



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

March 29, 2011 Government Records Council Meeting

Pauline Higgins
Complainant

Complaint No. 2010-30

v.

Borough of Caldwell (Essex)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide the requested records in a legible manner in the requested format and failed to provide certified confirmation of compliance with the Council’s December 21, 2010 Interim Order within the ten (10) business days required therein, the Custodian failed to *specifically* comply with the Council’s December 21, 2010 Interim Order.
2. The Custodian failed to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days of receipt thereof, resulting in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6, failed to provide the requested records in a legible manner in the requested format pursuant to the Council’s Interim Order and failed to provide certified confirmation of compliance to the GRC within the required ten (10) business days from receipt of the Council’s December 21, 2010 Interim Order. Although the Custodian’s submission of the required certification was untimely, the evidence of record demonstrates that the Custodian has worked with the Complainant throughout the adjudication of this Denial of Access complaint to ensure that the Complainant received the requested records in the desired format, and the Complainant’s e-mail to the Custodian dated January 19, 2011 indicates that the Custodian has complied with the substantive terms of the order. The evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



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

Final Decision Rendered by the
Government Records Council
On The 29th Day of March, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Pauline Higgins¹
Complainant**

GRC Complaint No. 2010-30

v.

**Borough of Caldwell (Essex)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

- Digital Images of Tax Maps for the Borough of Caldwell
- Geo Referenced Tax Maps
- Parcel Layers³

Request Made: November 24, 2009

Response Made: None

Custodian: Lisa O'Neill

GRC Complaint Filed: February 17, 2010⁴

Background

December 21, 2010

Government Records Council's ("Council") Interim Order. At its December 21, 2010 public meeting, the Council considered the December 14, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Complainant's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days of receipt thereof results in a "deemed" denial 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).
2. Because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose to the Complainant in the requested

¹ Formerly represented by Robert Blau, Esq. (Springfield, NJ). As of September 15, 2010, Mr. Blau no longer represents the Complainant.

² Represented by Gregory Mascera, Esq. of Bannon, Rawding, McDonald & Mascera (Verona, NJ).

³ The Complainant's Denial of Access Complaint refers to these collectively as "digital images of tax maps."

⁴ The GRC received the Denial of Access Complaint on February 18, 2010.

medium, or another meaningful medium, the records relevant to this complaint.

3. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.
4. **If applicable, the Custodian shall calculate the appropriate special service charge in accordance with Paragraph No. 3 above and shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records (a digital copy of all of the tax maps and/or a copy of the Geographic Information Systems parcel layers shape file of the Borough of Caldwell) with any appropriate redactions and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
5. 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.

December 21, 2010

Council's Interim Order distributed to the parties.

January 4, 2011

E-mail from the Custodian's Counsel to the Complainant. Custodian's Counsel informs the Complainant that the information provided should satisfy the Complainant's request. Counsel states that the Borough of Caldwell is not obligated to provide the Complainant the maps in any specific dimensions.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

January 10, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the Borough of Caldwell's engineer has maps that are in a CAD format. The Complainant states that the maps that he received were originally 24" x 36" and have been reduced to 11" x 17" and cannot be read.

January 15, 2011⁵

E-mail from the Complainant to the Custodian's Counsel. The Complainant states that he also requested a parcel layer SHP file and a CAD file for the tax maps. The Complainant asserts that the CAD files of the tax maps are on the engineer's computer and that those files are used to generate the PDF file that was sent to him.

January 19, 2011

Custodian's Counsel's response to the Council's Interim Order. Counsel provides a legal certification stating that he received a copy of the Council's Interim Order on or about December 22, 2010. Counsel certifies that he immediately attempted to comply with the terms of the Order but was delayed because of bad weather and the Christmas and New Year holidays. Counsel certifies that he forwarded via e-mail copies of the Caldwell tax maps to the Complainant in electronic PDF format via e-mail on January 4, 2011. Counsel certifies that he requested that the Complainant confirm that he is in possession of the requested information.

Counsel certifies that the Complainant advised the Borough that the format of the maps provided to him was not acceptable via an e-mail dated January 10, 2011. Counsel contends that he believes that the Borough has met its obligation but is accommodating the Complainant by providing the maps in a revised format as long as the Complainant agrees to pay any conversion costs. Counsel certifies that he did not receive any further comments from the Complainant until January 10, 2011 when the Complainant asserted via e-mail that he believed the Borough engineer had the requested maps on his computer.

