



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

John Sebastian
Complainant

Complaint No. 2010-42

v.

Borough of Ramsey (Bergen)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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. The Custodian failed to establish in her motion for reconsideration of the Council’s December 20, 2011 Interim Order that the Council’s decision was based upon a “palpably incorrect or irrational basis” or that it is obvious the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Further, the Custodian failed to demonstrate that the Council in rendering its decision acted in an arbitrary, capricious or unreasonable manner. As such, reconsideration of the Council’s decision, based upon the Custodian’s asserted reasons for said reconsideration, is denied. See Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996), D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990) and 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).
2. To the extent that the Custodian complied with the terms of the Council’s October 25, 2011 Interim Order by disclosing the requested records to the Complainant within the time frame provided by said Order, the Custodian did not fail and refuse to comply with all of the terms of the Order; however, the Custodian still remains in violation of the Order because she failed to comply with the provision that she provide certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4.
3. Although the Custodian’s response to the Complainant’s OPRA request was legally insufficient; and although the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and although the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the



Complainant's request; and although the Custodian failed to comply with the terms of the Council's October 25, 2011 Interim Order by not providing certified confirmation of compliance to the Executive Director; the Custodian did disclose the requested records to the Complainant within the provided time frame in compliance with said Order. Additionally, although the Custodian violated several provisions of OPRA, the evidence of record does not indicate that said violations revealed a positive element of conscious wrongdoing or were 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 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

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

**John Sebastian¹
Complainant**

GRC Complaint No. 2010-42

v.

**Borough of Ramsey (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copies of construction cover sheets reflecting all permits related to applicant, date of application and general construction from 2000 until 2008 for 3 Valley View Drive.

Request Made: December 28, 2009

Response Made: January 6, 2010

Custodian: Meredith Bendian, Borough Clerk

GRC Complaint Filed: February 29, 2010³

Background

December 20, 2011

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 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, found that:

1. Because the Custodian failed and refused to comply with the terms of the Council’s October 25, 2011 Interim Order, Custodian Meredith Bendian is in contempt of said Order.
2. Because the Custodian’s response to the Complainant’s OPRA request was legally insufficient because the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant’s request; and because the Custodian failed and refused to comply with the terms of the Council’s October 25, 2011 Interim Order, it is possible that Custodian

¹ No legal representation listed on record.

² Represented by Peter Scandariato, Esq., Eastwood, Scandariato & Steinberg (Saddle Brook, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Meredith Bendian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

December 21, 2011

Council's Interim Order ("Order") distributed to the parties.

December 22, 2011

Letter from the Custodian to the GRC. The Custodian states that immediately upon receipt of the Council's Order dated October 22, 2011, she sent the records ordered for disclosure to the Complainant.⁴ Because the Custodian asserts that she sent the Complainant the requested records as ordered she requests the Council reconsider its December 20, 2011 Interim Order.

December 27, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the GRC is in receipt of her letter dated December 22, 2011 wherein the Custodian requested reconsideration of the Council's December 20, 2011 Interim Order. The GRC advises the Custodian that she must complete and submit the GRC's Request for Reconsideration form which is posted on the GRC website.

December 27, 2011

Custodian's motion for reconsideration. The Custodian requests that the GRC reconsider the Council's December 20, 2011 Interim Order pursuant to *N.J.A.C. 5:105-2.10*. The Custodian contends that the Order should be reconsidered for the following reasons: mistake, extraordinary circumstances, new evidence and change of circumstances. In support of her motion for reconsideration, the Custodian attaches a letter she sent to the GRC dated December 22, 2011. The Custodian also attaches a transmittal letter from the Custodian to the Complainant and a transmittal e-mail from the Custodian to the Complainant dated November 2, 2011 and November 3, 2011, respectively.

The Complainant includes copies of four (4) construction permits which she states were sent to the Complainant as attachments to each of the transmittals. The Custodian asserts that the construction permits are the records responsive to the Complainant's request which the Council ordered to be disclosed to the Complainant in its October 25, 2011 Interim Order; therefore, the Custodian asserts that the Council's December 20, 2011 Interim Order, which stipulates that she failed and refused to comply with the terms of the Council's October 25, 2011 Interim Order, is not correct because she did comply with the terms of the Order.⁵

⁴ The Custodian means the Council's Interim Order dated October 25, 2011.

