



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**January 31, 2023 Government Records Council Meeting**

Katalin Gordon  
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)  
Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 2023 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 Council should accept the ALJ’s Initial Decision “**CONCLUD[ING]**” that both original Custodian Ms. Smith and Mr. Ditinyak knowingly and willful violated OPRA and “**ORDER[ING]**” both individuals to “be and hereby shall be subject to a civil penalty of \$1,000.” Id. 24-25.
2. The Council should modify the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11(a), both penalties shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999” and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule, R. 4:70-3, payment of civil penalties is to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.
3. **Mr. Ditinyak and Ms. Smith shall comply with conclusion Nos. 1 and 2 above within ten (10) business days from receipt of the Council’s Final Decision.**

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 31<sup>st</sup> Day of January 2023

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 6, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 31, 2023 Council Meeting**

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-256**

v.

**City of Orange (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

**Custodian of Record:** Madeline Smith<sup>3</sup>

**Request Received by Custodian:** July 5, 2011

**Response Made by Custodian:** None.

**GRC Complaint Received:** August 3, 2011

**Background**

**November 18, 2014 Council Meeting:**

At its November 18, 2014 public meeting, the Council considered the November 10, 2014 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, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council's September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Currently represented by Wilson David Antoine, Esq., of the Antoine Law Firm (Newark, NJ). Previously represented by Avram White, Esq. (Orange, NJ).

<sup>3</sup> The original custodian of record was Shinell Smith.

2. This complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the Office of Administrative Law should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

### Procedural History:

On November 19, 2014, the Council distributed its Interim Order to all parties. On February 6, 2015, the Government Records Council (“GRC”) transmitted this complaint to the Office of Administrative Law (“OAL”). On February 24, 2020, the OAL sought an extension of time through April 13, 2020 to render an Initial Decision. On February 27, 2020, the GRC granted said extension.

On November 22, 2022, the Honorable Margaret M. Monaco, Administrative Law Judge (“ALJ”), issued an Initial Decision “**CONCLUD[ING]**” that both Director of Finance John Ditinyak and original Custodian Shinell Smith knowingly and willfully violated OPRA and “**ORDER[ING]**” that each are subject to a civil penalty of \$1,000.00. The ALJ’s Initial Decision provided the parties thirteen (13) days from mailing to submit to the GRC exceptions to the Decision. The GRC did not receive any exceptions.

On December 27, 2022, the GRC sought a forty-five (45) day extension, or until February 15, 2023, to adopt, modify, or reject the ALJ’s Initial Decision. On the same day, the OAL granted the requested extension of time.

### Analysis

#### Administrative Law Judge’s Initial Decision

The Administrative Procedures Act (“APA”) provides that:

The head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the [Initial Decision] no later than 45 days after receipt of such recommendations . . . Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

[N.J.S.A. 52:14B-10(c).]

The ALJ’s findings of fact are entitled to deference from the GRC because they are based upon the ALJ’s determination of the credibility of the parties. “The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied)

121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the instant complaint, the ALJ issued an Initial Decision on November 15, 2022, set forth as “Exhibit A.” The ALJ, after fairly summarizing the facts, testimony and evidence, and explaining how she weighed the proofs before her and why she credited, or discredited, certain testimony, determined that:

I **CONCLUDE** that Custodian [Ms.] Smith and [Mr.] Ditinyak knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Succinctly stated, the totality of the evidence demonstrates a flagrant disregard of the statutory mandates. [The Complainant] filed her OPRA request on July 5, 2011, and the City failed to provide any documents in response to [the Complainant’s] request until approximately three months later on October 3, 2011, and then only provided a woefully limited response; namely, only one of the twenty-four monthly BOA Analysis Statements. Approximately two months later on December 7, 2011, and approximately five months after [the Complainant] filed her OPRA request, [she] indirectly received seventeen additional monthly Analysis Statements, via [the original Custodian’s] e-mail to the GRC. And it is undisputed that no further documents were provided to [the Complainant] after this e-mail and the City never provided the monthly Analysis Statements for six of the requested twenty-four months.

...

[B]ased upon a consideration of the totality of the circumstances, including Ditinyak’s knowledge of his obligation and responsibility to timely provide documents to the Custodian, Ditinyak’s refusal to provide a deadline for his

response, the substantial period of time that he failed to provide the documents without explanation, and the incomplete documents that were eventually provided, I **CONCLUDE** that Ditinyak knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. I **CONCLUDE** that Ditinyak's actions and omissions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional, and such actions and omissions were taken with reckless indifference to the consequences. Accordingly, I **CONCLUDE** that Ditinyak should be subject to a civil penalty of \$1,000.

As Custodian, [Ms.] Smith was primarily responsible for ensuring compliance with the OPRA requirements. Like Ditinyak, Smith asserted a lack of recollection regarding the events that transpired. However, Smith unquestionably had actual knowledge that [the Complainant] had not received any documents as of August 1, 2011. The evidence fails to demonstrate that Smith requested an extension of time to respond to [the Complainant's] request or took any action to secure a response, or even a deadline regarding the response, from the finance department. In this regard, Smith acted deliberately and with knowledge that she would not comply within the mandated response time. Her lack of timely or even delayed follow-up with Ditinyak regarding the status of his response or the reason for the inexcusable delay represents willful misconduct. Plainly, the purpose of OPRA to make government records accessible to citizens would be subverted if a custodian could defend her inaction by claiming that she was denied access to records by other officials.

...

I **CONCLUDE** that Smith knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. I **CONCLUDE** that Smith's actions and omissions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional, and such actions and omissions were taken with reckless disregard of the statutory command. Accordingly, I **CONCLUDE** that Smith should be subject to a civil penalty of \$1,000.

[Id. 22; 23-24; 25 (emphasis in original).]

Based on the forgoing, the ALJ "**ORDER[ED]** that [original] Custodian Shinell Smith be and hereby shall be subject to a civil penalty of \$1,000." The ALJ further "**ORDER[ED]** that former Director of Finance [Mr.] Ditinyak be and hereby shall be subject to a civil penalty of \$1,000." Id. at 25.

Upon review of the lengthy Initial Decision, the GRC finds that the ALJ's conclusions are clearly aligned and consistent with the aforementioned credibility determinations set forth in his Initial Decision. As such, the GRC is satisfied that it can clearly ascertain which testimony the

ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Accordingly, the Council should accept the ALJ's Initial Decision "**CONCLUD[ING]**" that both original Custodian Ms. Smith and Mr. Ditinyak knowingly and willful violated OPRA and "**ORDER[ING]**" both individuals to "be and hereby shall be subject to a civil penalty of \$1,000." Id. 24-25.

Additionally, the Council should modify the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11(a), both penalties shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule, R. 4:70-3, payment of civil penalties is to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Council should accept the ALJ's Initial Decision "**CONCLUD[ING]**" that both original Custodian Ms. Smith and Mr. Ditinyak knowingly and willful violated OPRA and "**ORDER[ING]**" both individuals to "be and hereby shall be subject to a civil penalty of \$1,000." Id. 24-25.
2. The Council should modify the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11(a), both penalties shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule, R. 4:70-3, payment of civil penalties is to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.
3. **Mr. Ditinyak and Ms. Smith shall comply with conclusion Nos. 1 and 2 above within ten (10) business days from receipt of the Council's Final Decision.**

Prepared By: Frank F. Caruso  
Executive Director

January 24, 2023



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. GRC 02862-15  
AGENCY DKT. NO. 2011-256

**KATALIN GORDON,**

Petitioner,

v.

**CITY OF ORANGE TOWNSHIP (ESSEX),**

Respondent.

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**Katalin Gordon**, petitioner, pro se

**Wilson David Antoine**, Esq., for respondent (The Antoine Law Firm, attorneys)

Record Closed: November 26, 2019

Decided: November 15, 2022

BEFORE **MARGARET M. MONACO**, ALJ:

**STATEMENT OF THE CASE**

Petitioner Katalin Gordon (Gordon) filed a Denial of Access Complaint against respondent the City of Orange (the City) pursuant to the New Jersey Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The Government Records Council (GRC) determined that Gordon's complaint should be referred to the Office of Administrative Law (OAL) for a fact-finding hearing to determine the following: (1) what records the City's Director of Finance (John Ditinyak) determined to be responsive; (2) which of those



records Mr. Ditinyak provided to Gordon; and (3) whether any additional records are outstanding and need to be provided. The GRC further directed that, “if necessary, the . . . [OAL] should determine whether the original Custodian [Shinell Smith] and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances.”