Counsel certifies that he informed the Complainant via an e-mail dated January 10, 2011 that the Borough would still attempt to accommodate his request. Counsel certifies that the Borough of Caldwell has complied with the substantive requirements set forth in the Council's Interim Order dated December 21, 2010 and intends to make continual efforts to provide the Complainant with the additional information requested in his e-mail dated January 15, 2011.

January 19, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the Borough of Caldwell has agreed to send him the DWG file of the requested maps; the Complainant's OPRA request will therefore have been completed to his satisfaction.

January 21, 2011

Facsimile from the Custodian's Counsel to the GRC. Counsel provides a certification that Counsel believes that the Borough of Caldwell has complied with the substantive requirements set forth in the Council's Interim Order dated December 21, 2010 because Counsel has supplied the Complainant with all of the information sought in the OPRA request.

⁵ Additional documentation not relevant to the adjudication of this complaint was also submitted.
Pauline Higgins v. Borough of Caldwell (Essex), 2010-30 – Supplemental Findings and Recommendations of the Executive Director

Analysis

Whether the Custodian complied with the Council's December 21, 2010 Interim Order?

In the instant matter, the Complainant requested copies of digital images of tax maps for the Borough of Caldwell, including geo referenced tax maps and parcel layers, in any format. In the SOI, the Custodian certified that the Borough does not maintain scanned tax maps digitally; moreover, the Borough Engineer attempted to fulfill the request by providing paper copies of the requested records for a copy fee of \$50.00. The Council determined that pursuant to N.J.S.A. 47:1A-5.d., the Custodian has an affirmative duty to provide a copy of a record in the medium requested unless the agency does not maintain the record in such a medium, in which case the Custodian is required to either convert the record to the requested medium or provide a copy in another meaningful medium and noted that here, the Custodian failed to make any effort to convert the record to the medium requested or provide a copy in another meaningful medium.

The Council's December 21, 2010 Interim Order therefore required the Custodian to disclose to the Complainant in the requested medium, or another meaningful medium, the records relevant to this complaint within ten (10) business days of receipt of the Council's Interim Order.

The evidence of record reveals that on January 4, 2011, the Custodian's Counsel provided the requested records to the Complainant in a digital CAD format; however, the Complainant advised the Borough via an e-mail dated January 10, 2011 that the dimensions of the maps provided to him rendered the maps unreadable. Via legal certification to the GRC dated January 11, 2011, Custodian's Counsel stated that the Custodian would continue to attempt to provide copies of the requested records to the Complainant. In an e-mail to the Custodian dated January 19, 2011, the Complainant stated that the Borough had agreed to send him the DWG file of the requested maps and further stated that the Complainant's OPRA request will therefore have been completed to his satisfaction.

The evidence of record therefore reveals that the Custodian provided the Complainant with digital copies of the requested tax maps within the ten (10) business days delineated in the Council's December 21, 2010 Interim Order. However, the Custodian did not provide the Complainant with the specified electronic file format until nineteen (19) business days after receipt of the Council's Interim Order.

While the legibility and accuracy of records is not within the Council's jurisdiction, OPRA places a duty upon custodians of record to ensure that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." N.J.S.A. 47:1A-1. Accordingly, the Custodian should have ensured that the initial digital scans of the requested tax maps were legible and not "unreadable," as per the Complainant's January 10, 2011 e-mail. The Council's Interim Order requires "specific" and not "substantive" compliance, and it is the responsibility of the Custodian to ensure that the records are offered and prepared to the exact specifications of the requested format. Furthermore, the Custodian did not provide the Council with the required certification of compliance until the fifteenth (15th) business day following receipt of the Council's Interim Order.

Therefore, the Custodian's failure to disclose the requested records in a legible manner in the requested format and the Custodian's failure to provide certified confirmation of compliance with the Council's Interim Order within ten (10) business days of receipt of the Council's Interim Order constitutes a failure to *specifically* comply with the Council's December 21, 2010 Interim Order.