⁵ The evidence of record reveals that the Custodian received the Council's October 25, 2011 Interim Order on October 29, 2011; therefore, the Custodian's first transmittal letter dated November 2, 2011, which was the third (3rd) business day following receipt of the Order, evidenced compliance with the Council's December 20, 2011 Interim Order which required disclosure of the requested records within five (5) business days from receipt of the Order.

December 28, 2011

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the Custodian has filed a request for reconsideration and asks the Complainant to inform the GRC if and when the Complainant received the four (4) construction permits that were ordered for disclosure.

December 30, 2011

E-mail from the Complainant to the GRC. The Complainant informs the GRC that he received from the Custodian copies of the requested construction permits via e-mail on November 3, 2011 and via regular mail on November 4, 2011. The Complainant also informs the GRC that he believes there was an effort on the part of Borough officials to deliberately delay disclosure of the requested construction permits.

January 5, 2012

Complainant's response to the Custodian's request for reconsideration. The Complainant contends that the Custodian gave as a reason for reconsideration (a) mistake, (b) extraordinary circumstances and (c) change of circumstances; however, the Complainant states that the Custodian failed to elaborate upon any of the reasons she asserted for reconsideration of the Order. The Complainant further states that he opposes any reconsideration and wants the Office of Administrative Law to conduct a hearing on the issue of whether the Custodian knowingly and willfully denied him access to the requested records.⁶

January 6, 2012

Letter from the Custodian's Counsel to the GRC. Counsel informs the GRC that the Complainant was mistaken when he asserted in his response to the Custodian's request for reconsideration that the Custodian failed to provide an explanation of the circumstances requiring reconsideration of the Council's Order. Counsel contends that the Custodian submitted a detailed statement with respect to her compliance with the Order. Counsel further contends that the Complainant's response to the Custodian's request for reconsideration indicates that the Complainant's dissatisfaction is misguided.

Analysis**Whether the Complainant has met the required standard for reconsideration of the Council's December 20, 2011 Interim Order?**

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

⁶ The Complainant also discusses the circumstances giving rise to his complaint, referring to dates and events which pre-date the filing of his complaint. As such, these additional matters he discusses are not relevant to reconsideration of the Council's December 20, 2011 Interim Order.

In the matter before the Council, the Council distributed its December 20, 2011 Interim Order via overnight delivery to the parties on December 21, 2011. The Custodian submitted a motion for reconsideration of said Order on December 27, 2011. Therefore, the Custodian filed her motion for reconsideration of the Council's Interim Order with the GRC three (3) business days from receipt of the Council's decision. Accordingly, because the Custodian filed her motion for reconsideration in a timely manner, the GRC granted the Custodian's motion so that the Council could reconsider its decision.

Applicable case law holds that:

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

The Custodian asserts that (1) mistake by the Council, (2) new evidence, (3) extraordinary circumstances, and (4) change of circumstances require reconsideration and correction of the Council's Order; however, the Custodian does not offer any argument in support of her assertions. As such, the GRC cannot evaluate the merits of the Custodian's assertions to determine whether or not they support modification of the Council's Order.

The Custodian first asserts mistake by the Council; however, because the Custodian failed to provide certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 as directed by the Council's October 25, 2011 Interim Order, the GRC was wholly unaware that the Custodian delivered the requested records to the Complainant in compliance with the terms of said Order. As such, there was no mistake on the part of the Council. If a mistake was made, it was made by the Custodian for failing to abide by the terms of the Order and provide certified confirmation of compliance to the Executive Director, which action would have materially changed the Council's December 20, 2011 Interim Order.

The Custodian next asserts that new evidence compels reconsideration; however, she failed to articulate any evidence that could not have been provided prior to the Council's December 20, 2011 Interim Order because said evidence did not exist at that

time. If there was indeed new evidence, the Custodian had a duty to bring it to the attention of the GRC promptly, but she failed to do so. Accordingly, the GRC is at a loss to determine if any such evidence had sufficient probative value to justify modification of the Council's decision.

Finally, the custodian asserted change of circumstances and extraordinary circumstances as reasons requiring modification of the Council's Order. Again, because the Custodian failed to point to a change of circumstances or articulate any extraordinary circumstances, the GRC is unable to accept these assertions as reasons justifying modification of the Order.