### **PROCEDURAL HISTORY**

The GRC transmitted the matter to the OAL, where it was filed for hearing. The hearing was held on November 12, 2015; March 7, April 1, August 12, August 15, and December 7, 2016; and January 23, 2017. A telephone conference was held on the record on February 5, 2018 to address document issues, and the hearing continued on August 8, 2018. After the hearing, the record remained open for the receipt of transcripts of the hearing and post-hearing submissions, and the record closed upon receipt of the last submission.<sup>1</sup>

### **FACTUAL DISCUSSION**

Based upon a review of the testimony and the documentary evidence presented and having had the opportunity to observe the demeanor and assess the credibility of the witness who testified, I **FIND** the following pertinent **FACTS** and accept as **FACT** the testimony set forth below.

On July 5, 2011, Gordon submitted an OPRA request to the City that requested: (1) the “[i]nterest amount [paid] on the . . . [City’s] Bank of America [BOA] accounts in Fiscal Years 2009 and 2010 respectively,” and (2) the “[f]ees [paid] on the above accounts to . . . [BOA] in Fiscal Years 2009 and 2010 respectively.” (R-1; P-5.)

John Ditinyak (Ditinyak) served as the City’s Director of Finance at the time of Gordon’s OPRA request. He commenced employment with the City in July 2010 and is no longer employed by the City.

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<sup>1</sup> Pursuant to Executive Order No. 127, the deadline for Initial Decisions was extended until ninety days after the end of the Public Health Emergency.

Shinell Smith served as the Deputy Clerk and the custodian of records during the pertinent period. She was employed by the City from August 2019 to March 2013.

Gordon had filed an earlier OPRA request on April 25, 2011, which requested, among other things, the interest paid on the BOA accounts in Fiscal Years 2009 and 2010. (P-10.) The response received included a memorandum by Ditinyak dated May 2, 2011, which explained that the provided yearly interest amounts were the net values of the interest earned and the fees paid. After reviewing the response, Gordon met with Ditinyak in his office and inquired whether he received the two values (interest and fees) separately. Ditinyak showed Gordon some type of statement from the bank on his computer that displayed the interest payment and fees. After this meeting, Gordon submitted the OPRA request in issue on July 5, 2011. Ditinyak acknowledged speaking to Gordon “to ascertain exactly what she was looking for” in an attempt to ascertain which documents would fulfill her request and understanding what Gordon was looking for after speaking with her. To the extent that Ditinyak testified that this occurred after the filing of the July 5, 2011 OPRA request, this testimony is overborne by Gordon’s rendition that the discussion occurred in connection with her earlier OPRA request.

The City did not respond to Gordon’s OPRA request in seven days. As of August 1, 2011, Gordon had still not received any response to her OPRA request. Gordon went to the Clerk’s office on August 1, 2011, and verbally informed Custodian Shinell Smith that, unless she received a definite and reasonable deadline for the response to her OPRA request, she would submit a complaint to the GRC. Custodian Smith contacted Ditinyak in Gordon’s presence and requested that he come to the Clerk’s office to discuss when he would provide his response. Ditinyak met with Gordon in the Clerk’s office outside the presence of Ms. Smith. Ditinyak informed Gordon that he was not committing himself to any particular deadline and that she could pursue any legal avenues available to her. On August 3, 2011, Gordon filed a Denial of Access Complaint with the GRC. (P-5.)

The record includes an interoffice memorandum to the Finance Department, dated

July 11, 2011, with a handwritten altered date of July 5, 2011, enclosing Gordon's OPRA request. (P-7.) The memorandum contains a handwritten note, dated August 1, 2011, stating, "still in working progress. John D told Ms. Gordon in person he would have a response soon but could not provide a date." The author of the handwritten note was not established at the hearing and, accordingly, I afford no weight to the content of that note.

On August 26, 2011, Ditinyak sent an e-mail to Gordon, which was copied to, among others, GRC case manager Darryl Rhone (Rhone) and Shinell Smith, that states:

I wanted to update you on the OPRA request that you filed in July 2011, regarding the City's interest revenue from FY 2010 and FY 2009. I spoke at length with Francis McEnerney, managing partner of McEnerney Brady & Company LLC, in regard to how I could provide you with the information that you requested. I then contacted the City's representatives at the . . . [BOA] and asked them to provide me with an analysis of Interest revenue and bank expenses. I will provide you with their analysis as soon as I receive it.

I apologize for the delay, but I assure you that I have acted in good faith in providing you an estimated delivery time for such documents.

Never hesitate to call me if you have any questions. (P-11.)

Ditinyak described that he looked through the records at City Hall and was unable to locate documents at City Hall that he felt would meet Gordon's request. Ditinyak determined that the bank's monthly account Analysis Statements, which listed interest income (i.e., "earnings") and fees (i.e., "service charges"), would be responsive to Gordon's request. He contacted BOA and requested the Analysis Statements for fiscal years 2009 and 2010 (i.e., July 2008 through June 2010).

On October 3, 2011, Ditinyak sent an e-mail to Gordon that advised, "I received the BOA analysis report that you requested via the Clerk's office [and] I will leave a copy with Shinnel." (P-13.)<sup>2</sup> Gordon picked up the package from the Clerk's office between

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<sup>2</sup> Although the e-mail is titled "Analysis Report for FY 2010 and FY 2011," Gordon understood that the e-mail was in response to the OPRA request in issue, which requested information for FY 2009 and FY 2010.

October 3 and 6, 2011. The package contained two BOA Analysis Statements; one for the month ending June 30, 2010, and the other for June 2011, the later of which fell outside the time period of Gordon's OPRA request. (See P-14.) After reviewing the information provided, Gordon wrote a note to Ditinyak, which the Clerk's office received on October 6, 2011, stating, "if you have not requested/received the rest of my OPRA request material, I would like to simplify my request and reduce my interest" to the one BOA account number stated in the note for Fiscal Years 2009 and 2010. (P-7.)

On December 7, 2011, the GRC received the City's Custodian Statement of Information, which was signed by Shinell Smith and included an e-mail sent on December 7, 2011, by Shinell Smith to Rhone with a copy to Gordon. (P-2.) The e-mail states in pertinent part:

Please note that the attached was provided by our finance Director, John Ditinyak. Mr. Ditinyak informed me that Ms. Gordon had already received [the] first half of this request as stated. Also, Ms. Gordon has spent countless hours in the Clerk's hours [sic] reviewing record statements, in well kept binders, provided by Mr. Ditinyak. I had a discussion with Ms. Gordon at the time this OPRA request was filed, which was July 5, 2011 and she stated that Ditinyak would have an answer, as it relates to her request by August 1, 2011. However, he hadn't heard back from the auditor and couldn't respond to Ms. Gordon as he had desired.

I believe the attached should satisfy this request . . . .

At the hearing, Ditinyak could not recall whether the information conveyed in the e-mail was accurate and whether there was some issue about not hearing or getting information from an auditor. Shinell Smith also did not recall the information stated in her December 7, 2011 e-mail or whether she had followed up with Ditinyak.

Prior to this e-mail, Gordon had only received one of the twenty-four BOA Analysis Statements (i.e., the statement for the month ending June 30, 2010). Gordon further credibly explained that the referenced hours that she spent in the Clerk's office reviewing records was not connected or in response to her July 2011 OPRA request but, instead, it concerned an OPRA request that she had submitted on September 15, 2011, requesting

all of the City's bank account statements for Fiscal Year 2010. (P-12.) In this regard, on September 26, 2011, Gordon received a call from the Custodian advising that the records responding to her September 15, 2011 OPRA request were available. There were several large binders of bank account statements upon Gordon's arrival at the Clerk's office. Due to the volume of the documents, Gordon spent hours reviewing the binders in the Clerk's office, after which she requested copies of some of the records (e.g., P-16.) See also P-7 (memorandum dated September 15, 2011 with handwritten notes).

The attachment to Smith's December 7, 2011 e-mail included a pdf file, titled Analysis Statements, that contained files in two folders (i.e., FY 2009 and FY 2010) and these folders, in turn, contained monthly Analysis Statements that were specifically listed. (P-18.) As the list reflects, Gordon received with the e-mail Analysis Statements for six of the months in Fiscal Year 2009 (i.e., January 2009 through June 2009) and eleven of the months in Fiscal Year 2010 (i.e., July 2009 through May 2010). (P-18; see R-2, R-4.) As noted, Gordon had previously received the Analysis Statement for June 2010. The attachment did not include the monthly statements for July 2008 through December 2008.

On December 11, 2011, Gordon sent an e-mail to Rhone, with a copy to Shinell Smith, that states:

I have received the following e-mail with attachment files from Ms. Smith . . . . The OPRA request asked for information relating to a period of 24 month[s], starting with July 2008 to June 2010---the 2009 and 2010 fiscal years of the City . . . . The attachment provides the requested information from January 2009 to May 2010. The June 2010 information I have received in the past in paper format. If Mr. Ditinyak would just provide the missing information from July 2008 to December 2008, I would consider my OPRA request fulfilled . . . . (P-3.)

