.A. 47:1A-5.i., which indicate that the Custodian responded timely and properly.

OPRA requires a written response to an OPRA request. N.J.S.A. 47:1A-5.g. Although N.J.S.A. 47:1A-5.i. speaks directly to the seven (7) business day time frame, the provision carries a caveat for "shorter time [periods] ... otherwise provided by statute ..." Additionally, the Legislature clearly intended that all OPRA requests be responded to in writing by providing that custodians "... shall indicate the specific basis [for a denial of access] on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5.g. The GRC has expanded on the options a custodian has when responding to an OPRA request to include seeking clarification and requesting an extension of time. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Council has previously held on several occasions that a custodian has an obligation to respond immediately to OPRA requests seeking immediate access records. See Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009); Frost v. North Hudson Regional Fire & Rescue, GRC Complaint No. 2008-201 (December 2009); Paff v. Township of Springfield (Union), GRC Complaint No. 2008-77 (Interim Order dated June 23, 2009). Moreover, the Council's holding is consistent with Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), which the Council cited in its analysis of this issue. Lakavitch v. Township of Toms River (Ocean), GRC Complaint No. 2010-230 (Interim Order dated February 28, 2012) at pg. 8. Thus, the Council's holding in the Interim Order that the Custodian has an obligation to respond immediately to the Complainant's OPRA request for immediate access records is consistent with OPRA and relevant GRC case law.

Denial of Access

Regarding the Council's determination that the Custodian unlawfully denied access to the responsive records, Counsel argued that the Council ignored the fact that the Custodian made a reasonable accommodation pursuant to N.J.S.A. 47:1A-5.g. by providing the Complainant with a form copy of the contract, as well as records detailing

Shore Riptide fees and revenues generated to date. Counsel argued that the Complainant could have gleaned the same information from these three (3) records without receiving more than 600 pages of records. Counsel further argued that the records the Custodian provided were functionally no different from the redacted versions of the contracts that the Council ordered the Custodian to disclose to the Complainant, which numbered 80 contracts. Counsel thus argued that the Custodian could not have unlawfully denied access when he timely provided records that were functionally equivalent to the Council's Order.

The Council first notes that N.J.S.A. 47:1A-5.g. allows a custodian to attempt to reach a reasonable accommodation if "... a request for access to a government record would substantially disrupt agency operations ...". The Council notes that neither the Custodian nor Counsel at any time asserted that the Complainant's two (2) OPRA requests would substantially disrupt the Township's operations.

OPRA works to provide requestors with access to government records. N.J.S.A. 47:1A-1. In this instance, the Complainant specifically sought copies of all of the contracts for the Shore Riptide and not a form contract, Shore Riptide fees or revenues generated to date. Thus, the only records responsive to the Complainant's OPRA request were the 80 contracts that the Custodian provided in response to the Council's Interim Order; the form contract and reports the Custodian provided were not responsive to the Complainant's request. Although Counsel argued that the Complainant could have gleaned the information he sought from the three (3) records provided, this argument ignores the fact that these records were not responsive to the request at issue herein. The evidence of record is clear that the Custodian failed to provide the requested contracts until ordered to do so by the Council, arguing that the records contained personal information that was exempt from disclosure under OPRA. N.J.S.A. 47:1A-1. To this end, OPRA specifically provides that:

"[i]f the custodian of a government record asserts that part of a particular record is exempt from public access ... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5.g.

Thus, OPRA specifically required the Custodian to redact those portions of the 80 contracts that he believed to be exempt from disclosure and to provide the remainder of each record to the Complainant. The Custodian did not do this, instead opting to disclose records that were not responsive to the Complainant's two (2) OPRA requests. Moreover, the Council reinforced the Custodian's legal obligation under N.J.S.A. 47:1A-5.g. to redact the records by ordering disclosure of the responsive records with redactions. Therefore, the Council's determination that the Custodian unlawfully denied access to the responsive contracts is consistent with the facts of this complaint.

Knowing & Willful Violation

With regard to whether the Custodian knowing and willfully violated OPRA, Counsel argued that the record does not support such a violation. Counsel argued that the

Custodian acted reasonably in consulting with Counsel and crafting a response that was satisfactory to the Complainant's OPRA request without compromising the safety or privacy of the Shore Riptide participants.