As such, the Custodian failed to establish in her motion for reconsideration of the Council's December 20, 2011 Interim Order that the Council's decision was based upon a "palpably incorrect or irrational basis" or that it is obvious the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Further, the Custodian failed to demonstrate that the Council in rendering its decision acted in an arbitrary, capricious or unreasonable manner. Accordingly, reconsideration of the Council's decision, based upon the Custodian's asserted reasons for said reconsideration, is denied. *See Cummings, supra, D'Atria, supra, and In The Matter Of The Petition Of Comcast Cablevision, supra.*

Notwithstanding the Custodian's failure to establish a basis for reconsideration of the Council's December 20, 2011 Interim Order, the GRC must take cognizance of the fact that the Custodian did disclose the requested records to the Complainant within the time frame provided by the Council's October 25, 2011 Interim Order. This fact has been established because the evidence of record indicates that upon receipt of the Council's December 20, 2011 Order, the Custodian informed the GRC that she did comply in a timely manner with the terms of the Council's October 25, 2011 Order by disclosing the requested records to the Complainant on November 2, 2011 and November 3, 2011, and the Complainant confirmed that he did receive the requested records on November 3, 2011 and on November 4, 2011.

Accordingly, to the extent that the Custodian complied with the terms of the Council's October 25, 2011 Interim Order by disclosing the requested records to the Complainant within the time frame provided by said Order, the Custodian did not fail and refuse to comply with all of the terms of the Order; however, the Custodian still remains in violation of the Order because she failed to comply with the provision that she provide certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4.

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?⁷

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).

In the instant complaint, although the Custodian’s response to the Complainant’s OPRA request was legally insufficient; and although the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and although the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant’s request; and although the Custodian failed to comply

⁷Although the Council’s December 20, 2011 Interim Order provided for this complaint to be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, because the GRC determined in the reconsideration of this complaint that the Custodian disclosed the four (4) construction permits in a timely manner pursuant to the Council’s October 25, 2011 Interim Order, the GRC is now undertaking the analysis of this issue.

with the terms of the Council's October 25, 2011 Interim Order by not providing certified confirmation of compliance to the Executive Director; the Custodian did disclose the requested records to the Complainant within the provided time frame in compliance with the Council's December 20, 2011 Interim Order. Additionally, although the Custodian violated several provisions of OPRA, the evidence of record does not indicate that said violations revealed a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to establish in her motion for reconsideration of the Council's December 20, 2011 Interim Order that the Council's decision was based upon a "palpably incorrect or irrational basis" or that it is obvious the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Further, the Custodian failed to demonstrate that the Council in rendering its decision acted in an arbitrary, capricious or unreasonable manner. As such, reconsideration of the Council's decision, based upon the Custodian's asserted reasons for said reconsideration, is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and 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).
2. To the extent that the Custodian complied with the terms of the Council's October 25, 2011 Interim Order by disclosing the requested records to the Complainant within the time frame provided by said Order, the Custodian did not fail and refuse to comply with all of the terms of the Order; however, the Custodian still remains in violation of the Order because she failed to comply with the provision that she provide certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4.
3. Although the Custodian's response to the Complainant's OPRA request was legally insufficient; and although the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and although the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant's request; and although the Custodian failed to comply with the terms of the Council's October 25, 2011 Interim Order by not providing certified confirmation of compliance to the Executive Director; the Custodian did disclose the requested records to the Complainant within the provided time frame in compliance with said Order. Additionally, although the Custodian violated several provisions of OPRA, the evidence of record does not

indicate that said violations revealed a positive element of conscious wrongdoing or were 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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

December 20, 2011 Government Records Council Meeting

John Sebastian
Complainant

Complaint No. 2010-42

v.

Borough of Ramsey (Bergen)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 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 and refused to comply with the terms of the Council’s October 25, 2011 Interim Order, Custodian Meredith Bendian is in contempt of said Order.
2. Because the Custodian’s response to the Complainant’s OPRA request was legally insufficient because the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant’s request; and because the Custodian failed and refused to comply with the terms of the Council’s October 25, 2011 Interim Order, it is possible that Custodian Meredith Bendian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 21, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**John Sebastian¹
Complainant**

GRC Complaint No. 2010-42

v.

**Borough of Ramsey (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copies of construction cover sheets reflecting all permits related to applicant, date of application and general construction from 2000 until 2008 for 3 Valley View Drive.

Request Made: December 28, 2009

Response Made: January 6, 2010

Custodian: Meredith Bendian, Borough Clerk

GRC Complaint Filed: February 29, 2010³

Background

October 25, 2011

Government Records Council's Interim Order. At the October 25, 2011 public meeting, the Government Records Council ("Council") considered the October 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to respond to each item contained in the request. Moreover, the Custodian's response that OPRA requires a specific reason for use of the requested records is incorrect because there is nothing in OPRA which requires a requestor to provide a reason why he/she is requesting a specific government record. As such, the Custodian's response to the Complainant's OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g., Williams v. Board of Education of Atlantic City Public Schools, 329 N.J. Super. 308 (App. Div. 2000), *cert. denied* 165 N.J. 488 and Paff v.

