



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-326

v.

Township of Livingston (Essex)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 *Reconsideration* 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 the Complainant has failed to establish in his request for reconsideration of the Council’s February 27, 2013 Final Decision that 1) the Council's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably and failed to submit any evidence to contradict the Council’s Decision. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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

Final Decision Rendered by the
Government Records Council
On The 28th Day of May, 2013

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: June 4, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2011-326

v.

**Township of Livingston (Essex)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

1. 2000 and 2001 Debt Statement for the Township of Livingston (“Township”)
2. 2011 schedule of salaries for Township employees.
3. Budget account status/transaction audit trail for the following appropriations from date of adoption to present: 1) Ordinance No. 16-2001; 2) Ordinance No. 7-2005; 3) Ordinance No. 26-2007; 4) Ordinance No. 15-2009; 5) Ordinance No. 6-2010; and 6) Ordinance No. 14-2011.
4. Vendor reports for 22 vendors over the individually specified time periods.

Request Made: August 29, 2011

Response Made: September 8, 2011

GRC Complaint Filed: October 25, 2012³

Background

February 26, 2013 Council Meeting:

At its February 26, 2013 public meeting, the Council considered the January 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian’s failure to

¹ No legal representation listed on record.

² Glenn Turtleaub, Custodian of Records. Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner (Riverdale, NJ).

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

- respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5(e) pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009) *and* Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011).
 3. The Custodian certified that the debt statements could not be located and that the salary schedule did not exist at the time of the Complainant’s OPRA request. Further, the Complainant provided no competent, credible evidence to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s OPRA request Item Nos. 1 and 2 pursuant to Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009), and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
 4. Although the Custodian possessed the records responsive to the Complainant’s OPRA request Item Nos. 3 and 4 prior to advising the Complainant on September 8, 2011 that an extension of five days would be necessary, the Custodian’s appropriate extension did not place an unnecessary limitation on access based on the extraordinary circumstances and lasting effects of Hurricane Irene. Additionally, the GRC declines to order disclosure of these records because the Custodian certified in the Statement of Information that he provided same to the Complainant on September 20, 2011.
 5. The Custodian failed to timely respond to the Complainant’s OPRA request within the extended deadline pursuant to N.J.S.A. 47:1A-5(i) and further failed to respond immediately to the Complainant’s OPRA request Item No. 2 seeking salary information pursuant to N.J.S.A. 47:1A-5(e). However, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s OPRA request Item Nos. 1 and 2 because same could not be located or did not exist. Moreover, the Custodian’s extension of time to provide the Complainant with records responsive to the Complainant’s OPRA request Item Nos. 3 and 4 was appropriate based on extraordinary circumstances and the GRC declined to order disclosure of the records because the Custodian provided same to the Complainant on September 20, 2011. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions did 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 February 27, 2013, the Council distributed its Final Decision to all parties. On March 7, 2013, the Complainant e-mailed the GRC requesting additional time to review the Council's Final Decision. On March 12, 2013, the GRC responded granting an extension of time until March 15, 2013.

Complainant's Reconsideration:

On March 11, 2013,⁴ the Complainant requested that the Council reconsider its February 26, 2013 Final Decision.

The Complainant states the Custodian certified in the Statement of Information ("SOI") that "... no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services." Kohn v. Township of Livingston (Essex), GRC Complaint No. 2011-326 (Final Decision dated February 26, 2013) at pg. 3. The Complainant states that in its analysis, the Council states that the Custodian "... has not asserted or certified that the records were destroyed ..." *Id.* at pg. 11. The Complainant contends that the Council must rectify conflicting statements in its Findings & Recommendations.

The Complainant next contends that the Council failed to address at what point a custodian can stop seeking a record. The Complainant contends that the responsive debt records are to be maintained permanently. Records Retention and Disposal Schedule - Records Series No. 0306-0003 (October 2005). The Complainant asserts that he believes the Custodian purposely omitted the retention schedule from his document index. The Complainant asserts that the fact that debt statements are permanent records is critical to this complaint. The Complainant asserts that the Custodian's explanation that the records could not be located without a supporting argument regarding the search undertaken renders a denial of access based on this excuse meaningless and easy to invoke.