In order for the Council to determine whether a knowing and willful violation has occurred, it must take in account the "... totality of the circumstances ..." N.J.S.A. 47:1A-7.e. The Council thus routinely defers this analysis in complaints where it has determined that a custodian has unlawfully denied access to records and orders the custodian to take further action. This way, the Council can take into account the totality of the circumstances, as required by N.J.S.A. 47:1A-7.e., when making a final determination on this issue.

In this complaint, the Council's deferral of the issue was appropriate because the Council found that the Custodian unlawfully denied access to the responsive records and ordered the Custodian to provide access to same with redactions. Thus, the Council was required to defer the issue of whether the Custodian in this matter knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances because the Council was awaiting the Custodian's compliance with the Interim Order.

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 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).

As the moving party, the Custodian's Counsel 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*. Counsel's request for reconsideration does not meet this standard and is denied.

Therefore, because the Custodian's Counsel has failed to establish in his request for reconsideration of the Council's February 28, 2012 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, said request for reconsideration is denied. Cummings; D'Atria; In Re: Comcast.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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.e by failing to immediately respond in writing to the Complainant’s two (2) OPRA requests for contracts and further failed to bear his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the 80 responsive contracts, the Custodian timely complied with the Council’s February 28, 2012 Interim Order by providing the responsive records to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian’s violations 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. The Custodian timely complied with the Council's February 28, 2012 Interim Order by providing the responsive records to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order.
2. Because the Custodian's Counsel has failed to establish in his request for reconsideration of the Council's February 28, 2012 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, said request for reconsideration is denied. 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).
3. Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing to the Complainant's two (2) OPRA requests for contracts and further failed to bear his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the 80 responsive contracts, the Custodian timely complied with the Council's February 28, 2012 Interim Order by providing the responsive records to the Complainant and providing certified confirmation of compliance to the Executive Director within the prescribed deadline to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Michael Lakavitch
Complainant

Complaint No. 2010-230

v.

Township of Toms River (Ocean)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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 immediately respond in writing to the Complainant's two (2) OPRA requests for contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Thus, the Custodian failed to timely respond to the Complainant's OPRA requests. *See* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. The Custodian has unlawfully denied access to the contracts responsive to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. **Thus, the Custodian must provide all responsive contracts to the Complainant. However, the Custodian shall redact the names and signatures of all minors and their parents contained on the form.**
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.²**

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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: February 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Michael Lakavitch¹
Complainant**

GRC Complaint No. 2010-230

v.

**Township of Toms River (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

May 3, 2010 OPRA request: Copies of signed contracts of all Shore Riptide Hockey League (“Shore Riptide”) members with all personal information redacted.³

June 24, 2010 OPRA request: Copies of signed contracts of all Shore Riptide members with names, town of residence and fee paid. All financial information and street addresses can be redacted.⁴

Request Made: May 3, 2010 and June 24, 2010

Response Made: May 12, 2010 and July 6, 2010

Custodian: Mark Mutter

GRC Complaint Filed: August 31, 2010⁵

Background

May 3, 2010

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

May 12, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested contracts is denied based on the member parents’ reasonable expectation of privacy. The Custodian states that the safety concerns are obvious since the Township of Toms River (“Township”) cannot guarantee the lawful use of any information obtained pursuant to OPRA. The Custodian states that although he does not doubt that the Complainant’s motives for seeking these

¹ No legal representation listed on record.

² Represented by Anthony Merlino, Esq. (Toms River, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The Complainant requested additional records that are not at issue in the instant complaint.

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

records are innocuous, today's child predator is searching for increasingly devious ways to target new victims. The Custodian states that the Township is legitimately concerned that names of children obtained through OPRA could expose said children to this and other criminal dangers. The Custodian states that the law has long recognized government's inherent responsibility to safeguard society's most vulnerable members. Hoefers v. Jones, 288 N.J. Super. 590, 607 (Ch. Div. 1994).