¹ No legal representation listed on record.

² Represented by Peter Scandariato, Esq. (Saddle Brook, NJ); however, there are no submissions from the Custodian's Counsel to the GRC on file.

³ The GRC received the Denial of Access Complaint on said date.

Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. Because the Custodian certified in her Statement of Information dated March 8, 2010 that there are no such records as construction cover sheets, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant's request, the Custodian must disclose said records to the Complainant with the telephone numbers redacted.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, 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.

October 28, 2011

Council's Interim Order ("Order") distributed to the parties.

Analysis

Whether the Custodian complied with the Council's October 25, 2011 Interim Order?

At its October 25, 2011 public meeting, the Council ordered the Custodian to deliver to the Complainant within five (5) business days of receiving said Order:

- Four (4) construction permits with the telephone numbers redacted
- A detailed document index explaining the lawful basis for any redactions
- Certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director

The Custodian received the Council's October 25 2011 Interim Order on October 31, 2011; the Custodian's Counsel received the Interim Order on November 1, 2011.⁴ As

⁴ The GRC sent the Interim Order to the Custodian and Custodian's Counsel via UPS Next Day Air® on October 28, 2011. The UPS Proof of Delivery reveals the Order was successfully delivered to the John Sebastian v. Borough of Ramsey (Bergen), 2010-42 – Supplemental Findings and Recommendations of the Executive Director 2

such, pursuant to the terms of the Order the Custodian was to have fully complied with its provisions no later than November 9, 2011; however, the Custodian failed and refused to comply with the Council's Interim Order within the time provided therefor. In fact, the GRC has not received any correspondence from the Custodian regarding her compliance with the October 25, 2011 Interim Order.

Accordingly, because the Custodian failed and refused to comply with the terms of the Council's October 25, 2011 Interim Order, Custodian Meredith Bendian is in contempt of said Order.

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).

Custodian and signed for by Peter on October 31, 2011 at 10:04 a.m. The UPS Proof of Delivery also reveals the Order was successfully delivered to the Custodian's Counsel and signed for by Fran on November 1, 2011 at 10:10 a.m.

In the instant complaint, because the Custodian's response to the Complainant's OPRA request was legally insufficient because the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant's request; and because the Custodian failed and refused to comply with the terms of the Council's October 25, 2011 Interim Order, it is possible that Custodian Meredith Bendian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed and refused to comply with the terms of the Council's October 25, 2011 Interim Order, Custodian Meredith Bendian is in contempt of said Order.
2. Because the Custodian's response to the Complainant's OPRA request was legally insufficient because the Custodian failed to respond to each item contained in the request and required the Complainant to provide a reason why he was requesting specific government records; and because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant's request; and because the Custodian failed and refused to comply with the terms of the Council's October 25, 2011 Interim Order, it is possible that Custodian Meredith Bendian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

December 13, 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

October 25, 2011 Government Records Council Meeting

John Sebastian
Complainant

Complaint No. 2010-42

v.

Borough of Ramsey (Bergen)
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council (“Council”) considered the October 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to respond to each item contained in the request. Moreover, the Custodian’s response that OPRA requires a specific reason for use of the requested records is incorrect because there is nothing in OPRA which requires a requestor to provide a reason why he/she is requesting a specific government record. As such, the Custodian’s response to the Complainant’s OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g., Williams v. Board of Education of Atlantic City Public Schools, 329 N.J. Super. 308 (App. Div. 2000), *cert. denied* 165 N.J. 488 and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian certified in her Statement of Information dated March 8, 2010 that there are no such records as construction cover sheets, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant’s request, the Custodian must disclose said records to the Complainant with the telephone numbers redacted.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²

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 25th Day of October, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 28, 2011

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Sebastian¹
Complainant**

GRC Complaint No. 2010-42

v.

**Borough of Ramsey (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copies of construction cover sheets reflecting all permits related to applicant, date of application and general construction from 2000 until 2008 for 3 Valley View Drive.³

Request Made: December 28, 2009

Response Made: January 6, 2010

Custodian: Meredith Bendian, Borough Clerk

GRC Complaint Filed: February 29, 2010⁴

Background

December 28, 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.