Analysis

Reconsideration

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

⁴ The Complainant's letter requesting reconsideration was dated March 11, 2013; however, same was received in the mail on March 13, 2013.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.’ D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, *supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Complainant filed the request for reconsideration of the Council’s February 26, 2013 Final Decision on March 11, 2013, three (3) days prior to the expiration of the extension of time granted by the GRC. In support of his request for reconsideration, the Complainant first asserted that the Council needs to rectify statements from pages 3 and 11 of Kohn, that the Complainant believes are conflicting. Therein, the Council stated in the SOI entry on page 3 that the Custodian certified that no records were destroyed. The Council later notes on page 11 that the Custodian “... has not asserted or certified that the records were destroyed ...” *Id.* However, there is no conflict between these two (2) statements; rather, both acknowledge that no records were destroyed.

The Complainant argues that the Council failed to address at what point a custodian can discontinue searching for records and simply assert that same could not be located. The Complainant further argued that the Custodian purposely left out the retention schedule for the responsive debt statements even though this information was critical to the complaint. The Complainant submitted a record retention schedule for debt statements to show that debt statements are required to be maintained permanently.

The Council should reject the Complainant’s request for reconsideration. It should be noted that at no point did the Custodian ever contend, certify or even imply that the debt statements at issue were destroyed. In fact, the Custodian certified in the SOI that he believed the records were in the Library archives but that same could not be located. The Council further addressed similar concerns raised by the Complainant in its Decision, stating that “... the Custodian has not asserted or certified that the records were destroyed; therefore, expressly identifying a retention schedule has no bearing on the fact that the Custodian cannot locate the records.” *Id.* at pg. 11. Additionally, in its Decision the Council cited to O’Shea v. Borough of Hopatcong (Sussex) GRC Complaint No. 2009-223 (December 2010), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011) and Valdes v. Union

City Board of Education (Hudson), GRC Complaint No. 2010-180 (December 2011), in making its determination that the Custodian did not unlawfully deny access to the responsive records because he could not locate same.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the Council's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria, supra*. Notably, the Complainant failed to submit any evidence to contradict the Council's decision regarding the Custodian's failure to locate the responsive debt statements. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision. Thus, the Complainant's request for reconsideration should be denied. *Cummings, supra; D'Atria, supra; Comcast, supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's February 27, 2013 Final Decision that 1) the Council's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably and failed to submit any evidence to contradict the Council's Decision. Thus, the Complainant's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-326

v.

Township of Livingston (Essex)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5(e) pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009) and Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011).
3. The Custodian certified that the debt statements could not be located and that the salary schedule did not exist at the time of the Complainant’s OPRA request. Further, the Complainant provided no competent, credible evidence to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s OPRA request Item Nos. 1 and 2 pursuant to Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009), and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Although the Custodian possessed the records responsive to the Complainant's OPRA request Item Nos. 3 and 4 prior to advising the Complainant on September 8, 2011 that an extension of five days would be necessary, the Custodian's appropriate extension did not place an unnecessary limitation on access based on the extraordinary circumstances and lasting effects of Hurricane Irene. Additionally, the GRC declines to order disclosure of these records because the Custodian certified in the Statement of Information that he provided same to the Complainant on September 20, 2011.
5. The Custodian failed to timely respond to the Complainant's OPRA request within the extended deadline pursuant to N.J.S.A. 47:1A-5(i) and further failed to respond immediately to the Complainant's OPRA request Item No. 2 seeking salary information pursuant to N.J.S.A. 47:1A-5(e). However, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item Nos. 1 and 2 because same could not be located or did not exist. Moreover, the Custodian's extension of time to provide the Complainant with records responsive to the Complainant's OPRA request Item Nos. 3 and 4 was appropriate based on extraordinary circumstances and the GRC declined to order disclosure of the records because the Custodian provided same to the Complainant on September 20, 2011. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2011-326

