



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
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2010-304

v.

Township of Livingston (Essex)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant has failed to establish in his request for reconsideration of the Council’s March 27, 2012 Final Decision 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, and failed to submit any evidence to prove that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council’s Final Decision. Thus, the Complainant’s 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).

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 31st Day of July, 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: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting

Larry A. Kohn¹
Complainant

GRC Complaint No. 2010-304

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Executive session minutes for 22 specific dates from November 5, 2010 to June 21, 2010.³
2. Police report or reports from 12:00 p.m. on September 7, 2010 to 12:00 p.m. on September 9, 2010 detailing any police stop and/or investigation of any individuals distributing literature from Constellation Energy.
3. Purchase Order (“PO”) that resulted from R-10-90 for the purchase of furniture on February 22, 2010.

Request Made: September 20, 2010

Response Made: September 29, 2010

Custodian: Glenn Turteltaub

GRC Complaint Filed: November 16, 2010⁴

Background

March 27, 2012

Government Records Council’s (“Council”) Interim Order. At its March 27, 2012 public meeting, the Council considered the March 20, 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. Although the Custodian timely responded to the Complainant’s September 20, 2010 OPRA request in writing on three (3) occasions requesting extensions of time to respond to said request, the Custodian’s failure to respond in writing within the third (3rd) extended deadline results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner, Et Al. (Riverdale, NJ).

³ The Complainant listed the specific dates on an attached sheet of paper.

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

Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, pursuant to Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request.

2. The Custodian certified in the Statement of Information that he provided fourteen (14) of the twenty-five (25) sets of minutes responsive to the Complainant's OPRA request Item No. 1 to the Complainant on December 10, 2010 and the remaining sets of minutes are available for inspection. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Moreover, the GRC notes that the Custodian lawfully denied access to the October 26, 2009 meeting minutes pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) because same were not approved by Council at the time of the Complainant's OPRA request and are thus considered to be a draft document not disclosable under OPRA. N.J.S.A. 47:1A-1.1. *See also* Danis v. Garfield Board of Education (Bergen), GRC Complaint No. 2009-156, 2009-157 and 2009-158 (Interim Order dated April 28, 2010).
3. The Custodian certified in the Statement of Information that no responsive police reports existed at the time of the Complainant's OPRA request. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested police reports pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian violated N.J.S.A. 47:1A-5.i by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item No. 3 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that his request for an extension effectively stayed his obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive purchase orders because the Township provided the Complainant with access to same on December 3, 2010, December 6, 2010 and December 10, 2010.
5. The Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, the Custodian violated N.J.S.A. 47:1A-5.e for failing to immediately respond to the Complainant's OPRA request Item No. 3 and the Custodian failed to bear his burden of proving a lawful denial of access to the

responsive purchase orders by delaying access to said records pending compilation of the remaining records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to the responsive executive session minutes pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian did not unlawfully deny access to the responsive police reports pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) because same did not exist at the time of the request and the Custodian made the responsive purchase orders available to the Complainant on December 3, 2010, December 6, 2010 and December 10, 2010. 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.

April 5, 2012

Council's Final Decision distributed to the parties.

April 16, 2012

Letter from the Complainant to the GRC. The Complainant requests a stay of the Council's Final Decision.

The Complainant states that the Final Decision correctly indicates that the Custodian provided him with the responsive records but fails to identify that the Custodian did not provide same until after the filing of the instant complaint. The Complainant asserts that the GRC should correct this omission.

The Complainant asserts that this issue should be corrected as it would be in the public interest for the GRC to correct same.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's March 27, 2012 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.12*, parties may file a stay of any decision rendered by the Council. A request for a stay must be in writing, delivered to the Council and served to all parties. Parties must file any objection to the request for a stay from a final decision within ten (10) business days following receipt of the request. The Executive Director may grant a stay from a final decision based on consideration of the request and any objection to the request submitted to the Council. *N.J.A.C. 5:105-2.12(a) - (f)*.

In the matter before the Council, the Complainant filed a request for a stay of the Council's Final Decision dated March 27, 2012 on April 16, 2012. In his request for a stay, the Complainant requested that the GRC correct one (1) issue that he believed should have been addressed by the GRC.