The Custodian further states that the Township is required to "safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1. The Custodian states that no parents would reasonably expect that their child's identity (and by extension their location at a particular time) would be accessible without their consent. The Custodian states that privacy interests preclude the release of the contracts sought. The Custodian further states that this denial is consistent with other State laws and regulations that protect the confidentiality of certain records relating to minors. See N.J.S.A. 18A:36-19 (authorizing the State Board of Education to enact regulations protecting the privacy of student records) and *N.J.A.C.* 13:94-1.5 (exempting juvenile criminal records from disclosure under OPRA).

The Custodian states that the Township will attempt to accommodate the Complainant with information about the Shore Riptide that is otherwise disclosable and does not violate the aforementioned safety and privacy concerns.

May 14, 2010

Letter from the Complainant to the Township Mayor and Council. The Complainant states that he is in receipt of the Township's denial of access to his first (1st) OPRA request. The Complainant disputes the denial, arguing that not only are the rosters required to be registered with USA Hockey but that Shore Riptide's website lists the schedule for each team. The Complainant states that this effectively gives the general public not only the names of the children but also where they will be at any given time.⁶

The Complainant states that he recently heard that the Township Ice Committee, a non-governmental entity, is in charge of the Shore Riptide. The Complainant states that the purpose of his request was simply to verify that this is true. The Complainant states that he is concerned that a non-governmental entity that may also be a non-profit organization is somehow tied to the Township's Department of Recreation. The Complainant notes that if the Ice Committee is in charge of the Shore Riptide, the Township will need to answer several questions.

June 24, 2010

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant notes that contracts are immediate access records. N.J.S.A. 47:1A-5.e.

⁶ The Complainant notes that the information contained in such website is common among hockey organization websites across the country.
Michael Lakavitch v. Township of Toms River (Ocean), 2010-230 – Findings and Recommendations of the Executive Director 2

July 6, 2010

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that he is providing a copy of the "Youth Travel Hockey Program Player and Parent(s)/Guardian(s) Contract 2010-2011 Season Form." The Custodian further states that he is also attaching his May 12, 2010 response, in which the Custodian denied access to the contracts sought based on safety and privacy concerns.

August 31, 2010

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

- Letter from the Custodian to the Complainant dated May 12, 2010.
- Letter from the Complainant to the Township Mayor and Council dated May 14, 2010.
- Letter from the Custodian to the Complainant dated July 6, 2010.

The Complainant states that he submitted an OPRA request to the Township on May 3, 2010. The Complainant states that the Custodian responded on May 12, 2010 denying access to the responsive contracts due to safety and privacy concerns. N.J.S.A. 47:1A-1. The Complainant states that he subsequently submitted to the Township a second (2nd) request for the contracts showing only the names, towns of residence and fee charged on June 24, 2010. The Complainant states that the Custodian responded on July 6, 2010 again denying access to the contracts due to safety and privacy concerns.

The Complainant asserts that he has spoken many times with the Township explaining that the contracts are necessary to calculate the need for an additional hockey program, and to ensure that the financial records are accurate and that there is no preferential treatment to individuals. The Complainant asserts that the Shore Riptide is a Township run program; thus, the contracts should be subject to disclosure under OPRA. The Complainant argues that upholding the Township's denial could result in the program running at a financial loss with no oversight.

The Complainant argues that the Township has further contradicted their denial of access by providing the Complainant with a copy of the Shore Riptide's ice schedule, thus allowing the Complainant to know when the teams are on the ice.

The Complainant does not agree to mediate this complaint.

September 24, 2010

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

September 24, 2010

Complainant's executed offer of mediation. The Complainant agrees to mediate this complaint.

September 24, 2010

E-mail from the GRC to the Custodian. The GRC states that it sent the Custodian a request for an SOI on this date. The GRC states that subsequent to sending out the SOI request, it received an executed offer of mediation from the Complainant. The GRC states that the Custodian may disregard the SOI request. The GRC states that attached are mediation materials for the Custodian's review.

September 30, 2010

The Custodian declines mediation.

November 5, 2010

Request for the SOI sent to the Custodian.

November 10, 2010

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated May 3, 2010.
- Letter from the Custodian to the Complainant dated May 12, 2010.
- Complainant's second (2nd) OPRA request dated June 24, 2010.
- Letter from the Custodian to the Complainant dated July 6, 2010 (with attachments).