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Copies of the following:

1. 2000 and 2001 Debt Statement for the Township of Livingston (“Township”)
2. 2011 schedule of salaries for Township employees.
3. Budget account status/transaction audit trail for the following appropriations from date of adoption to present:
 - Ordinance No. 16-2001.
 - Ordinance No. 7-2005.
 - Ordinance No. 26-2007.
 - Ordinance No. 15-2009.
 - Ordinance No. 6-2010.
 - Ordinance No. 14-2011.
4. Vendor reports for 22 vendors over the individually specified time periods.

Request Made: August 29, 2011

Response Made: September 8, 2011

Custodian: Glenn Turteltaub

GRC Complaint Filed: October 25, 2012³

Background

August 29, 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. The Complainant indicates that the preferred method of delivery is e-mail.

September 8, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that he will need five (5) additional days to complete the Township’s response to over two (2) dozen items sought in the request.

¹ No legal representation listed on record.

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

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

October 25, 2011

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

- Complainant’s OPRA request dated August 29, 2011.
- E-mail from the Custodian to the Complainant dated September 8, 2011.
- Letter from the Complainant to the Custodian dated October 14, 2011.

The Complainant states that he submitted an OPRA request to the Township on August 29, 2011. The Complainant states that the Custodian responded on September 8, 2011 stating that he needed five (5) additional days to respond. The Complainant states that in early October, the Complainant made an appointment for either October 13, 2011 or October 14, 2011 to review records. The Complainant states that he inspected a number of records on October 14, 2011 but was not shown records responsive to the subject OPRA request. The Complainant states that he sent the Custodian a follow-up letter dated October 14, 2011 advising that the Custodian failed to provide the responsive records.

The Complainant does not agree to mediate this complaint.

November 7, 2011

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

November 14, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of five (5) business days to submit the SOI.

November 14, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 21, 2011 to submit the SOI.

November 18, 2011

E-mail from the Custodian to the GRC. The Custodian requests a second (2nd) extension of time to submit the SOI.

November 21, 2011

E-mail from the GRC to the Custodian. The GRC states that due to the circumstances surrounding the filing of this complaint, the Custodian is granted an extension of time until November 30, 2011 to submit the SOI.

November 30, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated August 29, 2011.
- E-mail from the Custodian to the Complainant dated September 8, 2011.
- Records responsive to the Complainant’s OPRA request.

The Custodian certifies that his search for the requested records involved forwarding the Complainant's OPRA request to the Chief Financial Officer ("CFO") on August 29, 2011. The Custodian certifies that the CFO responded on September 6, 2011 providing budget account status reports and vendor reports.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that he received the Complainant's OPRA request on August 29, 2011. The Custodian's that due to Hurricane Irene, his office was handling all weather related issues for the next two (2) weeks. The Custodian certifies that although the CFO provided him with some records on September 6, 2011, the Custodian requested an extension of five (5) business days on September 8, 2011 because his office was still dealing with weather-related issues. The Custodian certifies that after the weather-related issues were handled, he forgot about the Complainant's OPRA request and instead was focused on numerous other requests submitted by the Complainant. The Custodian certifies that the following responsive records are attached:

List of Responsive Records	Records Retention Schedule	Records Provided	General Nature Description of Records	Legal Explanation
2000 Township Debt Statement		To be provided. Unable to locate.	N/A	The Custodian believes the record is in the archives in the Library, but they have not been located to date.
2001 Township Debt Statement		To be provided. Unable to locate.	N/A	The Custodian believes the record is in the archives in the Library, but they have not been located to date.
2011 Schedule of salaries for Township employees		No.		No record existed as of September 7, 2011.
Budget Account Status/Transaction Audit Trail Ordinance No. 16-2001 (3 pages)	6 years.	Provided September 20, 2011.	N/A	N/A
Budget Account Status/Transaction Audit Trail Ordinance No. 7-2005 (6 pages)	6 years	Provided September 20, 2011.	N/A	N/A