On December 12, 2011, Shinell Smith sent an e-mail to Rhone, with a copy to Gordon and Ditinyak, that states in pertinent part:

I will forward Ms. Gordon's request to Mr. Ditinyak and follow up with him in person. However, for the record, the request clearly stated 2009-2010 not 2008.

I hope to resolve this matter fairly quickly but it is contingent upon the accessibility of the requested documents. (P-3.)

At the hearing, Ditinyak did not recall receiving the December 12, 2011 e-mail or taking any further action after the e-mail. Shinell Smith did not remember whether she had followed up with Ditinyak or what she did. Gordon credibly testified that she received no verbal or written communication regarding her OPRA request after the December 12, 2011 e-mail and before the GRC's Final Decision in August 2012.

Ditinyak did not recall when he supplied the documents to Gordon. Although he described having a meeting with Gordon and going through the statements after he received the packet of documents from BOA, this testimony is not supported by the record and is overborne by other evidence. Gordon credibly testified that she only met with Ditinyak twice; in response to her earlier OPRA request and on August 1, 2011, when she asked him for a deadline. Gordon did not speak to Ditinyak or anyone from the finance department after she submitted her July 2011 OPRA request and before August 1, 2011 regarding the status of her request but did have communications with Shinell Smith during that period concerning why she was not receiving a response. The only time Gordon spoke to someone in the finance department between her July 2011 OPRA request and the end of that year was on August 1, 2011.

On August 28, 2012, the GRC adopted the Executive Director's Findings and Recommendations dated August 21, 2012, and the GRC issued a Final Decision that was distributed on August 30, 2012. (J-1; see J-4.) The GRC concluded that, "[b]ecause the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to . . . [Gordon's] request in writing within the statutorily mandated seven (7) business days, the Custodian's failure to respond in writing to . . . [Gordon's] OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a 'deemed' denial of . . . [Gordon's] OPRA request . . . ." However, the GRC further concluded that Gordon's "request is invalid under OPRA because it fails to specify an identifiable government record sought . . . ." Accordingly, the GRC concluded that "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 [and] [t]herefore, 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." Gordon appealed the GRC's decision, and the Appellate Division granted the GRC's request for a remand in order to develop the record. (J-5 at 2.)

Avam White (White) commenced employment with the City's law department as an Assistant City Attorney in or around February 2013. On January 24, 2014, White sent an e-mail to Frank Caruso with the GRC that states in pertinent part:

I spoke to Mr. Ditinyak preliminarily. I had to track him down as he is no longer an employee . . . . I will write him formally asking for a certification as to what he told me during our conversation. Mr. Ditinyak informed me that he cannot remember whether or not every record that he would have determined to be responsive to Ms. Gordon's request was provided. He does remember several very lengthy meetings that he had with Ms. Gordon to go over and provide Ms. Gordon with whatever documentation she wanted. (P-1.)

At the hearing, White recalled speaking to Ditinyak on one occasion and recalled the conversation stated in the letter. He did not recall whether he sent a letter or request to Ditinyak for a certification. Ditinyak recalled having a conversation with the City attorney but did not recall whether he conveyed the information set forth in the attorney's e-mail or the substance of the conversation. He did not recall receiving a formal request for a certification.

On September 30, 2014, the GRC adopted the Executive Director's Supplemental Findings and Recommendations dated September 23, 2014, and the GRC issued an Interim Order that was distributed on October 1, 2014. (J-2; see J-5.) The GRC concluded that it "should reverse its August 28, 2012 Final Decision at conclusion No. [2] to hold that, instead, . . . [Gordon's] OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records." The GRC ordered that, within five business days from receipt of the GRC's Interim Order, "the current Custodian must disclose all responsive records with the exception of those previously provided [and] [i]f the current Custodian

cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.” The GRC further concluded that, since it “has reversed conclusion No. 2, the [GRC] should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA,” and the GRC “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 [GRC’s] Interim Order.”

Madeline Smith has been employed by the City as the Deputy Clerk since July 2013 and served as the custodian of records at the time of the GRC’s Interim Order. She completed a Certification in Lieu of Oath or Affidavit dated October 16, 2014 that states:

It is my understanding that Mr. Ditnyak is no longer an employee of the City . . . and at this time I cannot determine whether the City obtained all documentation Mr. Ditnyak deemed responsive to the Complainant’s OPRA request . . . . I cannot determine, with certainty, what records were provided to . . . Gordon, and further, I cannot determine whether Mr. Ditnyak would have determined any such records that were provided to . . . Gordon as responsive . . . I cannot determine thru Finance Dept that there are any more records . . . . [T]he requested records are not in the clerk’s office and Finance Dept said they do not have them. So it appears we do not have [the] requested records. (R-7.)

On November 18, 2014, the GRC adopted the Executive Director’s Supplemental Findings and Recommendations dated November 10, 2014, and the GRC issued an Interim Order in which the GRC found that the “current Custodian [Madeline Smith] complied with the [GRC’s] September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided” to Gordon. (J-3; see J-6.) The Executive Director’s Supplemental Findings and Recommendations had noted:

The SOI [Statement of Information] and subsequent submissions did provide that, at a minimum, Mr. Ditnyak obtained and provided some records to . . . [Gordon] and that others were outstanding. However, the record is insufficient to determine the exact identity or location of those records . . . .



The original Custodian[’s] [Shinell Smith’s] and Mr. Ditinyak’s acknowledgement of the existence and provision of certain records is a contradiction of the current Custodian’s certified statements; though she attempted to at least find responsive records in the Clerk’s Office and Finance Department. It is this evidence and the current Custodian’s lack of unfamiliarity with the original Custodian[’s] and Mr. Ditinyak’s actions that have created contested facts in this case . . . . (J-6 at 4.)

Accordingly, the GRC determined that Gordon’s “complaint should be referred to the . . . [OAL] for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to . . . [Gordon] and 3) whether any additional records are outstanding and need to be provided.” (J-3.) The GRC further directed that, “if necessary, the . . . [OAL] should determine whether the original Custodian [Shinell Smith] and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances.” (Ibid.)

On July 6, 2015, counsel for the City sent an e-mail to Joy Lascari (Lascari), requesting her to contact BOA and “get a copy of the Bank Statement/Group Summary Analysis” for the months of July–December 2008 and June and July 2010 for the account listed in the e-mail. (R-5.) Lascari serves as the City’s Chief Financial Officer (CFO). She commenced employment with the City in mid-July 2011 and worked in the finance office with Ditinyak. On July 6, 2015, Lascari contacted the City’s BOA representative and forwarded counsel’s document request to the representative. (Ibid.) By e-mail sent on July 6, 2015, the BOA representative advised Lascari that she would “request the historical statements” needed from its “Government Client Service Center” and marked the request as a “rush.” (Ibid.) The BOA Client Service Team informed Lascari, by e-mail dated July 23, 2015, that “the Analysis statements couldn’t be locate[d] for the time period you requested of 2008 July–Dec and 2010 June–July,” and that “[o]ur Government Research and Analysis Services searched diligently but was unsuccessful in locating the statements . . . .” (R-6.)

In addition to the evidence that forms the foundation of the aforesaid findings of fact, a summary of other pertinent testimony follows.

## The Testimony

### John Ditinyak

Ditinyak testified that he provided Gordon with all the statements that BOA was able to provide. (See R-2.) At some point around that time frame someone at BOA informed Ditinyak that it could not provide the statements for July 2008 through December 2008. Ditinyak did not recall the reason BOA could not provide these statements. He did not recall if he was advised of the missing months when BOA gave him the statements or if he went back and asked why the statements were not provided. Ditinyak also did not recall whether he communicated that information to Gordon.

### Shinell Smith

To Smith's recollection, Gordon was provided documents in response to her OPRA request. Smith did not "recall exactly what happened" and did not "recall anything specific." Smith was given the documents in response to Gordon's OPRA request and Smith gave Gordon whatever documents Smith received. She did not "remember owing [Gordon] anything else" and did not "recall not giving [Gordon] anything specific." Smith did not recall if she received the documents in the seven-day period or whether she then contacted Ditinyak but indicated that part of her job as custodian is to follow-up. Smith noted that her December 7, 2011 e-mail and Gordon's complaint reflect conversations between Gordon and Ditinyak. In her experience, a requester normally never speaks directly to the department from which the OPRA request is coming and normally goes through the Clerk's office. Smith would have no knowledge of any such conversations and whether they exchanged documents unless it came through the Clerk's office or unless she was told. Smith described that the City had a general OPRA file/folder where all OPRA requests were filed and a log concerning OPRA requests. She did not recall what was on the log or what the log looked like. Smith also did not recall whether she would keep a copy of the documents that she received from a different department.