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).

Regarding the Complainant’s issue, the Complainant asserted that the GRC should specifically identify the fact that the Custodian did not provide the responsive records until after the filing of the instant Denial of Access Complaint. A review of the Final Decision reveals that it is clear therein that the Custodian did not provide the responsive records until after the filing of the Denial of Access Complaint. In fact, the Council’s background portion of the Council’s Final Decision makes this point clear. *See Kohn v. Township of Livingston (Essex)*, GRC Complaint No. 2010-304 (Final Decision dated March 27, 2012). Additionally, regardless of whether the Custodian provided the records before or after the filing of this complaint, it is clear that the Custodian’s failure to timely respond resulted in a “deemed” denial of access. The Complainant here further failed to prove that the addition of this fact would change the substance of the Council’s Final Decision in anyway. Thus, this portion of the request for reconsideration is denied.

The Complainant failed to submit any new evidence in support of his request for reconsideration. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably. *See D'Atria, supra*. The Complainant further failed to prove that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council’s Final Decision.

Therefore, because the Complainant has failed to establish in his request for reconsideration of the Council’s March 27, 2012 Final Decision 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, and failed to submit any evidence to prove that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council's Final Decision. Thus, the Complainant's request for reconsideration is denied. Cummings; D'Atria; Comcast.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his request for reconsideration of the Council's March 27, 2012 Final Decision 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, and failed to submit any evidence to prove that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council's Final Decision. Thus, the Complainant's 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).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

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RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2010-304

v.

Township of Livingston (Essex)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 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. Although the Custodian timely responded to the Complainant’s September 20, 2010 OPRA request in writing on three (3) occasions requesting extensions of time to respond to said request, the Custodian’s failure to respond in writing within the third (3rd) extended deadline results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, pursuant to Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request.
2. The Custodian certified in the Statement of Information that he provided fourteen (14) of the twenty-five (25) sets of minutes responsive to the Complainant’s OPRA request Item No. 1 to the Complainant on December 10, 2010 and the remaining sets of minutes are available for inspection. Additionally, there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s OPRA request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Moreover, the GRC notes that the Custodian lawfully denied access to the October 26, 2009 meeting minutes pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) because same were not approved by Council at the time of the Complainant’s OPRA request and are thus considered to be a draft document not disclosable under OPRA. N.J.S.A. 47:1A-1.1. *See also* Danis v. Garfield Board of Education (Bergen), GRC Complaint No. 2009-156, 2009-157 and 2009-158 (Interim Order dated April 28, 2010).



3. The Custodian certified in the Statement of Information that no responsive police reports existed at the time of the Complainant's OPRA request. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested police reports pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item No. 3 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that his request for an extension effectively stayed his obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive purchase orders because the Township provided the Complainant with access to same on December 3, 2010, December 6, 2010 and December 10, 2010.
5. The Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian violated N.J.S.A. 47:1A-5.e. for failing to immediately respond to the Complainant's OPRA request Item No. 3 and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive purchase orders by delaying access to said records pending compilation of the remaining records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to the responsive executive session minutes pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian did not unlawfully deny access to the responsive police reports pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) because same did not exist at the time of the request and the Custodian made the responsive purchase orders available to the Complainant on December 3, 2010, December 6, 2010 and December 10, 2010. 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2010-304

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Executive session minutes for 22 specific dates from November 5, 2010 to June 21, 2010.³
2. Police report or reports from 12:00 p.m. on September 7, 2010 to 12:00 p.m. on September 9, 2010 detailing any police stop and/or investigation of any individuals distributing literature from Constellation Energy.
3. Purchase Order (“PO”) that resulted from R-10-90 for the purchase of furniture on February 22, 2010.

Request Made: September 20, 2010

Response Made: September 29, 2010

Custodian: Glenn Turteltaub

GRC Complaint Filed: November 16, 2010⁴

Background

September 20, 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.

