



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

May 28, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-328

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 26, 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 in holding that the Custodian did not knowingly and willfully violate OPRA, 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. 2011-328

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Electronic copies of documentation and proof that excavation of soil was satisfied per the contractual arrangement with Chanree Construction Co. for the municipal/police building prior to the change orders approved for the same purpose.

Request Made: July 28, 2011

Response Made: August 9, 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 until August 17, 2011 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). Moreover, the Custodian's September 8, 2011 response for an extension of time is also invalid pursuant to Hardwick v. NJ Department of

¹ No legal representation listed on record.

² Glenn Turteltaub, 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.

Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to request same in writing within the extended time frame and further failed to provide a date certain on which he would respond.

2. The Custodian unlawfully denied access to the 12 pages of records that the Complainant identified during his October 14, 2011 inspection of the responsive records because he failed to provide same to the Complainant via e-mail in a timely manner. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the Complainant informed the GRC on February 13, 2012 that he received the records at issue on February 8, 2012.
3. 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 unlawfully denied access to 12 pages of records that the Complainant specifically identified in his October 14, 2011 inspection. N.J.S.A. 47:1A-6. However, the Custodian did initially timely respond and further granted the Complainant inspection of the records deemed to be responsive on October 14, 2011 and eventually provided the 12 pages of records on February 8, 2012. 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 that on October 14, 2011, he reviewed the entire box of documents containing the responsive records and marked specific pages for copying. The Complainant states that he sent a letter to the Custodian on the same day confirming this fact. The Complainant states that the Custodian did not provide the records until nearly four (4) months later. The Complainant requests that the Council change its Final Decision to order a hearing at the Office of Administrative Law ("OAL") for a determination on whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

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

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)*.

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 argued that the Custodian did not provide the Complainant copies of the responsive records for nearly four (4) months. The Complainant contended that this fact should be enough for the Council to reconsider its holding 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 and order a hearing at OAL.

The Council should reject the Complainant’s request for reconsideration. The Complainant’s request for reconsideration merely expresses dissatisfaction with the Council’s Decision and provides no new supporting evidence not previously contemplated by the Council. Further, the reasons for the Council’s finding that the Custodian’s actions did not rise to a level of a knowing and willful violation were clearly articulated in its Final Decision.

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 GRC acted arbitrarily, capriciously or unreasonably. *See D'Atria, supra*. Notably, the Complainant failed to submit any evidence to contradict the Council's Decision that the Custodian did not knowingly and willfully violate OPRA. 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 26, 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 in holding that the Custodian did not knowingly and willfully violate OPRA, 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

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

CHRIS CHRISTIE
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FINAL DECISION

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-328

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 until August 17, 2011 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). Moreover, the Custodian’s September 8, 2011 response for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to request same in writing within the extended time frame and further failed to provide a date certain on which he would respond.
2. The Custodian unlawfully denied access to the 12 pages of records that the Complainant identified during his October 14, 2011 inspection of the responsive records because he failed to provide same to the Complainant via e-mail in a timely manner. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the Complainant informed the GRC on February 13, 2012 that he received the records at issue on February 8, 2012.
3. 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 unlawfully denied access to 12 pages of records that the Complainant specifically identified in his October 14, 2011 inspection. N.J.S.A. 47:1A-6. However, the Custodian did initially timely respond and further granted the Complainant inspection of the records deemed to be responsive on October 14, 2011 and eventually provided the 12 pages of records



on February 8, 2012. 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. 2011-328

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Electronic copies of documentation and proof that excavation of soil was satisfied per the contractual arraignment with Chanree Construction Co. for the municipal/police building prior to the change orders approved for the same purpose.

Request Made: July 28, 2011

Response Made: August 9, 2011

Custodian: Glenn Turteltaub

GRC Complaint Filed: October 25, 2011³

Background

October 25, 2011

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

- Complainant’s OPRA request dated July 28, 2011 with the Custodian’s notes thereon dated September 22, 2011.
- E-mail from the Custodian to the Complainant dated August 9, 2011.
- Letter from the Complainant to the Custodian dated August 15, 2011.
- E-mail from the Custodian to the Complainant dated September 8, 2011.
- Letter from the Complainant to the Custodian dated September 19, 2011.
- Letter from the Custodian to the Complainant dated September 22, 2011.
- Letter from the Complainant to the Custodian dated October 14, 2011.