Status/Transaction Ordinance No. 26-2007 (16 pages)		Provided September 20, 2011	N/A	N/A
Budget Account Status/Transaction Ordinance No. 15-2009 (3 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Budget Account Status/Transaction Ordinance No. 6-2010 (3 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Budget Account Status/Transaction Ordinance No. 6-2010 (6 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Budget Account Status/Transaction Ordinance No. 14-2011 (2 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for the Gibson, Tarquini Group (2 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Security Design (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Santini Moving & Storage (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Ace Worldwide Moving & Storage (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Eneractive Solutions	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Jersey Professional Management (2 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor	6 years	Provided	N/A	N/A

Activity Report for VTM, Inc. (7 pages)		September 20, 2011.		
Detail Vendor Activity Report for Network Cabling Inc. (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Carousel Ind. Of N. America, Inc. (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Consulting & Municipal Eng. (2 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Kimball/National Office (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Herman Miller, Inc. (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Arnold Furniture Manufac., Inc. (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for BFI, Inc. (2 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Jami, Inc./The Harter Group (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Chanree Construction Co., Inc. (4 pages)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Atlantic Engineering Labs,	6 years	Provided September 20, 2011.	N/A	N/A

Inc. (2 pages)				
Detail Vendor Activity Report for SOR Consulting Engineers, Inc. (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Weiss Design Group (1 page)	6 years	Provided September 20, 2011.	N/A	N/A
Detail Vendor Activity Report for Schwanewede/Hals Eng. Inc. (1 page)	6 years	Provided September 20, 2011.	N/A	N/A

December 6, 2011

Letter from the Complainant to the GRC. The Complainant asserts that this complaint is a prime example of the Custodian’s knowing and willful denial of access. The Complainant requests that he has reviewed the Custodian’s SOI and offers the following comments.

The Complainant notes that the Custodian failed to identify a retention schedule for the debt statements. Moreover, the Complainant asserts that the Custodian has confirmed that the debt statements are still not available and the Custodian failed to provide a date certain on which they would be provided.

The Complainant further contends that although the Custodian had a majority of the records on September 6, 2011, he still requested an extension of five (5) business days on September 8, 2011. The Complainant asserts that the Custodian provided the responsive records to him for inspection on October 14, 2011, or 33 days after the Custodian received these records. The Complainant further asserts that it was not until the filing of this complaint that the Custodian provided any responsive records.

The Complainant contends the records attached to the SOI show a problem with the accuracy of the information. The Complainant asserts that the vendor report for VTM did not contain information from 2001 to present: the last entry was December 20, 2010. The Complainant contends that this is contrary to the fact that the budget account status/transaction audit trail Ordinance No. 26-2007 shows payments to VTM in January and March 2011.

December 12, 2011

Letter from the Complainant to the GRC. The Complainant states that he recently filed multiple complaints against the Custodian. The Complainant asserts that all complaints taken as a group show a clear pattern of noncompliance with OPRA. The Complainant contends that although the Custodian is a lawyer by training, has long worked as the Township’s custodian of record, and has testified that he is fully

knowledgeable as to the requirements of OPRA, the Custodian has frequently violated same.

The Complainant contends that the Custodian's SOI contained issues that were not relevant to facts presented. The Complainant acknowledges that there could have been complications due to Hurricane Irene; however, the Custodian was committing similar violations well before the storm. The Complainant asserts that he has given the Custodian multiple chances to correct and resolve issues, but the Custodian has failed to do so.

The Complainant thus requests that the GRC group all 10 complaints together and, under the totality of the circumstances, determine that the Custodian knowingly and willfully violated OPRA.

Analysis

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

OPRA provides that:

“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5(e).

OPRA 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).⁴ 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 Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

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

In the matter before the Council, as in Kohn, supra, the Custodian responded in writing to the Complainant's OPRA request in a timely manner stating that he needed five (5) additional days to respond; thus, the Custodian's written response granting or denying access was due by September 15, 2011. However, the Custodian failed to respond in writing to the Complainant within that time. This fact is corroborated by the Custodian's SOI, wherein he certifies that a majority of all the records were provided to the Complainant on September 20, 2011, three (3) business days after the expiration of the deadline to respond.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn, supra. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009).

