



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

July 26, 2011 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2010-286

v.

NJ Department of State,
Division of Archives and Records Management
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Deputy Record Custodian Joseph Klett’s failure to respond in a timely manner *in writing* to the Complainant’s October 12, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. Because the Custodian certified that there are no records responsive to the Complainant’s request for the record relevant to this complaint, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although Deputy Records Custodian Joseph Klett’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period resulted in a “deemed” denial, because the Deputy Custodian certified that he verbally responded to the Complainant on October 28, 2010 and advised the Complainant that the requested records do not exist, and further, because the evidence of record does not indicate that the Deputy Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate, it is concluded that Deputy Records Custodian Joseph Klett’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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

Sabino Valdes¹
Complainant

GRC Complaint No. 2010-286

v.

NJ Department of State, Division of Archives and Records Management²
Custodian of Records

Record Relevant to Complaint: Copy of the original “Request and Authorization for Records Disposal” form submitted to the NJ Department of State, Division of Archives and Records Management (“DARM”) by the Office of Administrative Law (“OAL”) requesting authorization, pursuant to the Records Retention and Disposition Schedule, to dispose of or destroy the duplicate case file maintained by OAL In the Matter of the Tenure Hearing of Sabino Valdes, Agency Docket Number 328-9/00; OAL Docket Number EDU 3620-01.

Request Made: October 12, 2010

Response Made: November 9, 2010³

Custodian: Karl Niederer

GRC Complaint Filed: November 1, 2010⁴

Background

October 12, 2010

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.

October 28, 2010

Custodian’s response to the OPRA request. Deputy Records Custodian Joseph Klett (“DRC”) received the Complainant’s OPRA request sometime during the week of October 25, 2010.⁵ The DRC responds verbally to the Complainant’s OPRA request on

¹ No legal representation listed on record.

² In the Custodian’s Statement of Information dated December 20, 2010 the Custodian listed DAG Donald M. Palombi, on behalf of the NJ Attorney General, as Custodian’s Counsel; however, there are no submissions on file from Custodian’s Counsel to the GRC.

³ The evidence of record indicates that the Custodian’s response to the OPRA request was verbal.

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

⁵ There is confusion surrounding the precise date the OPRA request was received by the Custodian. The Complainant states that he mailed it on October 12, 2010 and it was received by the Custodian on October 15, 2010. The Complainant submits a domestic return receipt as proof the item was delivered on October 15, 2010; however, the item was not received by the Custodian on October 15, 2010 but by the Capitol Post Office. This was clearly indicated on the domestic return receipt. The DRC certified that the request was Sabino Valdes v. NJ Department of State, Division of Archives and Records Management, 2010-286 – Findings and Recommendations of the Executive Director

the ninth (9th) business day following receipt of such request. The DRC by telephone informs the Complainant that the requested record does not exist and has never existed.⁶

November 1, 2010

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

- Complainant’s OPRA request dated October 12, 2010
- Postal Service certified mail receipt dated October 12, 2010
- Postal Service Domestic Return Receipt for an article addressed to the Custodian but delivered to the Capitol Post Office dated October 15 2010

The Complainant states that his OPRA request for the record relevant to the complaint was mailed to the Custodian on or about October 12, 2010.⁷ The Complainant asserts that the request was provided to the Custodian on October 15 2010. The Complainant subsequently asserts that the request was received by the Custodian on October 15, 2010 but the Complainant does not offer any evidence in support of such assertion.

The Complainant states that the Custodian did not respond to his OPRA request; therefore, the Custodian did not provide a statutory exemption for denying the Complainant access to the requested record. The Complainant further asserts that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Complainant does not agree to mediate this complaint.

November 9, 2010

NJ Government Records Request Receipt from the Custodian to the Complainant. The Custodian sends the Complainant a NJ Government Records Request Receipt which states that access to the requested record is denied because there are no records responsive to the Complainant’s request.

November 29, 2010

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

November 29, 2010

E-mail from the Custodian to the GRC. The Custodian provides the GRC with a copy of the Custodian’s written response to the Complainant’s OPRA request dated November 9, 2010. The Custodian states that he was on an extended medical leave when the Complainant submitted his OPRA request and that the DRC did not respond in

found in the Custodian’s in-box during the week of October 25, 2010. Because the request was delivered to the State of New Jersey Capital Post Office on October 15, 2010 and it was not thereafter stamped received upon arrival at the DARM offices on that same date, the GRC will use the date certain, October 15, 2010, as the date received by the custodial agency.

⁶ The DRC certified that the Custodian was on leave when the Complainant filed this OPRA request and therefore in the Custodian’s absence the DRC responded to the Complainant’s request.