September 29, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian requests seven (7) additional days to obtain, review and redact (if necessary) any records responsive to the Complainant’s OPRA request. The Custodian states that he needs this extension due to the voluminous nature of the responsive records and the fact that the retrieval of records will be delayed due to the relocation of the municipal offices.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner, Et Al. (Riverdale, NJ).

³ The Complainant listed the specific dates on an attached sheet of paper.

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

October 8, 2010

Letter from the Custodian to the Complainant. The Custodian requests an extension of time until October 15, 2010 to respond for the reasons previously stated in the Custodian's September 29, 2010 response.

October 15, 2010

Letter from the Custodian to the Complainant. The Custodian requests an extension of time until October 20, 2010 to respond for the reasons previously stated as well as because of the Township's preparation for the grand opening of Prospect Park.

October 27, 2010

Letter from the Complainant to the Custodian. The Complainant requests that the Custodian advise as to the status of his OPRA request.

November 16, 2010

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

- Complainant's OPRA request dated September 20, 2010.
- Letter from the Custodian to the Complainant dated September 29, 2010.
- Letter from the Custodian to the Complainant dated October 8, 2010.
- Letter from the Custodian to the Complainant dated October 15, 2010.
- Letter from the Complainant to the Custodian dated October 27, 2010.

The Complainant states that he submitted an OPRA request to the Township of Livingston ("Township") on September 20, 2010. The Complainant states that the Custodian requested three (3) extensions of time to respond on September 27, 2010, October 8, 2010 and October 15, 2010 respectively. The Complainant states that after he received no response from the Custodian following the last request for an extension, he sent a letter to the Custodian requesting a status update of his OPRA request. The Complainant states that he received no further communications from the Custodian.

The Complainant does not agree to mediate this complaint.

November 26, 2010

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

December 2, 2010

E-mail from the Custodian to the GRC. The Custodian states that he received the GRC's request for an SOI on November 29, 2010. The Custodian states that he assumes that the deadline to submit same is December 6, 2010. The Custodian states that he will contact the GRC if additional time to complete the SOI is needed.

December 6, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until December 15, 2010 to submit the requested SOI.

December 7, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until December 15, 2010 to submit the requested SOI.

December 15, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 20, 2010.
- Letter from the Custodian to the Complainant dated September 29, 2010.
- Letter from the Custodian to the Complainant dated October 8, 2010.
- Letter from the Custodian to the Complainant dated October 15, 2010.

The Custodian certifies that his search for the requested records included sending memoranda to the Township departments believed to be in possession of the responsive records and making verbal inquiries. The Custodian certifies that he retrieved the responsive closed session minutes and forwarded them to Counsel on October 15, 2010 for review and guidance. The Custodian certifies that Counsel returned the minutes to the Custodian on November 22, 2010 with instructions to redact specific portions of the minutes.

The Custodian also certifies that no records 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.

The Custodian certifies that he received the Complainant's OPRA request on September 20, 2010. The Custodian certifies that he responded in writing on September 29, 2010 requesting an extension of seven (7) business days to respond. The Custodian certifies that he sent a second (2nd) letter to the Complainant on October 8, 2010 requesting additional time until October 15, 2010 to respond. The Custodian certifies that he sent a third (3rd) letter to the Complainant on October 15, 2010 requesting three (3) additional business days to respond.

Request Item No. 1

The Custodian certifies that he retrieved and provided the responsive executive session minutes to Counsel for review. The Custodian certifies that following said review, he made redactions based on Counsel's directives and provided the records to the Complainant on December 10, 2010. The Custodian certifies that he made the redactions to the responsive minutes pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12 (allowing government bodies to exclude the public from attorney-client privileged conversations, contract negotiations, and litigation). The Custodian further certifies that he did not provide the following minutes to the Complainant on December 10, 2010 because Counsel had not yet completed her review:

- November 16, 2009 executive session minutes
- January 11, 2010 executive session minutes
- January 25, 2010 executive session minutes
- March 8, 2010 executive session minutes

- April 19, 2010 executive session minutes
- May 3, 2010 executive session minutes
- May 10, 2010 executive session minutes
- June 7, 2010 executive session minutes
- June 21, 2010 executive session minutes

The Custodian certifies that these minutes are now available for review.