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

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

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

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

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

Here, the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days of receipt thereof resulting in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6, failed to provide the requested records in a legible manner in the requested format pursuant to the Council's Interim Order, failed to provide the Complainant the requested records in the specified format, and failed to provide certified confirmation of compliance to the GRC within the required ten (10) business days from receipt of the Council's December 21, 2010 Interim Order. Although the Custodian's submission of the required certification was untimely, the evidence of record demonstrates that the Custodian has worked with the Complainant throughout the adjudication of this Denial of Access complaint to ensure

that the Complainant received the requested records in the desired format, and the Complainant's e-mail to the Custodian dated January 19, 2011 indicates that the Custodian has complied with the substantive terms of the order. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide the requested records in a legible manner in the requested format and failed to provide certified confirmation of compliance with the Council's December 21, 2010 Interim Order within the ten (10) business days required therein, the Custodian failed to *specifically* comply with the Council's December 21, 2010 Interim Order.
2. The Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days of receipt thereof, resulting in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6, failed to provide the requested records in a legible manner in the requested format pursuant to the Council's Interim Order and failed to provide certified confirmation of compliance to the GRC within the required ten (10) business days from receipt of the Council's December 21, 2010 Interim Order. Although the Custodian's submission of the required certification was untimely, the evidence of record demonstrates that the Custodian has worked with the Complainant throughout the adjudication of this Denial of Access complaint to ensure that the Complainant received the requested records in the desired format, and the Complainant's e-mail to the Custodian dated January 19, 2011 indicates that the Custodian has complied with the substantive terms of the order. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

December 21, 2010 Government Records Council Meeting

Pauline Higgins
Complainant

Complaint No. 2010-30

v.

Borough of Caldwell (Essex)
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council (“Council”) considered the December 14, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof results in a “deemed” denial 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).
2. Because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose to the Complainant in the requested medium, or another meaningful medium, the records relevant to this complaint. *See also* Kimberly Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010)(the Council determined that the Custodian made no attempt to satisfy the Complainant’s OPRA request by converting the record to the medium requested or providing a copy in some other meaningful medium because he certified that Essex County did not maintain maps in an electronic format; the Council required the Custodian to obtain an estimate of the special service charge attendant upon conversion of the requested tax maps to a digital format and provide such estimate to the Complainant).
3. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the



Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. If necessary, the Custodian shall contract with an outside vendor to perform any necessary conversions, and similarly allow the Complainant the opportunity to object to any charges prior to incurring same.

4. **If applicable, the Custodian shall calculate the appropriate special service charge in accordance with Paragraph No. 3 above and shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records (a digital copy of all of the tax maps and/or a copy of the Geographic Information Systems parcel layers shape file of the Borough of Caldwell) with any appropriate redactions and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
5. 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 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: December 21, 2010

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Pauline Higgins¹
Complainant**

GRC Complaint No. 2010-30

v.

**Borough of Caldwell (Essex)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

- Digital Images of Tax Maps for the Borough of Caldwell
- Geo Referenced Tax Maps
- Parcel Layers³

Request Made: November 24, 2009

Response Made: None

Custodian: Lisa O'Neill

GRC Complaint Filed: February 17, 2010⁴

Background

November 24, 2009

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

February 17, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a copy of the Complainant's OPRA request dated November 24, 2009. The Complainant asserts that the Custodian did not respond to the OPRA request. The Complainant agrees to mediate this complaint.

March 25, 2010

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

¹ Formerly represented by Robert Blau, Esq. (Springfield, NJ). As of September 15, 2010, Mr. Blau no longer represents the Complainant.

² Represented by Gregory Mascera, Esq., Bannon, Rawding, McDonald & Mascera (Verona, NJ).

³ The Complainant's Denial of Access Complaint refers to these collectively as "digital images of tax maps."

⁴ The GRC received the Denial of Access Complaint on February 18, 2010.