⁷ The evidence of record reveals the request was mailed on October 12, 2010 by certified mail.

writing to the request. The Custodian further states that he returned from medical leave on November 8, 2010 and sent the response to the Complainant the following day.

December 8, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation between the GRC and the Custodian wherein the Custodian stated that the records requested by the Complainant do not exist and the Custodian asked the GRC if, under the circumstances, the Complainant would withdraw his complaint. The GRC informs the Custodian that during a subsequent telephone conversation between the GRC and the Complainant, the Complainant told the GRC that he will not withdraw his complaint. The GRC grants the Custodian an additional five (5) business days to submit his completed SOI to the GRC.

December 9, 2010

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he has completed the SOI and that it has been forwarded to the Custodian's Counsel for review and advice. The Custodian states that the GRC should receive the SOI within a few days.

December 17, 2010

The Custodian submits an unsigned SOI to the GRC.

December 17, 2010

E-mail from the GRC to the Custodian. The GRC returns the unsigned SOI to the Custodian and informs the Custodian that he must sign the SOI.

December 20, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 12, 2010
- NJ Government Records Request Receipt dated November 9, 2010

The Custodian certifies that the DRC directed the Supervisor of Records and Forms Analysis, Joseph Falca, to search the agency files for the requested record. The Custodian further certifies that Mr. Falco conducted a search of the agency files but could find no record responsive to the Complainant's request.

The Custodian also certifies that the record series "Request and Authorization for Records Disposal", which are the records that may have been responsive to the request, fall under DARM retention schedule No. S740803-003, series No. 0007-0000 and are retained permanently. The Custodian certifies that no destruction of documents in said series ever occurs.

The Custodian certifies that the Complainant's OPRA request arrived at the agency sometime after October 12, 2010 while the Custodian was on extended leave. The Custodian further certifies that the request was found by the DRC in the Custodian's in-box and that the DRC responded to the Complainant's OPRA request. The Custodian certifies that he returned from leave on November 8, 2010 and was presented with a

folder from the DRC that contained the Complainant's OPRA request. The Custodian further certifies that the DRC told him that the DRC responded to the Complainant's request telephonically. The Custodian certifies that he then responded in writing to the Complainant's request on November 9, 2010.

December 21, 2010

Telephone call from the Complainant to the GRC. The Complainant states that he has not yet received the Custodian's SOI. The GRC informs the Complainant that the SOI was received by the GRC and that the GRC will send a copy to the Complainant.

December 22, 2010

E-mail from the Custodian to the GRC. The Custodian wants to know the procedure that will be followed with respect to the adjudication of the complaint and if a hearing will be scheduled.

December 22, 2010

E-mail from the GRC to the Custodian. The GRC provides the Custodian with an overview of the typical complaint adjudication process and refers the Custodian to the GRC website for more information. The GRC also informs the Custodian that the GRC will send a copy of the SOI to the Complainant on this occasion but in the future the Custodian must copy the Complainant on all correspondence forwarded to the GRC.

December 22, 2010

E-mail from the Custodian to the GRC. The Custodian acknowledges the e-mailed information provided by the GRC, informs the GRC that this is the first time he responded to a Denial of Access Complaint and assures the GRC he will try to abide by all proper GRC procedures in the future.

December 29, 2010

Letter from the Complainant to the Custodian. The Complainant informs the Custodian that via an e-mail from the GRC to the Custodian dated November 24, 2010, the Custodian was to submit his SOI to the GRC with a copy to the Complainant. The Complainant states that he learned from the GRC that the SOI was submitted to the GRC but that the Complainant never received his copy. The Complainant requests his copy of the SOI from the Custodian.

December 29, 2010

Telephone call from the GRC to the Complainant. The GRC informs the Complainant that the GRC already informed the Custodian that he must copy the Complainant on all correspondence forwarded to the GRC. The GRC further informs the Complainant that the Custodian had advised the GRC that this was the first experience the Custodian had with processing a Denial of Access Complaint and that the Custodian said that he had inadvertently failed to copy the Complainant with the SOI. The GRC further informs the Complainant that the GRC has already mailed a copy of the SOI to the Complainant and he should receive the copy shortly.⁸

⁸ Overlapping and/or slow communications have caused some issues to arise in the adjudication of this complaint. There is overlapping of communications in this matter because the GRC and the Custodian Sabino Valdes v. NJ Department of State, Division of Archives and Records Management, 2010-286 – Findings and Recommendations of the Executive Director

December 30, 2010

Letter from the Complainant to the Custodian. The Complainant informs the Custodian that he faxed a letter to the Custodian dated December 29, 2010 stating the Custodian failed to send a copy of the SOI to the Complainant simultaneously with the Custodian's SOI submission to the GRC. The Complainant informs the Custodian that the Custodian signed a certification affirming that he would send a copy of the SOI to the Complainant and therefore the Complainant wants his copy of the SOI sent immediately.