The Custodian certifies that no executive session minutes for January 14, 2010 existed; however, the Custodian provided the Complainant with minutes dated January 4, 2010 in their stead and the Complainant did not object to the provision of these minutes. Counsel further certifies that the only minutes not provided were those dated October 26, 2009 that the Township Council has not approved.

Request Item No. 2

The Custodian certifies that the Police Department advised that no responsive records exist.

Request Item No. 3

The Custodian certifies that he obtained the responsive POs from the Purchasing Manager on October 4, 2010 and that these records were ready for review pending the compilation of the remaining records. The Custodian certifies that he made the following POs available for the Complainant's review on three (3) separate dates:

- PO No. 10-00904
- PO No. 10-00905
- PO No. 10-00906
- PO No. 10-00907
- PO No. 10-00908
- PO No. 10-00909

The Custodian certifies that the Complainant partially reviewed the responsive POs on December 3, 2010. The Custodian certifies that the Complainant returned to the Township offices and reviewed the responsive POs on December 6, 2010 and again on December 10, 2010. The Custodian certifies that he provided all responsive POs to the Complainant.

The Custodian certifies that withholding the POs is consistent with the Complainant's preferred practice and instructions over the past ten (10) years. The Custodian asserts that because the Complainant's OPRA requests typically seek multiple records, the Custodian typically waits until all records were available to contact the Complainant. The Custodian certifies that this practice is an accommodation to the Complainant to avoid multiple trips to the Clerk's Office. The Custodian contends that he handled the request item at issue herein in a similar way; however, the Complainant still

felt compelled to file a complaint alleging that the Custodian knowingly and willfully violated OPRA. The Custodian states that he will discontinue this process accordingly.⁵

The Custodian contends that he did not deny access to the responsive records. The Custodian contends that his three (3) responses seeking an extension of time were sufficient responses to the Complainant's OPRA request given the following unusual circumstances. The Custodian asserts that between the date of the Complainant's OPRA request and production of the responsive records on December 10, 2010, the Township was dealing with several issues. The Custodian asserts that the Township was moving its offices from a temporary location to the new municipal building and its operations were substantially disrupted thereby. The Custodian asserts that the Complainant submitted his OPRA request during this moving period. The Custodian next asserts that the Township was also dealing with three (3) additional complaints before the GRC, one of which the Complainant withdrew after the filing of the SOI.⁶ The Custodian finally asserts that the Township was also responsible for responding to two (2) OPRA requests from the Complainant filed on November 22, 2010 that sought the same records at issue in this complaint.

The Custodian contends that the breadth and intensity of the Complainant's OPRA requests have virtually monopolized the time of the Custodian and one part-time staffer hired specifically to handle the Complainant's OPRA requests, to the detriment of the Township and its 28,000 citizens. The Custodian asserts that the Township would welcome the opportunity to have the GRC review the hundreds of OPRA requests submitted by the Complainant and resulting tens of thousands of pages of records generated in response to such requests. The Custodian further contends that the Complainant's OPRA requests are also substantially disrupting other Township officials such as the Township Manager, Comptroller, CFO, the Engineering Department and others. The Custodian contends that the Complainant's documented history of inundating the Township with OPRA requests provides clear proof of the Complainant's abuse of the intent of OPRA.

The Custodian asserts that the GRC should know the extent to which the Township has complied with the Complainant's excessive amount of comprehensive OPRA requests. The Custodian asserts that the Township, including him and all affected departments and staff members, makes a concerted effort to provide all responsive records in accordance with OPRA. The Custodian asserts that a review of the responses and voluminous amount of records provided to the Complainant clearly proves that the Township is trying in good faith effort to comply with the Complainant's OPRA requests. The Custodian further asserts that this is made even clearer as the Township has hired a part time employee and has used hours of attorney time in responding to the Complainant's many OPRA requests.

⁵ The Custodian notes that eight (8) days after the filing of this complaint, the Complainant submitted another OPRA request for identical records and insisted that the request be considered a new OPRA request even in light of acknowledging the duplication of the request at issue herein.