May 10, 2010

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

June 9, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on May 10, 2010 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

September 22, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated November 24, 2009
- Copies of tax maps

The Custodian certifies that the Borough of Caldwell does not maintain scanned tax maps digitally. The Custodian further certifies that the Borough Engineer, Anthony Marucci, notified the Complainant by telephone on December 1, 2009 (the fourth (4th) business day following receipt of the request) that paper copies of the requested tax maps were available for pickup and further informed the Complainant that a \$50.00 copying fee was required. The Custodian certifies that she contacted the Complainant on December 1, 2009 and again on December 3, 2009 (the fourth (4th) and sixth (6th) business days following receipt of the request, respectively) to advise the Complainant that paper copies of the requested records were ready for pick up. The Custodian states that the Complainant did not come to pick up the copies of the requested tax maps and had no further contact with the Borough.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

“Whenever...the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies...[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further provides that:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. *If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.* If a request is for a record...[that] require[es] a substantial amount of manipulation...the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

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-5i. As also prescribed under N.J.S.A. 47:1A-5i., 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-5g.⁵ 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-5g., N.J.S.A. 47:1A-5i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, the Custodian certified in the SOI that the Borough Engineer, Anthony Marucci, responded verbally to the Complainant's OPRA request on December 1, 2009, the fourth (4th) business day following receipt thereof. However, the Complainant stated in the Denial of Access Complaint that he received no response to the OPRA request. Moreover, there is no evidence in the record to establish the existence of a written response from the Custodian to the Complainant's OPRA request.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the matter before the Council, the Complainant sought digital images of tax maps for the Borough, as well as geo-referenced tax maps and parcel layers. The Custodian has certified that the Borough does not maintain scanned tax maps but provided paper copies of the requested tax maps. As such, the Custodian certified that there are no records responsive to the Complainant's OPRA request other than the paper copies of tax maps already provided to the Complainant.

Pursuant to N.J.S.A. 47:1A-5.d., the Custodian has an affirmative duty to provide a copy of a record in the medium requested unless the agency does not maintain the record in such a medium, in which case the Custodian is required to either convert the record to the requested medium or provide a copy in another meaningful medium. Here, however, the Custodian failed to make any effort to convert the record to the medium requested or provide a copy in another meaningful medium.

In Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), where the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a format that was conducive to such delivery, the Council decided: "...in this complaint, if the Custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail."

Accordingly, because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose to the Complainant in the requested medium, or another meaningful medium, the records relevant to this complaint. *See also* Kimberly Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010)(the Council determined that the Custodian made no attempt to satisfy the Complainant's OPRA request by converting the record to the medium requested or providing a copy in some other meaningful medium because he certified that Essex County did not maintain maps in an electronic format; the Council required the Custodian to obtain an estimate of the special

service charge attendant upon conversion of the requested tax maps to a digital format and provide such estimate to the Complainant).

If the records require a substantial amount of manipulation, the Custodian may charge pursuant to N.J.S.A. 47:1A-5.d., "...in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency..." Further, in accord with N.J.S.A. 47:1A-5.c "...[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred."

Therefore if the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. If necessary, the Custodian shall contract with an outside vendor to perform any necessary conversions and similarly allow the Complainant the opportunity to object to any charges prior to incurring same.

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. The Custodian's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days of receipt thereof results in a "deemed" denial 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).
2. Because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose to the Complainant in the requested medium, or another meaningful medium, the records relevant to this complaint. *See also* Kimberly Smela v. County of Essex, GRC Complaint No. 2009-255 (Interim Order May 2010)(the Council determined that the Custodian made no attempt to satisfy the Complainant's OPRA request by converting the record to the medium

requested or providing a copy in some other meaningful medium because he certified that Essex County did not maintain maps in an electronic format; the Council required the Custodian to obtain an estimate of the special service charge attendant upon conversion of the requested tax maps to a digital format and provide such estimate to the Complainant).

3. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. If necessary, the Custodian shall contract with an outside vendor to perform any necessary conversions, and similarly allow the Complainant the opportunity to object to any charges prior to incurring same.
4. **If applicable, the Custodian shall calculate the appropriate special service charge in accordance with Paragraph No. 3 above and shall make the amount of the charge available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records (a digital copy of all of the tax maps and/or a copy of the Geographic Information Systems parcel layers shape file of the Borough of Caldwell) with any appropriate redactions and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director. If a special service charge is applicable and the Complainant fails to pay the special service charge for the requested records by the tenth (10th) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
5. 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: Darryl C. Rhone
Case Manager

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Approved By: Catherine Starghill, Esq.
Executive Director

December 14, 2010