The Complainant states that he submitted an OPRA request to the Township of Livingston (“Township”) on July 28, 2011 seeking the relevant records via e-mail. The Complainant states that the Custodian responded in writing on August 9, 2011 stating that he would need until August 17, 2011 to respond because Vincentsen, Thompson, Meade, Inc., (“VTM”), needed the additional time to retrieve and send to the Custodian the

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.

responsive records. The Complainant states that he sent a letter to the Custodian on August 15, 2011 advising that the seven (7) business day time frame had passed without a response. The Complainant further requested that the Custodian advise when he would provide the responsive records via e-mail.

The Complainant states that the Custodian responded via e-mail on September 8, 2011 stating that he was still awaiting a response from VTM and the Township Engineer. The Complainant states that he responded on September 19, 2011 stating that it has been 36 business days since submission of the OPRA request. The Complainant states that he further noted that the responsive information will justify expenditures of \$1,000,000, thus this OPRA request is extremely important. The Complainant states that he requested the Custodian to provide the records or state that the records are unavailable by September 23, 2011.

The Complainant states that the Custodian responded on September 22, 2011 stating that the Township Engineer provided a voluminous amount of records. The Complainant states that the Custodian suggested that although the Complainant wished to receive the records via e-mail, the sheer quantity of the records suggests that the Complainant may want to review the records first. The Complainant states that the Custodian further advised that he would begin scanning the records if the Complainant still wished to receive same via e-mail and would be able to provide all records beginning on September 24, 2011.

The Complainant states that he went to the Township offices on October 14, 2011 to review the responsive records and subsequently sent a letter to the Custodian on the same day. The Complainant states that in this letter, he advised the Custodian that he would provide comments when he received copies of 12 pages he identified that he wanted via e-mail.

The Complainant contends that as of October 24, 2011, the Custodian has failed to provide copies of any records.

The Complainant does not agree to mediate this complaint.

November 30, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 28, 2011 with the Custodian's notes thereon dated September 22, 2011.
- E-mail from the Custodian to the Complainant dated August 9, 2011.
- E-mail from the Custodian to the Complainant dated September 8, 2011.
- E-mail from the Custodian to the Complainant dated September 22, 2011 attaching a letter from the Custodian to the Complainant of the same date.

The Custodian certifies that his search for the requested records involved forwarding the Complainant's OPRA request to the Township Engineer and VTM, the Project Manager for the municipal/police building.

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 July 29, 2011. The Custodian certifies that he responded on August 9, 2011, the seventh (7th) business day after receipt of the OPRA request, advising that he needed until August 17, 2011 to provide a response. The Custodian certifies that he needed an extension based on a conversation with VTM. The Custodian certifies that he e-mailed the Complainant on September 8, 2011 advising that he was still waiting for records from VTM and the Township Engineer. The Custodian certifies that on September 22, 2011, in response to the Complainant's September 19, 2011 letter, the Custodian advised on the Complainant that a voluminous amount of records were available for production. The Custodian further certifies that he advised that the Complainant may want to review the records first based on the sheer volume. The Custodian certifies that he further advised the Complainant that if he still wished to receive the records via e-mail, the Custodian would begin the scanning process and start providing records as of September 24, 2011.

The Custodian contends that because he made the records available once they were provided by VTM and the Township Engineer, he has satisfied his duties under OPRA. The Custodian asserts that the Complainant reviewed a box and cartful of records and now asserts that those records did not satisfy his OPRA request. The Custodian contends that this argument is erroneous: a custodian is not required to reconcile records or conduct research to supply "supporting" records. Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007) and MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian argues that the Complainant's request is invalid and the Custodian could not have unlawfully denied access to the responsive records. Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

The Custodian certifies that all responsive records were provided and the Complainant's claim that records were missing has no base. The Custodian argues that the Complainant's dispute with the content of the records provided is not within the Council's authority to adjudicate. Kwanzaa v. NJ Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record). The Custodian further contends that it is clear that he did not knowingly and willfully violate OPRA.

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 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.

February 13, 2012

Letter from the Complainant to the GRC. The Complainant states that on October 14, 2011, he reviewed and identified by post-it certain records that he wished to receive via e-mail. The Complainant states that the Custodian made no reference to these facts and provided no argument as to why he did not send these records to the Complainant.

The Complainant states that in a February 8, 2012 written response to a recent OPRA request the Custodian specifically referenced these records, to include the date of review and the fact that there were post-its affixed to them, and advised that same were attached. The Complainant questions why it took the Custodian four (4) months and a new OPRA request to provide these clearly identifiable records.