⁶ Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-234 (October 2010).

The Custodian requests that the GRC direct the Township how it can best respond to the Complainant's regular OPRA requests without disrupting the Township's operations.⁷

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.

OPRA also provides that:

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

Further, OPRA provides that:

*“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The 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.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were not provided until May 31, 2007. The Council held that:

⁷ The parties submitted additional correspondence. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

In the matter before the Council, as in Kohn, supra, the Custodian responded in writing to the OPRA request herein in a timely manner on September 29, 2010 requesting an extension of seven (7) business days, or until October 8, 2010, to respond. The Custodian subsequently responded within the extended deadline requesting additional time until October 15, 2010. The Custodian finally responded within the second (2nd) extended deadline requesting three (3) additional business days, or until October 20, 2010, to respond. However, the Custodian failed to respond in writing to the Complainant until December 10, 2010, 35 business days following the expiration of the third (3rd) and final deadline to respond.

Moreover, in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Council held that “[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond.”

The facts here are slightly different from Paff in that the Custodian did respond in a timely manner on three (3) occasions requesting an extension of time. However, the Custodian knew that he needed additional time in order to respond to the Complainant’s OPRA request because he did not provide Counsel with the responsive minutes until October 15, 2010, or three (3) business days before the expiration of the third (3rd) extension. However, the Custodian failed to timely seek another extension of time to respond. Thus, the Complainant’s OPRA request is “deemed” denied.

Therefore, although the Custodian timely responded to the Complainant’s September 20, 2010 OPRA request in writing on three (3) occasions requesting extensions of time to respond to said request, the Custodian’s failure to timely request an extension of time in writing within the third (3rd) extended deadline results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn, supra. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, pursuant to Paff, supra, seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

Request Item No. 1:

The Complainant’s OPRA request Item No. 1 sought “[e]xecutive session minutes for 22 specific dates from November 5, 2010 to June 21, 2010.” The Custodian certified in the SOI that he forwarded all responsive minutes to Counsel for review. The Custodian further certified that he received the minutes from Counsel on November 22, 2010 with instructions for redactions. The Custodian certified that he redacted the records and provided same to the Complainant on December 10, 2010. The Custodian further certified that nine (9) sets of minutes were withheld pending completion of attorney review; however, said records are now available for inspection.

The Custodian also certified that he did not provide access to minutes dated October 26, 2009 because same were not approved by Council. Moreover, the Complainant did not take issue with any of the redactions or the withholding of the minutes dated October 26, 2009.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant’s March 2, 2005, OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified on August 1,

2005 that the record provided to the complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

In this complaint, the Custodian certified in the SOI that he provided fourteen (14) of the twenty-five (25) sets of minutes responsive to the Complainant’s OPRA request Item No. 1 to the Complainant on December 10, 2010 and the remaining sets of minutes are available for inspection. Additionally, there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s OPRA request pursuant to Burns, supra. Moreover, the GRC notes that the Custodian lawfully denied access to the October 26, 2009 meeting minutes pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) because same were not approved by Council at the time of the Complainant’s OPRA request and are thus considered to be a draft document not disclosable under OPRA. N.J.S.A. 47:1A-1.1. See also Danis v. Garfield Board of Education (Bergen), GRC Complaint No. 2009-156, 2009-157 and 2009-158 (Interim Order dated April 28, 2010).

OPRA request Item No. 2:

The Complainant’s OPRA request Item No. 2 sought “[p]olice report or reports for the time frame of 12:00 p.m. on September 7, 2010 to 12:00 p.m. on September 9, 2010 detailing any police stop and/or investigation of any individuals distributing literature from Constellation Energy.” The Custodian certified in the SOI that the Police Department informed him that no records responsive exist.

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 certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. 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.” *Id.*

In this complaint, the Custodian certified in the SOI that no responsive police reports existed at the time of the Complainant’s OPRA request. Additionally, there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the requested police reports pursuant to Pusterhofer.