Joy Lascari

Lascari, who commenced employment in mid-July 2011, did not work on Gordon's July 5, 2011 OPRA request and was not involved in the search for records at that time, but was aware of what was going on regarding the request. As the City's CFO, Lascari is responsible for the recording of the City's transactions and reporting to the State according to State statutes. Lascari explained that the interest and fee figures requested by Gordon cannot be found in the City's bank statements or ledgers. The bank statements would only provide the net result of the interest and charges that were applied to the accounts (i.e., the balance between the interest and the charges). The City only records the net (i.e., the final charge or interest) in its books as it appears on the bank statement, not the detail of how the bank arrived at that number. There was no record that Lascari could print out of the City's accounting system that would show what Gordon was asking for. The only portion reflected in the accounting system is the net result that appears on the bank statements. A new accounting system went into effect on January 1, 2012. The new system does not contain past data before it came online. The only thing that was brought forward onto the new system was the beginning balances from the general ledger. The interest and fee figures requested by Gordon are contained in the BOA Analysis Statements, which include the detail of the interest applied and the charges against the bank account. In Lascari's opinion, the BOA Analysis Statement that Ditinyak deemed responsive to the OPRA request was the best response or report that could be provided to try to answer Gordon's request. During Lascari's later testimony, she articulated her understanding that Gordon received available bank statements for July 1, 2008 to July 30, 2010 and her belief that "only the bank statement would provide any information as to whether or not there was any interest earned and whether or not there were any fees change[d]." She also stated her "understanding that when the bank statements did not suffice that John Ditinyak presumed that she was really asking for the bank analysis statements so he attempted to provide those to her," and the bank analysis statements "would only have the detail of the interest applied and the charges against the bank account."

As CFO, Lascari would oversee the archiving of records. Lascari explained that different records have different retention schedules. (See P-22.) The retention

schedule for bank statements is six years. Lascari did not currently have access to bank statements for June to December 2008. She did not recall having access to the 2008 bank statements in 2014. The only bank statements that she saw when she commenced employment, and since that time, went back to 2010. There is no mention of a retention schedule for bank Analysis Statements, which Lascari noted would only really be used to compare the services of the existing bank to another bank. Lascari explained that the yearly financial records are summarized in the audit, and the only thing that she needs to rely on as a new CFO is the audit, not the detail that went into producing the audit. The audit incorporates information from the general ledger, which includes information from the journals. Lascari described that most of the financial documents stay within the finance office for a period of time or until there is no room and then the documents go to a room at the police building. Some documents are in the finance office for seven years (e.g., purchase orders). In response to Gordon's subpoena (P-6), Lascari did not find financial books reflecting interest and bank fees. Prior to January 1, 2012, the general ledgers were handwritten books and not electronic. Lascari located the book for fiscal year 2010 but did not find any listing of the requested information. She could not find the book for fiscal year 2009.

Lascari did not recall being asked to search for records, or conducting a search for records, in 2014. As far as she could recall, Lascari did not receive any such request in 2014. Lascari receives requests for financial documents from the Clerk's office and would have been aware of the request if someone else did the search. Regarding the records requested from BOA in 2015, Lascari did not physically look in the office for the records, explaining that most of those records, if they existed, would have been removed to an off-site storage space. Lascari understood that the City could not locate the requested records in the office at the time of Gordon's OPRA request so she deemed attempting another search four years later would result in the same conclusion. Accordingly, she directly contacted the bank, as Ditinyak had previously done, as the most efficient way to obtain the records.

Madeline Smith

At the time of her October 16, 2014 certification, a search of the Clerk's office and the two storage rooms was conducted, and Smith did not identify any additional records that would satisfy Gordon's OPRA request and did not find anything from BOA. The index cards that list the items in inventory were reviewed. The Clerk's office had a box of Gordon's complaints, which Smith's staff reviewed. Smith understood that the issue involved financial records from the bank, which were not in the box. Based on her certification, she also requested the finance department to do a record search. Smith did not recall whether she made a request to the finance department in general or to Lascari, and Smith did not recall the wording of her request, which would not necessarily be put in writing. Smith did not investigate the e-mail exchanges for the records and opined that the e-mails regarding this case are beyond her access. During her later testimony, Smith did not recall her actions in response to the Interim Order. If it was done according to her procedure, Smith would have directed her staff, likely Ms. Bradshaw, to research the files with Gordon's name and an electronic search would have been conducted. Smith would have done a search of her e-mails and Ms. Bradshaw would have searched her e-mails. Smith did not have access to Shinell Smith's e-mails. Smith was not familiar with a log in the Clerk's office regarding OPRA requests that includes information regarding to whom the request was directed and the information produced. The Clerk's office has a log that includes the requester's name, the date the request came in and the date it was completed. After the OPRA request is closed, the OPRA request and the documents given are placed into a file under the person's name. Smith put this procedure in place in 2014. Gordon's box did not include the financial records. Smith stood by the statement in her certification that she could not determine with certainty what records were provided to Gordon. According to some of the e-mails, Ditinyak met with Gordon, and Smith did not know what documents Ditinyak gave to Gordon. Smith produced documents (which are included as part of P-7) in response to Gordon's subpoena that requested documents filed by the Clerk's office regarding Gordon's OPRA request and GRC complaint 2011-256, along with e-mails, e-mail attachments and other electronically kept data regarding the case in the Clerk's office's possession. As to these documents, Smith had her staff (Mr. Fields) go

through the box of Gordon's complaints and pull-out material associated with 2011-256. The City's IT person also searched Ms. Bradshaw's e-mail account for any e-mails by or between Ms. Bradshaw and the GRC or Gordon regarding 2011-256. Smith could not determine whether certain documents in the produced packet (i.e., the December 7, 2011 e-mail) came from the box or the server.

Joyce Lanier

Lanier commenced employment in May 2015 as the City Clerk. The e-mail address cityclerk1@ci.orange.nj.us, which was set up prior to her arrival, is not her assigned e-mail and not an e-mail address that she uses. It is not an e-mail address that she gives out to receive e-mails, and she does not sign into that user account because it is not an account that she uses. E-mails that come into that e-mail account, which are usually in reference to an OPRA request, are automatically forwarded to Lanier's e-mail account. She would then forward the e-mail to Quinn Fields, who reports to her and handles OPRA requests in the Clerk's office. Lanier could not state for certain whether she has access to the e-mail account because she does not use it. She does not have a password to the account. In response to Gordon's subpoena requesting that she search that e-mail account using the keyword "2011-256" (P-24), Lanier contacted the IT department to do the search and IT did not find any e-mails corresponding to that keyword.

Katalin Gordon

Gordon testified that she could have ascertained the requested fees and interest from the type of bank statements she reviewed in response to her September 2011 OPRA request for 2010 bank statements. (See P-16.) Based on P-16, in Gordon's opinion, the information she requested was available and Ditinyak could have provided the information within days of her OPRA request in the form of bank statements.

### **The GRC's Referral**

Turning to the GRC's referral, the GRC transmitted the matter for the determination of the following factual issues: (1) what records Ditinyak determined to be responsive; (2) which of those records Ditinyak provided to Gordon; and (3) whether any additional records are outstanding and need to be provided. The undisputed evidence establishes that Ditinyak determined that the BOA monthly Analysis Statements for the period of July 2008 through June 2010 were responsive to Gordon's request. The undisputed evidence further demonstrates that between October 3 and 6, 2011, Gordon received the monthly Analysis Statement for June 2010, and Gordon later received the monthly Analysis Statements for January 2009 through May 2010 on December 7, 2011. The City does not dispute that it has not provided Gordon with the monthly Analysis Statements for July 2008 through December 2008. However, the totality of the evidence establishes that the missing statements are no longer available from BOA and not in the City's possession. Gordon further acknowledges that the records to be provided is, at this juncture, "academic" since, even if the records existed, "they have lost the significance they possessed at the time of the request."

### **LEGAL DISCUSSION AND CONCLUSIONS**

The Open Public Records Act (OPRA) embodies the Legislature's determination that it is the "public policy" of the State 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 . . . shall be construed in favor of the public's right of access[.] N.J.S.A. 47:1A-1. Toward that end, OPRA sets forth a comprehensive framework for access to government records. Subject to various statutory exclusions, N.J.S.A. 47:1A-1.1 broadly defines a "government record" or "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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

“OPRA calls for the prompt disclosure of government records.” Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). Custodians of government records “shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.” N.J.S.A. 47:1A-5(i).<sup>3</sup> The failure to respond within seven business days “shall be deemed a denial of the request[.]” Ibid. If the government record is in storage or archived, custodians must report that fact within seven business days and advise when the record will be available. Ibid. “If the record is not made available by that time, access shall be deemed denied.” Ibid.