The Custodian certifies that his search for the requested records included examining the Township Department of Recreations files.

The Custodian also certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable in this complaint.

The Custodian certifies that he received the Complainant's first (1st) OPRA request on May 3, 2010. The Custodian certifies that he responded on May 12, 2010 denying access to the responsive contracts⁷ due to safety and privacy concerns of minors (and their parents) involved in a Township recreation program pursuant to N.J.S.A. 47:1A-1. The Custodian certifies that he received the Complainant's second (2nd) OPRA request on June 24, 2010. The Custodian certifies that he responded on July 6, 2010 again denying access to the responsive contracts based on safety and privacy concerns.

The Custodian argues that the Township's denial of access is supported by OPRA and case law. The Custodian asserts that the Complainant sought records that would have revealed the names, addresses and other personal identifying information of children participating in a Township run recreational program.

The Custodian asserts that regardless of the Complainant's need for access, the Township has erred on the side of caution given that unfettered access to the contracts

⁷ The Custodian also notes that he denied access to the team rosters as well; however, the Complainant does not identify these records as at issue in the instant complaint.

could expose children to danger. The Custodian contends that no parents would reasonably expect that enrolling their child in a Township run recreation program would subject the child’s personal information to public access. The Custodian argues that to the contrary, parents would expect the Township to safeguard this information; therefore, access to the responsive contracts was denied pursuant to N.J.S.A. 47:1A-1 and the long established *parens patriae* duty to safeguard society’s most vulnerable members. *See Hoefers v. Jones*, 288 N.J. Super. 590, 607 (Ch. Div. 1994). The Custodian further contends that the Township’s position comports with other State law and regulations that protect the confidentiality of certain records relating to minors. *See N.J.S.A. 18A:36-19* and *N.J.A.C. 13:94-1.5*.

The Custodian certifies that he attempted to accommodate the Complainant by providing him with form documents, including a copy of the “Youth Travel Hockey Program Player and Parent(s)/Guardian(s) Contract 2010-2011 Season Form” that disclosed pertinent information about the Shore Riptide without compromising children’s information. The Custodian asserts that the Complainant’s dissatisfaction with the Township’s responses notwithstanding, he has failed to cite to any countervailing statutes, regulations or other authorities that entitles him to the responsive contracts. The Custodian contends that the safety and privacy interests of the children and parents involved in Shore Riptide override OPRA’s purpose of public access to government records.

October 24, 2011

E-mail from the GRC to the Complainant attaching a balancing test questionnaire. The GRC states that because privacy interest is at issue in this complaint, the GRC must employ a balancing test. The GRC requests that the Complainant submit his balancing test responses by close of business on October 31, 2011.

October 24, 2011

E-mail from the GRC to the Custodian attaching a balancing test questionnaire. The GRC states that because privacy interest is at issue in this complaint, the GRC must employ a balancing test. The GRC requests that the Custodian submit his balancing test responses by close of business on October 31, 2011.

October 25, 2011

Custodian’s balancing test responses.

Factors for Consideration in Balancing Test	Custodian’s Response
1. The type of records requested.	Signed contracts of all Shore Riptide members
2. The information the requested records do or might contain.	The requested records reveal the names, home addresses and other personal identifying information of the minor children participating in the program and can be used to determine the children’s potential whereabouts when the program is in session.
3. The potential harm in	Disclosure would allow individuals, regardless of motive, to