OPRA request Item No. 3:

The Complainant's OPRA request Item No. 3 sought a "[PO] that resulted from R-10-90 for the purchase of furniture on February 22, 2010." The Custodian certified in the SOI that he obtained six (6) responsive POs from the Purchasing Manager on October 4, 2010 and held the records until he compiled all other responsive records. The Custodian certified that this procedure is consistent with the Complainant's preference.

The GRC must determine whether the Custodian was required to produce the records available for disclosure at the time of his response or whether his request for an extension of time effectively stayed the Custodian from having to provide the records available until after compiling the remaining records.

OPRA mandates that "government records *shall be readily accessible for inspection, copying, or examination* by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be *construed in favor of the public's right of access.*" (Emphasis added.) N.J.S.A. 47:1A-1. Moreover, OPRA provides that a custodian must respond to an OPRA request in writing granting or denying access "*as soon as possible, but not later than seven business days after receiving the request.*" (Emphasis added.) N.J.S.A. 47:1A-5.i. The Council has expanded on the response options available to a custodian to include requesting clarification and seeking an extension of time. See Kelley, supra.

Here, the Custodian failed to provide copies of those records responsive to the Complainant's OPRA request Item No. 3 which were available "as soon as possible" pursuant to OPRA's mandate to make government records "readily accessible for inspection, copying or examination." N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-1. Further, the Custodian's withholding of the responsive POs which were available for disclosure at the time of the Custodian's initial response until the Custodian obtained all other responsive records placed an unnecessary limitation on "... the public's right of access." N.J.S.A. 47:1A-1.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.i by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item No. 3 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that his request for an extension effectively stayed his obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive POs because the evidence of record indicates that the Township provided the Complainant with access to same on December 3, 2010, December 6, 2010 and December 10, 2010.

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 (Felder 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)).

The Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian violated N.J.S.A. 47:1A-5.e. for failing to immediately respond to the Complainant’s OPRA request Item No. 3 and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive POs by delaying access to said records pending compilation of the remaining records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to the responsive executive session minutes pursuant to Burns, the Custodian did not unlawfully deny access to the responsive police reports pursuant to Pusterhofer because same did not exist at the time of the request and the Custodian made the responsive POs available to the Complainant on December 3, 2010, December 6, 2010 and December 10, 2010. 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. Although the Custodian timely responded to the Complainant's September 20, 2010 OPRA request in writing on three (3) occasions requesting extensions of time to respond to said request, the Custodian's failure to respond in writing within the third (3rd) extended deadline results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, pursuant to Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), seeking legal advice is reasonable, but is not a lawful basis for delaying a response to an OPRA request.
2. The Custodian certified in the Statement of Information that he provided fourteen (14) of the twenty-five (25) sets of minutes responsive to the Complainant's OPRA request Item No. 1 to the Complainant on December 10, 2010 and the remaining sets of minutes are available for inspection. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Moreover, the GRC notes that the Custodian lawfully denied access to the October 26, 2009 meeting minutes pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) because same were not approved by Council at the time of the Complainant's OPRA request and are thus considered to be a draft document not disclosable under OPRA. N.J.S.A. 47:1A-1.1. *See also* Danis v. Garfield Board of Education (Bergen), GRC Complaint No. 2009-156, 2009-157 and 2009-158 (Interim Order dated April 28, 2010).
3. The Custodian certified in the Statement of Information that no responsive police reports existed at the time of the Complainant's OPRA request. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested police reports pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item No. 3 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that his request for an extension effectively stayed

his obligation to provide access to said records, because such a stay would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive purchase orders because the Township provided the Complainant with access to same on December 3, 2010, December 6, 2010 and December 10, 2010.

5. The Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian violated N.J.S.A. 47:1A-5.e. for failing to immediately respond to the Complainant's OPRA request Item No. 3 and the Custodian failed to bear his burden of proving a lawful denial of access to the responsive purchase orders by delaying access to said records pending compilation of the remaining records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to the responsive executive session minutes pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian did not unlawfully deny access to the responsive police reports pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) because same did not exist at the time of the request and the Custodian made the responsive purchase orders available to the Complainant on December 3, 2010, December 6, 2010 and December 10, 2010. 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.

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Executive Director

March 20, 2012