A requestor who is denied access to a government record by the custodian may file a complaint with the GRC, which has a statutory power to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian[.]” N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(b). If the GRC determines that “the complaint is within its jurisdiction and is neither frivolous nor without factual basis, the . . . [GRC] shall proceed with the adjudication process.” N.J.A.C. 5:105-2.1; see N.J.S.A. 47:1A-7(e). If the GRC “is unable to make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto,” the GRC may transmit the matter to the OAL for a contested-case hearing. N.J.S.A. 47:1A-7(e); see N.J.A.C. 5:105-2.7(a). “The public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. A custodian or employee who is found to have “knowingly and willfully” violated 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); see N.J.S.A. 47:1A-7(e); N.J.A.C. 5:105-

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<sup>3</sup> In the case of a municipality, the “custodian of a government record” or “custodian” is defined as the municipal clerk. N.J.S.A. 47:1A-1.1.



2.14(a). The statutory penalties are “\$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation.” N.J.S.A. 47:1A-11(a).

In the within matter, the GRC has already determined, and the evidence clearly establishes, that “the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to . . . [Gordon’s] request in writing within the statutorily mandated seven (7) business days, [and] the Custodian’s failure to respond in writing to . . . [Gordon’s] OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a ‘deemed’ denial of . . . [Gordon’s] OPRA request . . . .” (J-1.) The only remaining issue is “whether the original Custodian [Shinell Smith] and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances.” (J-3.)

The phrase “knowing and willfully” is not defined in the OPRA statutes and regulations. Accordingly, it is necessary to look to decisional law that has addressed these terms in the context of other legislation.

In the context of an award of punitive damages, the New Jersey Supreme Court articulated in Berg v. Reaction Motors Div., 37 N.J. 396 (1962) that, “in order to satisfy the requirement of willfulness or wantonness there must be a ‘positive element of conscious wrongdoing.’” Id. at 414 (citation omitted.) The Court explained that this “requirement may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences.” Ibid.

In Foldi v. Jeffries, 93 N.J. 533 (1983), the New Jersey Supreme Court addressed the issue of “willful or wanton misconduct” in the context of a parent-child immunity claim and held that “the doctrine of parental immunity will continue to preclude liability in cases of negligent supervision, but not for a parent’s willful or wanton failure to supervise his or her children.” Id. at 549. The Court noted that “‘wanton or willful misconduct does not require the establishment of a positive intent to injure,’” and the wanton or willful standard constitutes “an accepted intermediary position between simple negligence and the

intentional infliction of harm.” Ibid. (citation omitted.) Citing McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970), the Court recognized that “[i]t is not easy to set down a readily usable definition of willful [or] wanton misconduct,” Foldi, 93 N.J. at 549, but indicated that the Court has generally expressed the concept as follows:

[I]t must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result.

\* \* \*

[W]illful [or] wanton misconduct signifies something less than an intention to hurt. To establish that condition it is not necessary that the defendant himself recognize his conduct as being extremely dangerous; it is enough that he know, or has reason to know, of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct.

[Foldi, 93 N.J. at 549-50 (quoting McLaughlin, 56 N.J. at 305-06.).]

See also G.S. v. Dep’t of Human Services, 157 N.J. 161, 178 (1999) (“Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result” and “actions taken with reckless disregard for the consequences also may be wanton or willful.”).

In Fielder v. Stonak, 141 N.J. 101 (1995), the New Jersey Supreme Court addressed the concept of “willful misconduct” in the context of a police pursuit. The police officer who collided with a motorist could not be immune from liability under the applicable statute if his conduct constituted “willful misconduct.” In holding that willful misconduct in this context means “the knowing failure [of a police officer] to follow specific orders[,]” Id. at 126, the Court noted that the phrase “willful misconduct” “is not immutably defined but takes its meaning from the context and purpose of its use.” Id. at 124. The Court further explained:

Prior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety . . . . Although willful misconduct need not involve the actual intent to cause harm . . . , there must be some knowledge that the act is wrongful . . . . “Willful misconduct’ is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.”

[Ibid. (Citation omitted).]

In Executive Comm’n on Ethical Standards v. Salmon, 295 N.J. Super. 86 (App. Div. 1996), an ethics case brought against a Commissioner of the Board of Public Utilities, the Executive Commission on Ethical Standards sought the Commissioner’s removal on the grounds that he had acted in “willful and continuous disregard” of the ethics laws. The Appellate Division noted that the meaning of “willful” was defined by the United States Supreme Court in McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) as follows:

In common usage the word “willful” is considered synonymous with such words as “voluntary,” “deliberate,” and “intentional” . . . . The word “willful” is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.

[Executive Comm’n, 295 N.J. Super at 105 (quoting McLaughlin, 486 U.S. at 133 (Citations omitted).]

The Appellate Division further cited Fielder, 141 N.J. at 124, where the Court stated that, “[a]lthough willful misconduct need not involve the actual intent to cause harm . . . there must be some knowledge that the act is wrongful” and “[w]illful misconduct’ is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.” Executive Comm’n, 295 N.J. Super. at 105-06. The Appellate Division found the Court’s reasoning in Fielder to be pertinent in the context of ethics violations since “[b]oth scenarios deal with possible malfeasance of a person charged with protection of the public,” and held that “conduct, to be considered willful under N.J.S.A 52:13D-21(i), must be intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional.” Id. at 106, 107.

The New Jersey Supreme Court re-visited the meaning of “willful misconduct” in Alston v. City of Camden, 168 N.J. 170 (2001). The Court stated:

It is clear that willful misconduct requires “much more” than mere negligence . . . . It also is clear that willful misconduct will fall somewhere on the continuum between simple negligence and the intentional infliction of harm . . . . In Fielder . . . , this Court noted that “[p]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety.” . . . However, McLaughlin also may be interpreted to suggest that “reckless” applies only to the “indifference to the consequences” aspect of its holding[.]

[Alston, 168 N.J. at 185. (Citations omitted).]

The above decisional law makes clear that there is no presumption of “willful” misconduct simply from the failure of a public official to timely respond to an OPRA request. A knowing and willful violation requires the official’s actions to be much more than negligent conduct. Alston, 168 N.J. at 185. Mere negligence or heedlessness in complying with the statute in a timely manner is not enough to label the failure as “willful.” Rather, the individual must have had actual knowledge that his/her actions were wrongful and there must be a positive element of conscious wrongdoing. Fielder, 141 N.J. at 124; Berg, 37 N.J. at 414. In other words, the evidence must show that the official’s actions were “intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional.” Executive Comm’n, 295 N.J. Super. at 107. However, a showing of deliberate action or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences will suffice to satisfy the willful standard. Berg, 37 N.J. at 414; see also G.S., 157 N.J. at 178 (“actions taken with reckless disregard for the consequences also may be wanton or willful”); McLaughlin, 56 N.J. at 305 (“it must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result.”). The GRC has found a records custodian to have acted “knowingly and willfully” based on the custodian’s lack of communication, cooperation, and timeliness in securing the documents from other departments and following up with the department heads regarding

their lack of response. Jung v. Borough of Roselle, GRC 07137-08, Initial Decision (November 18, 2008), <<https://njlaw.rutgers.edu/collections/oal/>>, adopted as modified, Gov't Records Council (December 18, 2008), <<https://www.nj.gov/grc/decisions/pdf/2007-299.pdf>>.

Against this backdrop, I **CONCLUDE** that Custodian Shinell Smith and John Ditinyak knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Succinctly stated, the totality of the evidence demonstrates a flagrant disregard of the statutory mandates. Gordon filed her OPRA request on July 5, 2011, and the City failed to provide any documents in response to Gordon's request until approximately three months later on October 3, 2011, and then only provided a woefully limited response; namely, only one of the twenty-four monthly BOA Analysis Statements. Approximately two months later on December 7, 2011, and approximately five months after Gordon filed her OPRA request, Gordon indirectly received seventeen additional monthly Analysis Statements, via Shinell Smith's e-mail to the GRC. And it is undisputed that no further documents were provided to Gordon after this e-mail and the City never provided the monthly Analysis Statements for six of the requested twenty-four months.