December 30, 2010

Letter from the Complainant to the GRC. The Complainant informs the Executive Director of the GRC that the Custodian failed to send a copy of the SOI to the Complainant simultaneously with the Custodian's SOI submission to the GRC. The Complainant informs the Executive Director that she should instruct the Custodian to provide the Complainant with a copy of the SOI.

December 30, 2010

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he received a letter from the Complainant wherein the Complainant demands the Custodian provide him with a copy of the SOI. The Custodian states that he is perplexed because the GRC informed him on December 22, 2010 that the GRC would send a copy of the SOI to the Complainant. The Custodian asks the GRC if he should send a copy of the SOI to the Complainant.

January 3, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the GRC advised the Complainant on December 29, 2010 that the GRC mailed a copy of the SOI to the Complainant. The GRC states that it does not know why the Complainant continues to demand a copy of the SOI from the Custodian.

January 10, 2011

The Complainant's response to the Custodian's SOI.⁹ The Complainant asserts that the Custodian failed to respond to the Complainant's request in writing within seven (7) business days pursuant to the provisions of OPRA and that the Custodian altered the complaint number and signature page on the SOI form to avoid culpability for his willful false statement that he provided a copy of the completed SOI to the Complainant simultaneously with his submission of the SOI to the GRC, when in fact, he did not. Finally, the Complainant alleges that due to delay in the Complainant's receipt of the

communicate via instantaneous e-mail correspondence; however, the Complainant communicates with the GRC and the Custodian via the U.S. Postal Service ("USPS"), unless he deems his communication to be urgent in which case the Complainant will fax the communication to the GRC and/or the Custodian. The GRC and the Custodian can only communicate with the Complainant via telephone (when the Complainant answers) and USPS. The Complainant has not provided the GRC with a fax number, and overnight express service is not feasible because the Complainant only provided a P.O. Box and such services will not deliver to a P.O. Box.

⁹ Much of the Complainant's submission repeats large segments of the transmittal form letter, segments of the SOI form itself or other documents already presented to the GRC by one or both parties.

completed SOI, he was time barred from amending his complaint within the thirty (30) business day time period as a matter of right pursuant to *N.J.A.C. 5:105-2.3(h)*.¹⁰

January 10, 2011

Letter from the GRC to the Complainant. The GRC informs the Complainant that pursuant to *N.J.A.C. 5:105 et seq.*, the GRC will only accept one (1) submission from each party unless (a) the Custodian failed to respond to the OPRA request or (b) argument or evidence was not available at the time of the initial submission. The GRC further advises the Complainant that the evidence of record reveals that the Custodian did not provide a written response to the Complainant's request until after the complaint was filed; therefore the GRC will accept the Complainant's response to the Custodian's SOI.

February 10, 2011

E-mail from the GRC to the Custodian. The GRC requests that the DRC prepare a certification concerning his handling of the Complainant's October 12, 2010 OPRA request.

February 15, 2011

DRC Joseph Klett's certification. The DRC certifies that during the week of October 25, 2010, while the Custodian was on leave, the DRC was informed by his staff that the Complainant had called the Custodian regarding an OPRA request. The DRC further certifies that he found the Complainant's OPRA request in the Custodian's in-box and determined that the Complainant had sent a second request for records with regard to an authorization for destruction of a duplicate case file of the Office of Administrative Law. The DRC certifies he consulted with the Supervisor of Records and Forms Analysis, Mr. Joseph Falca, who advised the DRC that the agency had no record responsive to the Complainant's request.

The DRC certifies that he called the Complainant on October 28, 2010 and informed the Complainant that he was processing several OPRA requests, including the Complainant's request, in the order they were received by the agency.¹¹ The DRC also certifies that he informed the Complainant that the agency had no record responsive to the Complainant's request. The DRC further certifies that he informed the Complainant that he would send a written response to him within a couple of days, but in the meantime the Complainant would have an answer to his OPRA request.

The DRC certifies that he took on additional duties due to the Custodian's absence and subsequently did not find the time to respond in writing to the Complainant's OPRA request. The DRC certifies that the Custodian returned to work on November 8, 2010 and he gave the Custodian the Complainant's OPRA request at that time.

¹⁰ The Complainant's Denial of Access complaint was filed on November 1, 2010 but the Complainant alleges that he did not receive a completed copy of the SOI until January 6, 2011; a forty-three (43) business day time period.

¹¹ The DRC certifies that a recent change of DARM's e-mail account to the Department of Treasury disabled the forwarding of OPRA requests to DARM resulting in a backlog of OPRA requests. Sabino Valdes v. NJ Department of State, Division of Archives and Records Management, 2010-286 – Findings and Recommendations of the Executive Director

February 16, 2011

Letter from the GRC to the Complainant. Because it is unclear whether the DRC sent a copy of his certification to the Complainant, the GRC sends a copy to the Complainant.