Moreover, the Complainant's OPRA request Item No. 2 sought a 2011 salary schedule for all employees. The requested salary information is specifically classified

⁴ 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.

under OPRA as “immediate access” records pursuant to N.J.S.A. 47:1A-5(e). In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggest that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Here, the Custodian initially responded to the Complainant’s OPRA request on the seventh (7th) business day after receipt of said request. Thus, the Custodian has violated N.J.S.A. 47:1A-5(e) because he had an obligation to respond to OPRA request Item No. 2 for immediate access records immediately, even if said records are part of a larger request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, as was the case here.

Therefore, because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5(e) pursuant to Herron, supra. See also Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009) and Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011).

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

OPRA request Item Nos. 1 and 2: 2000 and 2001 Debt Statement and Schedule of Salaries

The Custodian certified in the SOI that he did not provide the debt statements because he could not locate the records. The Custodian further certified in the SOI that the Township did not maintain a schedule of salaries as of September 7, 2011.

The Complainant argued that the Custodian has advised that he would provide the debt statements to the Complainant once located, but that the Custodian failed to provide a date certain on which same would be located. The Complainant further noted that the Custodian failed to provide the GRC with a specific retention period for the statements. Additionally, the Complainant did not dispute the non-existence of the salary schedule.

The GRC has previously upheld a denial of access in which a custodian certified in the SOI that no responsive records could be located. In Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009), the complainant sought tenure charges filed on August 2, 2000. The custodian responded requesting an extension of time and later stated that the UCBOE attorney was searching for responsive records. The custodian subsequently certified in the SOI that the UCBOE was unable to locate any tenure charges dated August 2, 2000 and that it is unknown whether said records exist. The custodian further asserted that he is unable to produce records that are not in the UCBOE’s possession or possibly never existed. O’Shea, Paff and Bent. The GRC thus determined that:

“... because the Custodian in this complaint certified that there are no records responsive to the Complainant’s request for tenure charges ... dated August 2, 2000, and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and [Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005)], had the Custodian properly responded in writing within the extended deadline date pursuant to N.J.S.A. 47:1A-5(i).” *Id.* at pg. 23.

The GRC has similarly held that a custodian lawfully denied access to records that could not be located pursuant to Pusterhofer. See O’Shea v. Borough of Hopatcong (Sussex) GRC Complaint No. 2009-223 (December 2010), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011) and Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-180 (December 2011).

In Pusterhofer, *supra*, the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access." *Id.*

Here, the Custodian certified that the debt statements could not be located and that the salary schedule did not exist at the time of the Complainant's OPRA request. Further, the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item Nos. 1 and 2 pursuant to Rivera, *supra*, and Pusterhofer, *supra*.

The GRC declines to address whether the Custodian was required to provide a date certain when he would disclose to the Complainant a record that he cannot locate, which would make it extremely difficult to determine when the record *could* be located. Moreover, the Custodian has not asserted or certified that the records were destroyed; therefore, expressly identifying a retention schedule has no bearing on the fact that the Custodian cannot locate the records.

OPRA request Items Nos. 3 and 4: Budget Account and Vendor Reports

In the SOI, the Custodian certified that the CFO provided him with the records responsive to the Complainant's OPRA request Item Nos. 3 and 4 on September 6, 2011; however, the Custodian advised the Complainant that he needed an extension of time on September 8, 2011. The Custodian certified that an extension was necessary due to the lingering effects of Hurricane Irene.

The GRC has previously dealt with the issue of whether a custodian was required to produce the records available for disclosure at the time of his response or whether his request for an extension of time effectively stayed the custodian from having to provide the records available until after compiling the remaining records. In Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-2010-210 (Interim Order dated November 29, 2011), the GRC determined that "... withholding ... records which were available for disclosure at the time of the Custodian's response ... placed an unnecessary limitation on '... the public's right of access.'" N.J.S.A. 47:1A-1. *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012).