Turning to the evidence, Ditinyak offered no explanation at the hearing regarding the steps he took after receiving Gordon's request, including the reason for any delay in requesting and/or receiving the Analysis Statements from BOA. Although Ditinyak acknowledged understanding the information that Gordon was seeking, the evidence fails to disclose when Ditinyak determined that the monthly BOA Analysis Statements would be responsive to Gordon's request and when he requested the Analysis Statements from BOA. Rather, Ditinyak asserted a lack of recollection regarding many of the critical facts, and the matters that he did recall, such as meetings with Gordon, were refuted by Gordon's credible testimony and not otherwise corroborated by the record. The evidence does establish, however, that Ditinyak provided no response for nearly a month after Gordon filed her OPRA request and had no communication with Gordon during that timeframe. He also refused on August 1, 2011 to provide Gordon with a

definite deadline regarding his response, a clear requirement of OPRA. Ditinyak undeniably knew of the seven-business day requirement, which was specifically set forth in the memorandum from the Clerk's office transmitting Gordon's OPRA request to the Finance Department (P-7) and addressed at the August 1, 2011 meeting with Gordon, during which Ditinyak simply told Gordon that she could pursue any legal avenues available to her. In other words, Ditinyak had actual knowledge that his actions were wrongful and in violation of the statutory requirements, and his actions and omissions were intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional. Only after Gordon filed her Denial of Access Complaint, and twenty-six days after meeting with Gordon, did Ditinyak inform Gordon in his August 26, 2011 e-mail that he had requested the Analysis Statements from BOA. Again, Ditinyak did not specify a response time or an estimated response time despite his claim that he had "acted in good faith in providing [Gordon] an estimated delivery time for such documents." As far as the record reveals, Ditinyak took no action to timely secure the documents from BOA and/or to follow-up on his request to BOA. Ditinyak offered no explanation regarding the reason why it took to early October to receive any documents from BOA or why only one Analysis Statement was then provided. He also had no communication with Gordon directly or through the Clerk's office throughout this period. Indeed, Gordon received additional Analysis Statements only through the Custodian's December 7, 2011 e-mail to the GRC. Significantly, the City's response was still missing six of the twenty-four responsive records; Ditinyak never responded or acted when he was notified of the shortcomings; and Gordon's request has not been fully satisfied to date.

Although Gordon contends that the information requested should have been produced immediately in the form of in-house monthly bank statements, divergent testimony was offered regarding the responsiveness of such documents. Apart from this, even if the bank statements were responsive, the evidence is insufficient to conclude that Ditinyak acted willfully and intentionally, with knowledge that what he was doing was wrong, when he determined that the Analysis Statements should be provided, which CFO Lascari appeared to support. Rather, Ditinyak's determination, even if wrong, would evidence negligence on his part. However, based upon a consideration of the totality of the circumstances, including Ditinyak's knowledge of his

obligation and responsibility to timely provide documents to the Custodian, Ditinyak's refusal to provide a deadline for his response, the substantial period of time that he failed to provide the documents without explanation, and the incomplete documents that were eventually provided, I **CONCLUDE** that Ditinyak knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. I **CONCLUDE** that Ditinyak's actions and omissions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional, and such actions and omissions were taken with reckless indifference to the consequences. Accordingly, I **CONCLUDE** that Ditinyak should be subject to a civil penalty of \$1,000.

As Custodian, Shinell Smith was primarily responsible for ensuring compliance with the OPRA requirements. Like Ditinyak, Smith asserted a lack of recollection regarding the events that transpired. However, Smith unquestionably had actual knowledge that Gordon had not received any documents as of August 1, 2011. The evidence fails to demonstrate that Smith requested an extension of time to respond to Gordon's request or took any action to secure a response, or even a deadline regarding the response, from the finance department. In this regard, Smith acted deliberately and with knowledge that she would not comply within the mandated response time. Her lack of timely or even delayed follow-up with Ditinyak regarding the status of his response or the reason for the inexcusable delay represents willful misconduct. Plainly, the purpose of OPRA to make government records accessible to citizens would be subverted if a custodian could defend her inaction by claiming that she was denied access to records by other officials.

Smith also provided inaccurate information to the GRC in her December 7, 2011 e-mail. For example, although Smith advised that Ditinyak had informed her that Gordon "had already received [the] first half of this request," at that point Gordon had only received one of the twenty-four statements, which Smith should have known since responses to an OPRA request go through the Clerk's office. Indeed, the memorandum from the Clerk's office transmitting Gordon's OPRA request to the Finance Department explicitly instructed, "Please do not give the requestor any documentation because there is a required fee for certain government documents . . . which the Clerk's office must process."

(P-7.) Similarly, although Smith informed the GRC, “I believe the attached should satisfy this request,” Gordon was undisputedly still missing six of the statements. Likewise, although Smith described that “Gordon has spent countless hours in the Clerk’s hours [sic] reviewing record statements, in well kept binders, provided by Mr. Ditinyak,” the evidence established that these documents were produced in response to a different OPRA request, which Smith had sent to Ditinyak under memorandum dated September 15, 2011, and includes handwritten notes dated September 26, 2011 addressing Gordon’s review. (P-7.) The evidence adduced at the hearing also does not support Smith’s advice that Gordon had informed Smith on July 5, 2011 that Ditinyak would have an answer to her request by August 1, 2011 and that the delay was due to Ditinyak not hearing back from the auditor. And, although Smith assured the GRC that she would “follow up with [Ditinyak] in person” after being apprised of the inaccuracy of her statement that the Analysis Statements attached to her e-mail should satisfy Gordon’s request, the evidence fails to demonstrate that any action was taken, and Gordon received no communication or documents before the GRC’s August 2012 decision.

I **CONCLUDE** that Smith knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. I **CONCLUDE** that Smith’s actions and omissions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional, and such actions and omissions were taken with reckless disregard of the statutory command. Accordingly, I **CONCLUDE** that Smith should be subject to a civil penalty of \$1,000.

### **ORDER**

I **ORDER** that former Custodian Shinell Smith be and hereby shall be subject to a civil penalty of \$1,000.

I further **ORDER** that former Director of Finance John Ditinyak be and hereby shall be subject to a civil penalty of \$1,000.




I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 15, 2022  
DATE

  
MARGARET M. MONACO, ALJ

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

jb

**APPENDIX**

**List of Witnesses**

**For Petitioner:**

Madeleine Smith

Joy Lascari

Keith Royster

Shinell Smith

Avram White

Katalin Gordon

Margarette Homere

Joyce Lanier

**For Respondent:**

John Ditinyak

Joy Lascari

Madeleine Smith

**List of Exhibits in Evidence**

**Joint:**

J-1 Final Decision dated August 28, 2012

J-2 Interim Order dated September 30, 2014

J-3 Interim Order dated November 18, 2014

J-4 Findings and Recommendations dated August 21, 2012

J-5 Supplemental Findings and Recommendations dated September 23, 2014

J-6 Supplemental Findings and Recommendations dated November 10, 2014

**For Petitioner:**

P-1 E-mail from Avram White to Frank Caruso dated January 24, 2014

P-2 Custodian Statement of Information and e-mails

- P-3 E-mails dated December 7, 11, and 12, 2011
- P-4 Not in evidence
- P-5 Denial of Access Complaint dated August 2, 2011
- P-6 Subpoena dated January 29, 2016 and attachment
- P-7 Chronological Sequence of Activities dated October 2, 2014; subpoena dated February 1, 2016 with attachment; and documents in response to subpoena
- P-8 Not in evidence
- P-9 Not in evidence
- P-10 OPRA Request Form dated April 25, 2011; memorandum from John Ditinyak to Katalin Gordon dated May 2, 2011; and correspondence from Katalin Gordon to John Ditinyak
- P-11 E-mail from John Ditinyak to Katalin Gordon dated August 26, 2011
- P-12 OPRA Request Form dated September 15, 2011
- P-13 E-mail from John Ditinyak to Katalin Gordon dated October 3, 2011
- P-14 Bank of America Analysis statements
- P-15 Not in evidence
- P-16 Bank of America statement
- P-17 Not in evidence
- P-18 E-mails dated November 21, 2011, December 7, 2011, and June 16, 2015; e-mail file folders and file lists; and CD
- P-19 Subpoena dated January 16, 2016 with attachment; return receipt; letter from Katalin Gordon to Bank of America dated March 18, 2016; and USPS letter dated March 23, 2016
- P-20 Bank of America online information, FAQs: Bank Account Statements
- P-21 E-mails dated June 10, June 18, and June 20, 2013; July 9, July 18, and July 28, 2013; October 10, 2014; and January 21, 2016
- P-22 State of New Jersey, Municipal Agencies General Record Retention Schedule
- P-23 Letter from Jeanette Calderon-Arnold to Katalin Gordon dated May 26, 2015
- P-24 Subpoenas dated September 30 and October 19, 2016
- P-25 Not in evidence
- P-26 Letter from Katalin Gordon to Jeanette Calderon-Arnold dated April 17, 2015; letter from Jeanette Calderon-Arnold to Katalin Gordon dated May 26, 2015;

- Certification of Keith Royster dated July 13, 2015; and letter from Katalin Gordon to Jeanette Calderon-Arnold dated December 14, 2015 with attachment
- P-27 Report on Examination of Accounts for the State Fiscal Year 2009 and OPRA Request Form dated December 19, 2016
- P-28 Subpoena dated June 18, 2018 and Chronological Sequence of Activities list dated October 2, 2014

For Respondent:

- R-1 OPRA Request Form dated July 5, 2011
- R-2 Bank of America Analysis statements
- R-3 Not in evidence
- R-4 Spreadsheet
- R-5 E-mails dated July 6, 2015
- R-6 E-mail from Bank of America dated July 23, 2015
- R-7 Certification in Lieu of Oath or Affidavit by Madeline Smith dated October 16, 2014



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

**INTERIM ORDER**

**November 18, 2014 Government Records Council Meeting**

Katalin Gordon  
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)  
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. This complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the Office of Administrative Law should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of November, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 19, 2014**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 18, 2014 Council Meeting**

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-256**

**v.**

**City of Orange (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

**Custodian of Record:** Madeline Smith<sup>3</sup>

**Request Received by Custodian:** July 5, 2011

**Response Made by Custodian:** None.

**GRC Complaint Received:** August 3, 2011

**Background**

**September 30, 2014 Council Meeting:**

At its September 30, 2014 public meeting, the Council considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Council should reverse its August 28, 2012 Final Decision at conclusion No. 3 to hold that, instead, the Complainant's OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. *Burke v. Brandes*, 429 N.J. Super. 169 (App. Div. 2012). Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Avram White, Esq. (Orange, NJ).