March 9, 2011

Letter from the Complainant to the GRC. The Complainant sends a letter to withdraw another complaint he has pending before the GRC; however, the Complainant goes on to state that the GRC in the instant complaint allowed the Custodian to violate *N.J.A.C. 5:105-2.4(f)*, accepted a distorted SOI from the Custodian and accepted an improper certification from Joseph Klett dated February 15, 2011.¹²

March 9, 2011

Letter from the GRC to the Custodian. The GRC informs the Custodian that the Complainant, under the pretense of a withdrawal letter sent to the GRC for a different complaint, reiterated some of the issues he raised in an earlier submission for the instant complaint. The Custodian was informed that, because such practice violates the GRC's position with respect to *ex parte* communications, the Custodian would be granted a five (5) business day period to respond to the Complainant's allegations. A copy of the Complainant's letter to the GRC dated March 9, 2011 accompanied this letter.

March 15, 2010¹³

Letter from the GRC to the Complainant. The GRC informs the Complainant that because a delay in the Complainant's receipt of the SOI resulted in him being time barred from amending his complaint as a matter of right pursuant to *N.J.A.C. 5:105-2.3(h)*, and because the Complainant has expressed a desire to amend his complaint, the GRC has agreed to grant the Complainant a fifteen (15) business day time period to amend and submit his complaint to the GRC.¹⁴

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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:

¹² *N.J.A.C. 5:105-2.4(f)* provides, "Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI. The Council will not accept additional submissions from the custodian unless the Executive Director orders same or offers its express approval for same. Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant."

¹³ 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.

¹⁴ The Complainant did not amend the instant complaint.

“... 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 further provides that:

“[a] custodian shall promptly comply with a request to inspect, examine, copy or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof...[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.

OPRA additionally provides that:

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

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the

required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2010).

Here, the DRC certified that he received the Complainant’s OPRA request during the week of October 25, 2010 and thereafter responded to the Complainant’s OPRA request on October 28, 2010 by telephoning the Complainant and telling him his OPRA request was denied because the requested record did not exist. The evidence of record reveals that the OPRA request was delivered to the agency on October 15, 2010; therefore by responding to the request on October 28, 2010, the DRC did not respond to the Complainant’s request until the ninth (9th) business day following receipt of the request. The DRC not only failed to respond in a timely manner, but also failed to respond to the Complainant in writing as required under OPRA. As such, the DRC’s response to the Complainant’s OPRA request was defective.

Here, Deputy Records Custodian Joseph Klett’s failure to respond in a timely manner *in writing* to the Complainant’s October 12, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The DRC certified that he telephoned the Complainant on October 28, 2010 and informed him that the record he requested does not exist and has never existed.¹⁵ The Custodian certified that he returned from extended leave on November 8, 2010 and the next day sent a written response to the Complainant informing the Complainant that there are no records responsive to his request.¹⁶

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the Complainant’s request, the custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was

¹⁵ The DRC, on February 15, 2011, certified that on or about October 28, 2010, he consulted with the Supervisor of Records and Forms Analysis, Mr. Joseph Falca, who advised the DRC that the agency had no record responsive to the Complainant’s request.

¹⁶ The Custodian certified in his SOI that he based his denial upon the search undertaken by his staff to satisfy the records request upon which this complaint is based. The Custodian certified that said search involved the DRC, on or about October 28, 2010, consulting with the Supervisor of Records and Forms Analysis, Joseph Falca, regarding the Complainant’s request and the subsequent determination by Falca that no record responsive to the Complainant’s request exists.

nonexistent. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access.”

Therefore, because the Custodian certified that there are no records responsive to the Complainant’s request for the record relevant to this complaint, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. See also Pusterhofer, supra.

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

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, Although Deputy Records Custodian Joseph Klett’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period resulted in a “deemed” denial, because the Deputy

Custodian certified that he verbally responded to the Complainant on October 28, 2010 and advised the Complainant that the requested records do not exist, and further, because the evidence of record does not indicate that the Deputy Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate, it is concluded that Deputy Records Custodian Joseph Klett'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. Deputy Record Custodian Joseph Klett's failure to respond in a timely manner *in writing* to the Complainant's October 12, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for the record relevant to this complaint, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although Deputy Records Custodian Joseph Klett's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day period resulted in a "deemed" denial, because the Deputy Custodian certified that he verbally responded to the Complainant on October 28, 2010 and advised the Complainant that the requested records do not exist, and further, because the evidence of record does not indicate that the Deputy Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate, it is concluded that Deputy Records Custodian Joseph Klett'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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011