January 6, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested record is denied because OPRA requires a specific reason for use of the requested records. The Custodian asks the Complainant to provide a reason for requesting the records.

February 29, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated December 28, 2009.⁵ The Complainant states that he provided his OPRA request to the Custodian on December 28, 2009 and

¹ No legal representation listed on record.

² Represented by Peter Scandariato, Esq. (Saddle Brook, NJ); however, there are no submissions from the Custodian's Counsel to the GRC on file.

³ The Complainant modified his request in the Denial of Access Complaint to specifically state that he wanted cover sheets only and no plans or specifications.

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

⁵ The OPRA request form also provides for the Custodian's response to the request.

that the Custodian denied said request on January 17, 2010.⁶ The Complainant states that he was seeking copies of cover sheets for permits on renovation work and never had a problem obtaining such records from other municipalities. The Complainant states that the Custodian in a January 22, 2010 telephone conversation with him said that she spoke with other clerks from surrounding municipalities and that they told her that the requested records should be disclosed; however, the Borough's Construction Official refused to allow access for privacy reasons.

The Complainant does not agree to mediate this complaint.

March 5, 2010

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

March 8, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 28, 2009⁷
- Letter from the Construction Code Official, Robert Connell to the Custodian dated March 10, 2010 (with attachments) which the Custodian has marked as "Document Index Statement."

The Custodian certifies that her search for the requested records involved delegating the task of locating the requested records to the employee who maintained actual physical custody of said records.⁸ The Custodian also certifies that construction permits must be retained for the life of the structure and that other records which may have been responsive to the request must be retained for three (3) to seven (7) years. The Custodian further certifies that no records which may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the State Uniform Construction Code ("UCC") does not identify any form designated as a "cover sheet." However, the Custodian did determine that fifteen (15) records may be responsive to the Complainant's request. The Custodian determined that four (4) of the records were construction permits and the other eleven (11) records were UCC technical information section sheets. The Custodian certifies that she refused to disclose any of the records to the Complainant because the records contain personal telephone numbers and technical information on the structure. The Custodian certifies that the Borough Construction Official asked the Complainant several times to provide a specific reason justifying his need for the records, but that the Complainant failed to do so and therefore the records were not disclosed to him. The Custodian certifies that she denied the Complainant access to the requested records

⁶ The evidence of record indicates the Complainant's request was denied on January 6, 2010.

⁷ This document also serves as the Custodian's response to the OPRA request dated January 6, 2010.

⁸ The Construction Code Official, Robert Connell, was delegated with this responsibility. The Custodian listed Mr. Connell on page 2 of the Statement of Information as the Custodian; however, the Statement of Information was submitted and signed by the Borough Clerk, Meredith Bendian.

pursuant to the privacy provisions of OPRA and the Privacy Act of 1974 which is codified as 5 U.S.C. § 552a.

March 24, 2010

E-mail from the Complainant to the GRC responding to the Custodian's SOI. The Complainant states that his request is for a copy of any permits and not for plans and specifications. The Complainant states that he will accept copies of the permits with the telephone numbers redacted.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was a sufficient response?

OPRA 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 therefor ...” N.J.S.A. 47:1A-5.g.

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 specifically states that a custodian “shall indicate the specific basis [for denial of access]...” N.J.S.A. 47:1A-5.g. Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough the Custodian responded in writing to the Complainant's...OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., *the Custodian's response was legally insufficient because he failed to respond to each request item individually.* Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” (Emphasis added.)

Moreover, under OPRA, a requestor's purpose for requesting the public records sought is irrelevant. See Williams v. Board of Education of Atlantic City Public Schools, 329 N.J. Super. 308 (App. Div. 2000), *cert. denied* 165 N.J. 488.

Here, the Custodian responded on the sixth (6th) business day following receipt of the request; however, the Custodian's response failed to identify any records responsive to the Complainant's request. The Custodian, instead of identifying the records responsive to the Complainant's request and responding to each item, stated that access to the requested record is denied because OPRA requires a specific reason for use of the requested records.

Accordingly, although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days,

the Custodian failed to respond to each item contained in the request. Moreover, the Custodian's response that OPRA requires a specific reason for use of the requested records is incorrect because there is nothing in OPRA which requires a requestor to provide a reason why he/she is requesting a specific government record. As such, the Custodian's response to the Complainant's OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g., Williams, *supra*, and Paff, *supra*.