<sup>3</sup> The original custodian of record was Shinell Smith.

records were previously provided, or if no further records exist, the Custodian must certify to this fact.

2. **The Custodian shall comply with Item No. 1 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, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
3. Since the Council has reversed conclusion No. 2, the Council should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On October 1, 2014, the Council distributed its Interim Order to all parties. On October 2, 2014, the current Custodian sought a five (5) business day extension to comply with the Order and further requested that the GRC provide any records it had on file that the Complainant previously received. On October 3, 2014, the GRC granted an extension until October 16, 2014 and also stated that it did not possess any of the records the Complainant may have received.

On October 16, 2014, the current Custodian responded to the Council's Interim Order. The current Custodian certified that, per her January 27, 2014 legal certification, Mr. Ditinyak is no longer with the City. Further, the current Custodian affirmed that she could not determine whether the City obtained all records it deemed to be responsive to the Complainant's OPRA request or whether all such records were provided to the Complainant. The current Custodian certified that she contacted the Finance Department to determine if they possessed any responsive records because none were in the Clerk's Office. The current Custodian affirmed that the Finance Department determined that they possessed no records, so it appears as though none exist.

On October 20, 2014, the Complainant e-mailed the GRC stating that this complaint was remanded to obtain additional facts; however, there appears to be less facts available now than there were at the time of the Council's initial adjudication of this complaint. The Complainant noted that the Council already agreed that more facts were needed to properly adjudicate this

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<sup>4</sup> "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."

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

complaint, hence the remand. For these reasons, the Complainant requested that this complaint be referred to the Office of Administrative Law (“OAL”) for a fact-finding hearing.

## Analysis

### Compliance

At its September 30, 2014 meeting, the Council ordered the current Custodian to disclose all responsive records with the exception of those already provided to the Complainant or certify if she could not determine what records were provided, or if no further records existed. Further, the current Custodian was required to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 1, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on October 8, 2014.

On October 2, 2014, the first (1<sup>st</sup>) business day after receipt of the Council’s Order, the current Custodian sought an extension of time, which the GRC granted until October 16, 2014. Thereafter, on the last day to comply, the current Custodian certified that she was unable to locate any records in the Clerk’s Office or Finance Department and thus, none appear to exist.

Therefore, the current Custodian complied with the Council’s September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

### Contested Facts

The Administrative Procedures Act provides that the OAL “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts have arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See* Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In this matter, the Council requested remand of this complaint from the Appellate Division to ascertain whether responsive bank records existed. This is because the original Custodian failed to submit an adequate SOI and the City failed to file a brief with the Appellate Division. The Appellate Division granted same, at which point the Council attempted to gain additional information from the City. However, at the time that the complaint was remanded for



adjudication, more than three (3) years had passed and both the original Custodian and Mr. Ditinyak were no longer employed at the City.

In an attempt to gain additional information prior to the Council's Order, the GRC caused Custodian's Counsel to contact Mr. Ditinyak, who purportedly did not recollect which records he determined were responsive or those provided. Counsel noted that Mr. Ditinyak did remember meeting with the Complainant on several occasions. Also, the current Custodian, with limited knowledge of the records which Mr. Ditinyak determined were responsive, and what he previously had acquired and provided to the Complainant; attempted to respond to the Council's request for additional information. The current Custodian, however, was unable to provide any additional facts that would allow the Council to properly adjudicate this complaint. Thereafter, the Complainant requested that this complaint be sent to OAL for a fact-finding hearing because the record was not adequate to adjudicate this complaint.

The SOI and subsequent submissions did provide that, at a minimum, Mr. Ditinyak obtained and provided some records to the Complainant and that others were outstanding. However, the record is insufficient to determine the exact identity or location of those records. Further, the evidence of record does not indicate that the parties communicated with each other in an attempt to determine what records were already provided and whether any further records were outstanding.

The original Custodian and Mr. Ditinyak's acknowledgment of the existence and provision of certain records is a contradiction of the current Custodian's certified statements; though she attempted to at least find responsive records in the Clerk's Office and Finance Department. It is this evidence and the current Custodian's lack of familiarity with the original Custodian and Mr. Ditinyak's actions that have created contested facts in this case. It is henceforth clear that a fact-finding hearing will provide the most efficient and effective method for developing the record and making determinations of fact.

Accordingly, this complaint should be referred to OAL for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the OAL should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's September 30, 2014 Interim Order because she responded in the extended time frame certifying that she was unable to locate responsive records and could not determine which records were provided to the Complainant. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. This complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine: 1) what records Mr. Ditinyak determined to be responsive; 2) which of those records he provided to the Complainant and 3) whether any additional records are outstanding and need to be provided. Further, and if necessary, the Office of Administrative Law should determine whether the original Custodian and/or Mr. Ditinyak knowingly and willfully violated OPRA under the totality of the circumstances. N.J.S.A. 47:1A-5(e).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

November 10, 2014



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

INTERIM ORDER

September 30, 2014 Government Records Council Meeting

Katalin Gordon  
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)  
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should reverse its August 28, 2012 Final Decision at conclusion No. 3 to hold that, instead, the Complainant's OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. Since the Council has reversed conclusion No. 2, the Council should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.

<sup>1</sup> "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."

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

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

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of September, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: October 1, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 30, 2014 Council Meeting**

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-256**

**v.**

**City of Orange (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

**Custodian of Record:** Madeline Smith<sup>3</sup>

**Request Received by Custodian:** July 5, 2011

**Response Made by Custodian:** None.

**GRC Complaint Received:** August 3, 2011

**Background**

August 28, 2012 Council Meeting:

At its August 28, 2012 public meeting, the Council considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant's request in writing within the statutorily mandated seven (7) business days, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Avram White, Esq. (Orange, NJ).

<sup>3</sup> The current custodian of record is Shinell Smith.

2. The Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005) and NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).
3. In the matter before the Council, the Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Council finds that Complainant's request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, 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.

Procedural History:

On August 30, 2012, the Council distributed its Final Decision to all parties.

On October 15, 2012, the Complainant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On October 4, 2013, the Council requested remand of this complaint from the Appellate Division in order to develop the record. The Council's remand request stated that the Statement of Information did not adequately identify whether the bank fee payment records were in the City's possession and further noted that the City failed to file a brief with the Appellate Division. On November 4, 2013, the Appellate Division granted the Council's request for remand.

On January 7, 2014, the GRC requested a response to the following:

1. Whether the City obtained all records Mr. Ditinyak deemed to be responsive to the Complainant's OPRA request? Please provide documentation to support this response.
2. Whether the Complainant was provided with said records? Please provide documentation to support provision of the records.

The GRC, noting that the original Custodian was no longer with the City, requested that the current Custodian and Mr. Ditinyak provide legal certifications and supporting documentation by January 10, 2014.

On January 15, 2014, the City contacted the GRC advising that they recently experienced frequent e-mail outages at the City. On the same day, the GRC resent its request for additional information and extended the time frame to respond through January 21, 2014. The Custodian's Counsel subsequently requested an extension until January 24, 2014, which was granted on

January 16, 2014.<sup>4</sup> On January 24, 2014, the Custodian's Counsel stated that he spoke with Mr. Ditinyak, who could not remember whether all records determined to be responsive were provided. Counsel noted that Mr. Ditinyak did remember several meetings he had with the Complainant to inspect records.

On January 27, 2014, the current Custodian responded to the GRC's request for additional information. The Custodian certified that Mr. Ditinyak is no longer with the City. The Custodian further certified that she could not determine whether the City obtained all records deemed to be responsive to the Complainant's OPRA request or whether all such records were provided to the Complainant.