Analysis

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

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* ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request ... *when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5(i).

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 until August 17, 2011 to respond to the Complainant's OPRA request. 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 certified that he did not respond until September 8, 2011 noting that another extension of time would be necessary. Moreover, the Custodian's September 8, 2011 response for an extension of time is invalid because he failed to respond in writing requesting same within the extended time frame and further failed to provide a date certain on which he would respond. *See* Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

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 until August 17, 2011 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 Custodian's September 8, 2011 response for an extension of time is also invalid pursuant to Hardwick, supra, because the Custodian failed to request same in

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.

writing within the extended time frame and further failed to provide a date certain on which he would respond.

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.

The Complainant’s OPRA request at issue herein sought “electronic copies” of records in regarding to soil excavation as part of the municipal /police building project. Neither party disputes that the Complainant went to the Township on October 14, 2011 to review a voluminous amount of records. The Complainant subsequently filed this complaint contending that during his October 14, 2011 inspection, he identified 12 pages of records he wished to receive via e-mail. The Complainant contended that as of the date he filed the complaint, the Custodian failed to provide these records.

In the SOI, the Custodian contended that he did not violate OPRA because he made the responsive records available to the Complainant for review as soon as possible. The Custodian contended that the Complainant reviewed a voluminous amount of records and then contended that the Custodian did not satisfy his OPRA request.⁵

⁵ The Custodian further argued that the Complainant claimed some records were missing. However, the GRC was not able to locate this argument in the Complainant’s Denial of Access Complaint and thus declines to address same.

The Complainant sent a letter to the GRC on February 13, 2012 stating that during his inspection on October 14, 2011, the Complainant affixed post-it notes to the records he wanted the Custodian to send to him via e-mail. The Complainant further stated that in a February 8, 2012 written response to another OPRA request, the Custodian referenced these records and provided same nearly four (4) months later.

Thus, the crux of this complaint is whether the Custodian unlawfully denied access to the records the Complainant specifically marked during his inspection on October 14, 2011.

As previously stated, the Complainant's OPRA request sought electronic copies of records. Additionally, the Custodian clearly understood this fact, because on September 22, 2011, he offered the Complainant the chance to review the records due to their voluminous nature and choose those he wished to receive via e-mail as an alternative to receiving all records electronically. The evidence of record indicates that the Complainant conducted an inspection on October 14, 2011 and identified 12 pages of records with post-its. Thereafter, the Complainant contended in his Denial of Access Complaint that the Custodian failed to provide those records. Subsequently, the Complainant wrote a letter to the GRC on February 13, 2012 advising that the Custodian forwarded the records at issue to the Complainant via e-mail on February 8, 2012. Thus, even though the Custodian was aware that he was offering inspection of records for the purpose of the Complainant identifying those records he wished to receive via e-mail, the Custodian unlawfully denied access to same by not subsequently providing the records in a timely manner.

Therefore, the Custodian unlawfully denied access to the 12 pages of records that the Complainant identified during his October 14, 2011 inspection of the responsive records because he failed to provide same to the Complainant via e-mail in a timely manner. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the Complainant informed the GRC on February 13, 2012 that he received the records at issue on February 8, 2012.

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

The Custodian 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 unlawfully denied access to 12 pages of records that the Complainant specifically identified in his October 14, 2011 inspection. N.J.S.A. 47:1A-6. However, the Custodian did initially timely respond and further granted the Complainant inspection of the records deemed to be responsive on October 14, 2011 and eventually provided the 12 pages of records on February 8, 2012. 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 until August 17, 2011 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). Moreover, the Custodian's September 8, 2011 response for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to request same in writing within the extended time frame and further failed to provide a date certain on which he would respond.

2. The Custodian unlawfully denied access to the 12 pages of records that the Complainant identified during his October 14, 2011 inspection of the responsive records because he failed to provide same to the Complainant via e-mail in a timely manner. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the Complainant informed the GRC on February 13, 2012 that he received the records at issue on February 8, 2012.
3. 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 unlawfully denied access to 12 pages of records that the Complainant specifically identified in his October 14, 2011 inspection. N.J.S.A. 47:1A-6. However, the Custodian did initially timely respond and further granted the Complainant inspection of the records deemed to be responsive on October 14, 2011 and eventually provided the 12 pages of records on February 8, 2012. 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁶

⁶ 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.