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:

"A government record shall not include...that portion of any document which discloses the...unlisted telephone number...of any person..." N.J.S.A. 47:1A-1.1.

OPRA further provides that:

"Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the ...unlisted telephone number...of any person. N.J.S.A. 47:1A-5.a.

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

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

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

In the instant complaint, the Custodian certified that the State Uniform Construction Code (“UCC”) did not identify any form designated as a “cover sheet.” Further, the Complainant provided no evidence to refute the Custodian’s certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant’s request existed and the complainant did not provide any evidence to refute the custodian’s certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In the instant complaint, because the Custodian certified in her SOI dated March 8, 2010 that there are no such records as construction cover sheets, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer, supra. N.J.S.A. 47:1A-6.

The Custodian did certify that fifteen (15) records, other than construction cover sheets, were located that may be responsive to the Complainant’s request. The Custodian determined that four (4) of these records were construction permits and the other eleven (11) records were UCC technical information section sheets. The Custodian denied the Complainant access to these records because the Custodian certified the four (4) permits contained telephone numbers and the technical information section sheets contained other privacy information which should not be disclosed pursuant to OPRA and federal law. Further, the Custodian certified that the Complainant, although he was asked several times, failed to provide a reason why he needed the records.

The Complainant in his Denial of Access Complaint narrowed his original OPRA request to indicate that he was only interested in obtaining a copy of any construction permits for the subject premises during the pertinent time period. As such, only the four (4) construction permits remain responsive to the Complainant’s request.

The Custodian failed to meet her burden of proof in denying the Complainant access to the four (4) construction permits responsive to the Complainant’s request because she certified that they contain telephone numbers and/or that the Complainant failed to provide a reason why he wanted said records. The Custodian failed to provide any legal reason for not disclosing the permits which could have been redacted to remove the telephone numbers.

OPRA not only allows for the redaction of unlisted telephone numbers, it places an affirmative duty on a custodian to maintain the confidentiality of a person’s unlisted telephone number by providing that “[a] government record shall not include...[an] unlisted telephone number.” N.J.S.A. 47:1A-1.1. A custodian therefore is required to redact an unlisted telephone number from any record that is being disclosed pursuant to

N.J.S.A. 47:1A-5.a. The Council, however, has long recognized the impracticality of this requirement. In Smith v. Department of Corrections, GRC Complaint No. 2004-163 (June 2005), the Council held that the complaint filed for denial of access to telephone records should be dismissed, in part, because the custodian could not safeguard unlisted telephone numbers from disclosure. In Smith, the Council determined that:

“...there is the practical problem with OPRA’s mandate that prior to allowing access to any government record, the custodian must redact from that record any information which discloses the unlisted phone numbers of any person. N.J.S.A. 47:1A-5(a). It is not likely that any custodian could comply with this OPRA provision by making such redactions with accurate precision when there is a realistic chance that the custodian may miss just one unlisted telephone number...[f]rom a practical standpoint, there may be no way for a custodian to ensure that all unlisted numbers have been redacted...” *Id.*⁹

In the instant complaint, therefore, the Custodian could have redacted *all* telephone numbers encountered to ensure that she was not in violation of OPRA and then disclosed the requested records; however the Custodian failed to do so.

Therefore, because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant’s request, the Custodian must disclose said records to the Complainant with the telephone numbers redacted. *See N.J.S.A. 47:1A-6.*

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

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. Although the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, the Custodian failed to respond to each item contained in the request. Moreover, the Custodian’s response that OPRA requires a specific reason for use of the requested records is incorrect because there is nothing in OPRA which requires a requestor to provide a reason why he/she is requesting a specific government record. As such, the Custodian’s response to the Complainant’s

⁹ *See, e.g., Bart v. Passaic County Public Housing Agency*, GRC Complaint No. 2007-266 (Interim Order February 2008)(holding that the Custodian properly redacted telephone numbers from the records requested).

OPRA request is legally insufficient pursuant to N.J.S.A. 47:1A-5.g., Williams v. Board of Education of Atlantic City Public Schools, 329 N.J. Super. 308 (App. Div. 2000), *cert. denied* 165 N.J. 488 and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. Because the Custodian certified in her Statement of Information dated March 8, 2010 that there are no such records as construction cover sheets, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Because the Custodian failed to bear her burden of proving a lawful denial of access to the four (4) construction permits responsive to the Complainant's request, the Custodian must disclose said records to the Complainant with the telephone numbers redacted.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹**
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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

October 18, 2011

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.