### Analysis

#### Reconsideration

The Council "at its own discretion, may reconsider any decision it renders." N.J.A.C. 5:105-2.10(a). Subsequent to the Council's Final Decision, the Appellate Division rendered a decision in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). In light of the Court's reasoning in Burke, on the issue of overly broad OPRA requests, the Council should reconsider its August 28, 2012 Final Decision to determine whether the Complainant's OPRA request was invalid.

The New Jersey Appellate Division has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'*" N.J.S.A. 47:1A-1." MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

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<sup>4</sup> On January 18, 2014, the Complainant notified the GRC that she filed a notice of petition with the New Jersey Supreme Court on December 2, 2013, disputing the Appellate Division's remand and was awaiting review. The Complainant thus requested that the GRC stay its adjudication until the Supreme Court decided on the petition. On September 15, 2014, the Complainant advised the GRC that the Supreme Court denied her notice of petition. Katalin Gordon v. City of Orange (Essex), 2011-256 – Supplemental Findings and Recommendations of the Executive Director

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>5</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

However, in Burke, the Court held that the defendant “performed a search and was able to locate records responsive[,]” which “belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. See also Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett’s entire OPRA request on the ground that it was improper.”).

Here, the Complainant’s OPRA request sought the “[i]nterest amount paid . . .” and “[f]ees paid on the . . . Bank of America account on fiscal years 2009 and 2010.” On its face, the request sought information and could reasonably have been determined to be invalid. However, the evidence of record indicates that Mr. Ditinyak advised the Complainant on August 26, 2011 that he contacted Bank of America and attempted to obtain analysis of interest revenue and bank expenses. Mr. Ditinyak further advised that he would provide the information he received. On December 3, 2011, the original Custodian advised that she believed the Complainant was in possession of records responsive to half of the OPRA request and that the additional records provided therein should have satisfied the Complainant’s OPRA request. See Gordon v. City of Orange (Essex), GRC Complaint No. 2011-256 (Final Decision dated August 28, 2012) at 2. However, the original Custodian failed to submit a completed SOI and the City did not submit an Appellate brief.

Here, as in Burke, the original Custodian and Mr. Ditinyak undertook the task of responding to the Complainant’s OPRA request. Further, the evidence submitted to the GRC indicates that the original Custodian and Mr. Ditinyak affirmed that, at the very least, some records were provided to the Complainant for review. The GRC recognizes that although the request sought information, the Complainant provided a definitive time frame and financial institution sufficient enough for Mr. Ditinyak to obtain responsive records for disclosure. Thus, the City’s actions here “belied any assertion that the request was . . . overbroad.” See Burke, 429 N.J. Super. at 177.

Therefore, the Council should reverse its August 28, 2012 Final Decision at conclusion No. 2 to hold that, instead, the Complainant’s OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke, 429 N.J. Super. at 177. Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.

Additionally, since the Council has reversed conclusion No. 2, the Council should

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<sup>5</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).



abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Council should reverse its August 28, 2012 Final Decision at conclusion No. 3 to hold that, instead, the Complainant's OPRA request is valid because the request contained enough identifiers to allow the original Custodian and Mr. Ditinyak to search for and identify responsive records. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the current Custodian must disclose all responsive records with the exception of those previously provided. If the current Custodian cannot determine what records were previously provided, or if no further records exist, the Custodian must certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, if necessary, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
3. Since the Council has reversed conclusion No. 2, the Council should abandon its August 28, 2012 Final Decision as to conclusion No. 3 regarding the knowing and willful violation of OPRA.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Communications Specialist/  
Resource Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

September 23, 2014

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<sup>6</sup> "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."

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



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

August 28, 2012 Government Records Council Meeting

Katalin Gordon  
Complainant

Complaint No. 2011-256

v.

City of Orange (Essex)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant’s request in writing within the statutorily mandated seven (7) business days, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. In the matter before the Council, the Custodian’s failure to respond in writing to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Council finds that Complainant’s request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, 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 28<sup>th</sup> Day of August, 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 30, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-256**

v.

**City of Orange (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively.
2. Fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively.

**Request Made:** July 5, 2011

**Response Made:**

**Custodian:** Shinell Smith

**GRC Complaint Filed:** August 3, 2011<sup>3</sup>

**Background**

**July 5, 2011**

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.

**August 3, 2011**

Denial of Access Complaint filed with the Government Records Council ("GRC") with an attached copy of the Complainant's OPRA request dated July 5, 2011.

The Complainant states that she submitted her request on July 5, 2011 and has waited patiently for an answer. The Custodian maintains that on August 1, 2011, she met with the City of Orange's Director of Finance, John Ditinyak. The Complainant asserts that Mr. Ditinyak informed her that although he is aware of OPRA's time limitations, he is not committing himself to a timeframe upon which to respond to her Denial of Access Complaint. The Complainant states that this interaction led her to file this complaint.

The Complainant agrees to mediate this complaint.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Marvin T. Braker, Esq. (Orange, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**August 3, 2011**

Offer of Mediation sent to the Custodian.<sup>4</sup>

**August 26, 2011**

Letter from Mr. Ditinyak to the Complainant. Mr. Ditinyak states that he has contacted the City's representatives at the Bank of America in order to retrieve an analysis of interest revenue and bank expenses. Mr. Ditinyak asserts that he will provide the Complainant with such information when he receives it. Mr. Ditinyak states that he is sorry for the delay and maintains that he has acted in good faith in providing an estimated delivery time for the requested records.

**August 15, 2011**

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

**November 21, 2011**

E-mail from the Custodian to the GRC. The Custodian states that due to staffing changes, she did not receive the GRC's request for the SOI at the time of such request, August 15, 2011. The Custodian requests a two week extension to complete the SOI.

**November 21, 2011**

E-mail from the GRC to the Custodian. The GRC grants the Custodian the requested extension to submit the SOI.

**December 3, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that she was informed by Mr. Ditinyak that the Complainant had already received records responsive to the first half of her request. The Custodian asserts that the Complainant has spent several hours in the Clerk's office reviewing various records. The Custodian further states that Mr. Ditinyak was unable to fulfill this request because the City auditor never gave Mr. Ditinyak a response to the Complainant's forwarded request.

The Custodian states that the files attached to this e-mail should satisfy the Complainant's request.

**December 7, 2011<sup>5</sup>**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 5, 2011
- Letter from Mr. Ditinyak to the Complainant dated August 26, 2011
- E-mail from the Custodian to the Complainant dated December 3, 2011

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<sup>4</sup> The Custodian did not respond to the Offer of Mediation by the August 10, 2011 deadline.

<sup>5</sup> The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007). The Custodian also declined to respond to the questionnaire contained in the Statement of Information form.

- A copy of the Complainant's Denial of Access Complaint dated August 3, 2011

### Analysis

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Complainant filed an OPRA request on July 5, 2011. However, the Custodian failed to bear the required burden of proof under N.J.S.A. 47:1A-6 that she provided a written response to the Complainant's request within the statutorily mandated seven (7) business days. Accordingly, the Custodian's failure to respond in writing to the Complainant's request is in violation of OPRA.

Therefore, because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant's request in writing within the

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<sup>6</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

statutorily mandated seven (7) business days, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, 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.

Moreover, 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." N.J.S.A. 47:1A-5.e.

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.

In the instant matter, the Custodian failed to fully complete the Statement of Information. Accordingly, the Custodian has failed to meet her statutory burden of proof that the denial of access was lawful, as required pursuant to N.J.S.A. 47:1A-6. However, in this particular instance, the Custodian's ability to raise an argument justifying the alleged denial of access is of no consequence because the Complainant's request is invalid on its face.

In the matter before the Council, the Complainant requested the "interest amount paid on the City of Orange Bank of America account on fiscal years 2009 and 2010 respectively" and the "fees paid on the [City of Orange] Bank of America account on fiscal years 2009 and 2010 respectively." Such a request merely seeks information and fails to request a specifically identifiable government record.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>7</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>8</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A.

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<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>8</sup> As stated in Bent, *supra*.



47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). Research is not among the custodian's responsibilities.” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” Accordingly, test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA.

In the instant matter, the Complainant’s request does not seek a specifically identifiable record. Instead, the Complainant merely requests the amount of interest and fees paid on the City’s Bank of America account. Such a request fails to identify a specific government record with reasonable specificity. Accordingly, the Complainant’s request is invalid under OPRA.

Therefore, the Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

**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)).

In the matter before the Council, the Custodian’s failure to respond in writing to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Council finds that Complainant’s request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, 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. Because the Custodian failed to bear her burden of proof pursuant to N.J.S.A. 47:1A-6 that she responded to the Complainant’s request in writing within the statutorily mandated seven (7) business days, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record sought pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

3. In the matter before the Council, the Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Council finds that Complainant's request is invalid under OPRA because such request fails to name identifiable government records. Accordingly, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

August 21, 2012