any subsequent non-consensual disclosure of the requested records.	use OPRA to obtain personal information of minors in Township sponsored recreation programs. Given OPRA's broad reach, any person could obtain the records to target children. Because OPRA allows access to records regardless of motive, the only way to guarantee the records would not be used improperly is by denying access to same.
4. The injury from disclosure to the relationship in which the requested record was generated.	The participating children's and their parents' safety and privacy rights would be severely compromised if these records were disclosed. Children enrolling in public recreation programs do not forfeit their right to be protected from unwarranted and unsolicited contact. Parents would not reasonably expect that participation in the program would expose their child's personal information to the public. If this were the case, OPRA could be sued as a tool for child predators to target new victims.
5. The adequacy of safeguards to prevent unauthorized disclosure.	Non-disclosure is only adequate safeguard against improper or unlawful use of the children's information. The Township would not be able to police the use of the information nor prevent unsolicited contact between the requestor and children without the parents' consent. Occasionally records can be provided with redactions, as was done with the contracts.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.	<ol style="list-style-type: none"> 1. Federal and state statutory privacy protections as well as constitutional privacy protections. <i>See Doe v. Poritz</i>, 142 N.J. 1 (1995). 2. OPRA's statutory mandate to safeguard personal identifying information. <u>N.J.S.A. 47:1A-1</u>. 3. OPRA's mandate to protect people's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u>. 4. Duty to safeguard vulnerable members of society. <i>See Hoefers</i>.

November 1, 2011

Complainant's balancing test responses.

Need for Access Questions	Complainant's Response
1. Why do you need the requested records or information?	The requested records are needed to determine whether the Township is accurately recording all monies paid to the Township and all revenues generated by the creation of the Shore Riptide; the Complainant states that he is seeking the records to check for accountability of the program.
2. How important is the requested records or information to you?	The records are very important since they are the only true means of comparing the money the Township collected with the money being records and reflected in the Township's official financial records.
3. Do you plan to	The Complainant states that he does not plan nor has ever

redistribute the requested records or information?	had the intention of redistributing the requested information.
4. Will you use the requested records or information for unsolicited contact of the individuals named in the government records?	<p>No. The Complainant states that he will not use the records for unsolicited contact of individuals. The Complainant states that to this end, he is willing to allow for redactions to be made so long as the records can be used for the intended purpose. The Complainant states that it is important for each contract to reflect that is it from a specific family from a specific town and that said contract was paid in full.</p> <p>The Complainant states that regarding the whereabouts of children in a Township recreational program, the team schedules are posted at the rink and on the website. The Complainant states that the children have their names on their jerseys and rosters containing names and jersey numbers are provided to opposing teams before each game.</p> <p>The Complainant states that if the Township were able to decline contracts where they are collecting revenue there will be no accountability. The Complainant states that he is willing to work with the GRC and the Township to get the records without invading anyone's privacy.</p>

January 26, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that “[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.” *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties’ submissions in this complaint and has determined that additional information is required.

The GRC states that attached to the SOI is a copy of a contract form. The GRC states that the pagination at the bottom shows that the document is five (5) pages; however, only four (4) pages were attached. The GRC additionally states there is no space for an address. The GRC thus requests a that the Custodian provide a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. Whether completed copies of the contract attached to the SOI are responsive to the Complainant’s OPRA request, and if so, how many pages are said contracts?
2. Whether the completed contracts also contain a space for addresses?

The GRC requests that the Custodian provide the requested legal certification by close of business on January 30, 2012 and that submissions received after this deadline date may not be considered by the Council for adjudication.

January 30, 2012

Custodian’s legal certification. The Custodian certifies that completed copies of the contract form attached to the SOI are responsive to the Complainant’s OPRA request.

The Custodian certifies that the contacts are actually four (4) pages in length. The Custodian certifies that the contract form attached to the SOI contains a typographical error regarding pagination. The Custodian certifies that the completed contracts do not contain a space for addresses.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

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.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

The responsive contracts are specifically classified under OPRA 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 “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggest 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 must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The evidence of record indicates that the Custodian did not conform to his statutory obligation under OPRA to respond immediately to the Complainant's two (2) OPRA requests in writing denying access to the requested contracts or requesting an extension of time to respond to said requests. Instead, the Custodian did not respond in writing until the seventh (7th) and fifth (5th) business day respectively after receipt of the Complainant's two (2) OPRA requests. Thus, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.e.

Therefore, because the Custodian failed to immediately respond to the Complainant's two (2) OPRA requests for contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, supra. Thus, the Custodian failed to timely respond to the Complainant's OPRA requests. See Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

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... a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been

entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy;” (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.