However, the facts of this complaint differ from Wolosky, *supra*, in that although the Custodian received responsive records from the CFO on September 6, 2011; however, the Custodian advised the Complainant on September 8, 2011 that he needed additional time to respond due to the lingering effects of Hurricane Irene. Although OPRA provides that all rights of access "... shall be construed in favor of the public's right of access ..." the impact of a significant weather event such as a hurricane in New Jersey cannot be

overlooked. Therefore, even though the Custodian possessed some of the records prior to advising the Complainant that an extension of time would be necessary based on the last effects of Hurricane Irene, said request was appropriate based on extraordinary circumstances and did not place an unnecessary limitation on access. Additionally, although the Custodian violated OPRA by failing to respond within the extended time frame, he provided the Complainant with these records "... as soon as possible ..." thereafter. N.J.S.A. 47:1A-5(i).

Therefore, although the Custodian possessed the records responsive to the Complainant's OPRA request Item Nos. 3 and 4 prior to advising the Complainant on September 8, 2011 that an extension of five days would be necessary, the Custodian's appropriate extension did not place an unnecessary limitation on access based on the extraordinary circumstances and lasting effects of Hurricane Irene. Additionally, the GRC declines to order disclosure of these records because the Custodian certified in the SOI that he provided same to the Complainant on September 20, 2011.

Finally, the Complainant submitted a letter to the GRC on December 12, 2011 requesting that the GRC combine a number of complaints filed against the Custodian and determine that, under the totality of the circumstances, the Custodian knowingly and willfully violated OPRA. The consolidation of complaints is solely at the discretion of GRC. In this instance and upon review of all complaints submitted by the Complainant, same will not be consolidated based on the number of complaints and the complexity of the issues therein.

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 Larry A. Kohn v. Township of Livingston (Essex), 2011-326 – Findings and Recommendations of the Executive Director

Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian failed to timely respond to the Complainant's OPRA request within the extended deadline pursuant to N.J.S.A. 47:1A-5(i) and further failed to respond immediately to the Complainant's OPRA request Item No. 2 seeking salary information pursuant to N.J.S.A. 47:1A-5(e). However, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item Nos. 1 and 2 because same could not be located or did not exist. Moreover, the Custodian's extension of time to provide the Complainant with records responsive to the Complainant's OPRA request Item Nos. 3 and 4 was appropriate based on extraordinary circumstances and the GRC declined to order disclosure of the records because the Custodian provided same to the Complainant on September 20, 2011. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. Because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5(e) pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009) *and* Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011).

3. The Custodian certified that the debt statements could not be located and that the salary schedule did not exist at the time of the Complainant's OPRA request. Further, the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item Nos. 1 and 2 pursuant to Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009), and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian possessed the records responsive to the Complainant's OPRA request Item Nos. 3 and 4 prior to advising the Complainant on September 8, 2011 that an extension of five days would be necessary, the Custodian's appropriate extension did not place an unnecessary limitation on access based on the extraordinary circumstances and lasting effects of Hurricane Irene. Additionally, the GRC declines to order disclosure of these records because the Custodian certified in the Statement of Information that he provided same to the Complainant on September 20, 2011.
5. The Custodian failed to timely respond to the Complainant's OPRA request within the extended deadline pursuant to N.J.S.A. 47:1A-5(i) and further failed to respond immediately to the Complainant's OPRA request Item No. 2 seeking salary information pursuant to N.J.S.A. 47:1A-5(e). However, the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item Nos. 1 and 2 because same could not be located or did not exist. Moreover, the Custodian's extension of time to provide the Complainant with records responsive to the Complainant's OPRA request Item Nos. 3 and 4 was appropriate based on extraordinary circumstances and the GRC declined to order disclosure of the records because the Custodian provided same to the Complainant on September 20, 2011. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁵

⁵ This complaint was originally prepared for the Council's January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.