The Complainant herein sought access to copies of “signed contracts of all [Shore Riptide] members with all personal information redacted” and “signed contracts of all Shore Riptide members with names, town of residence and fee paid...” respectively. The Custodian twice responded denying access to the responsive contracts based on member parents’ reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and the long-established *parens patriae* duty to safeguard society’s most vulnerable members. See Hoefers, supra. The Custodian further stated that this denial was consistent with other State laws regarding the disclosure of juvenile information. N.J.S.A. 18A:36-19 and N.J.A.C. 13:94-1.5. However, the Custodian provided the Complainant in response to his second (2nd) OPRA request a copy of the contract form.

Based on the expressed privacy interest, the GRC requested that both parties submit balancing test questionnaires. The Custodian reiterated his initial denial of access and stated that the responsive records would reveal names, home addresses and other personal identifying information of minors participating in a municipal program; the Custodian asserted that disclosure could open the way for individuals to obtain information about minors to prey on them. The Custodian further argued that nondisclosure is the only safeguard from unauthorized disclosure.

Conversely, the Complainant contended that he needed access to the contracts in order to check the program for accountability. The Complainant asserted that these records were the only records available that could be used to determine whether the Township was accurately listing all fees collected in its official records. The Complainant

further contended that he had no intention of redistributing the records. The Complainant further asserted that he would not contact any individuals, which is why he is willing to allow redactions to be made to the requested records.

After receiving the balancing test questionnaires, the GRC requested additional information from the Custodian. Specifically, the GRC noted that the contract form provided to the Complainant and submitted as part of the SOI did not contain some of the information the Custodian was asserting should not be disclosed; thus, it was unclear whether this form was the blank version of the responsive contracts. Additionally, the pagination noted that the contract was five (5) pages, yet only (4) pages were attached to the SOI. Thus, on January 26, 2012, the GRC asked the Custodian for a legal certification clarifying the facts regarding the contract form. On January 30, 2012, the Custodian certified that the contract form is the responsive record and that it is only four (4) pages. Additionally, the Custodian certified that the form does not contain a space for addresses.

A review of the responsive contract form shows that the first three (3rd) pages of the form list all of the conditions for participation with the Shore Riptide. The fourth (4th) page contains the last few conditions, a space for the participant's name and signature, parent/guardian names, signatures and dates and the Hockey Director's signature and date. The contract form contains no spaces for addresses, fees or any other personally identifying information, such as town, e-mail, social security number, etc. Thus, the information required for the contract does not substantiate the Custodian's argument that he lawfully denied access to the responsive contracts based on privacy interests.

However, in the case of the names of minors on public records, the GRC turns to the standard practice of the Courts for identifying minors. In cases where minors are referenced or at issue in court filings, the Courts will only use initials to identify these individuals. Further, the Court will also use initials for parents/guardians in cases where same are appearing on behalf of a minor. The GRC has adopted this standard when adjudicating denial of access complaints involving records concerning minors. This standard is appropriate based on a parent/guardian's reasonable expectation that the minor will not be identified publicly in any way. Thus, based on the privacy interests afforded in N.J.S.A. 47:1A-1, OPRA will protect the names of minors and their representative parents/guardians where no other law requires disclosure.⁸

Therefore, the Custodian has unlawfully denied access to the contracts responsive to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. **Thus, the Custodian must provide all responsive contracts to the Complainant. However, the Custodian shall redact the names and signatures of all minors and their parents contained on the form.**

⁸ N.J.S.A. 39:4-131 requires the disclosure of all information contained in accident reports regardless of inclusion of information for a minor. Moreover, directory information, which is information that is generally not considered harmful or an invasion of privacy if released, can also be disclosed to outside organizations without the consent of a parent or older student. These organizations include yearbook companies and military recruiters. N.J.S.A. 18A:36-19.1. and 20 U.S.C.A. § 1232g(b)(1).

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to immediately respond in writing to the Complainant's two (2) OPRA requests for contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Thus, the Custodian failed to timely respond to the Complainant's OPRA requests. *See* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. The Custodian has unlawfully denied access to the contracts responsive to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. **Thus, the Custodian must provide all responsive contracts to the Complainant. However, the Custodian shall redact the names and signatures of all minors and their parents contained on the form.**
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.¹⁰**
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.

Prepared By: Frank F. Caruso
Senior Case Manager

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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012