



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. 2011-330

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 GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its determination that the Custodian did not knowingly & willfully violate OPRA. Further, the Complainant failed to present any evidence that 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 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. 2011-330

v.

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

Records Relevant to Complaint:

1. Closed session minutes from the Township of Livingston's ("Township") September 6, 2011 and September 12, 2011 meetings.
2. 2011 salaries for all Township employees.
3. Gibson, Tarquini estimates of construction cost for municipal/police complex per 2.4.3 of contract with the Township.
4. Gibson, Tarquini analysis of owning and operating the municipal/police complex per 3.4.6 of contract with the Township.
5. Gibson, Tarquini approval of Change Order No. 105.
6. Gibson, Tarquini "as built" drawings of the municipal/police complex per 3.4.10 of contract with the Township.
7. 2010 Corrective Action Plan attached to R-11-195.
8. Letters to Verizon and Shen Yun regarding solicitation of Kanvorsar Ordinance.

Request Made: October 3, 2011

Response Made: None

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 No legal representation listed on record.

² Glenn Turtletaub, 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.

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, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Custodian's failure to immediately respond to the Complainant's OPRA request Item No. 2 for salaries results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5(e). See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item Nos. 1 and 2 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that staying his response until he compiled all records was lawful, as this practice would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive records because the evidence of record indicates that the Custodian provided the Complainant with access to same as part of the Statement of Information.
3. Notwithstanding the Custodian's "deemed" denial, the "as built drawings" responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. and Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006). The GRC further declines to order disclosure of the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5 because the Complainant failed to provide competent, credible evidence to refute the Custodian's Statement of Information certification.
4. The Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request Item No. 7. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these records because the Custodian provided same to the Complainant by attaching same to the Statement of Information.
5. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request Item No. 8 existed and 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 No. 8 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

6. The Custodian's failure to timely respond in writing to the Complainant's OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), resulted in a "deemed" denial, and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's OPRA request Item No. 2 seeking salary information. However, the Custodian certified in the Statement of Information that he was providing records responsive to the Complainant's OPRA request Item Nos. 1, 2 and 7. The GRC also declined to order disclosure of the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5. Further, the drawings responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 8 because no records existed. 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 contends regarding OPRA request Item Nos. 1 and 2, the Custodian certified that he possessed the responsive records but consciously did not provide them to the Complainant until he obtained all records responsive to said OPRA request. The Complainant contends that this is clear evidence that the Custodian "... had a positive element of conscious wrongdoing or was intentional and deliberate." The Complainant requests that the Council reconsider its Final Decision to hold that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

The Complainant contends that regarding OPRA request Item Nos. 3, 4 and 5, the Custodian had an obligation to notify the Complainant that the responsive records were contained within the box of documents the Complainant reviewed on October 14, 2011. The Complainant contends that if the Custodian did not notify the Complainant of this fact until after the inspection occurred, he could not claim in the Statement of Information that he provided the records. The Complainant contends that just as the Custodian has claimed he was under no obligation to conduct research, the Complainant is similarly under no obligation to search a box

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

of documents for records responsive to his OPRA request. The Complainant contends that this is particularly true if the Custodian does not advise the Complainant that responsive records are contained therein. The Complainant further argues that the Council erred by concluding that the Complainant failed to submit competent, credible evidence to refute that he was provided with the responsive records because the GRC never asked for this evidence.

The Complainant lastly contends that the regarding OPRA request Item No. 8, the fact that a responsive record may not exist does not absolve the Custodian of his obligation to respond to the Complainant's OPRA request.

Analysis

Reconsideration

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. *N.J.A.C. 5:105-2.10*. 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's failure to provide the records responsive to OPRA request item Nos. 1 and 2 until all other

records were obtained is clear evidence of a knowing and willful violation. The Complainant requested that the Council should reconsider its Decision that the Custodian did not knowingly and willfully violate OPRA. The Complainant further argued that the Custodian had an obligation to notify the Complainant if the records responsive to OPRA request items No. 3, 4 and 5 were in the box of records he inspected on October 14, 2011. The Complainant argued that the Council erred by holding that the Complainant failed to submit competent, credible evidence because the Council never sought this evidence from the Complainant. The Complainant finally argued that even if no records responsive to OPRA request item No. 8 existed, the Custodian still had an obligation to respond.

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. Specifically, the Complainant submitted similar arguments in his letter to the GRC dated December 6, 2011. Kohn v. Township of Livingston (Essex), GRC Complaint No. 2011-330 (Final Decision dated February 26, 2013) at pg. 3. The Council also noted the Custodian's failure to respond appropriately in all instances that the Complainant is disputing thus proving that the Council contemplated the Custodian's violations of OPRA in coming to its decision that the Custodian did not knowingly and willfully violate OPRA under the totality of the circumstances. Thus, the Council's Decision contemplated not only the arguments advanced by the Complainant in his request for reconsideration, but also the Custodian's failure to respond.

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 in reaching its determination that the Custodian did not knowingly & willfully violate OPRA. *See D'Atria, supra*. Further, the Complainant failed to present any evidence that 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 GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its determination that the Custodian did not knowingly & willfully violate OPRA. Further, the Complainant failed to present any evidence that 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 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: Bandon D. Minde, Esq.
Executive Director

May 21, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
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FINAL DECISION

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-330

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, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Custodian’s failure to immediately respond to the Complainant’s OPRA request Item No. 2 for salaries results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e). See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available records responsive to the Complainant’s OPRA request Item Nos. 1 and 2 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that staying his response until he compiled all records was lawful, as this practice would place an unnecessary limitation on the public’s right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive records because the evidence of record indicates that the Custodian provided the Complainant with access to same as part of the Statement of Information.
3. Notwithstanding the Custodian’s “deemed” denial, the “as built drawings” responsive to the Complainant’s OPRA request Item No. 6 are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to



- N.J.S.A. 47:1A-1.1. and Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006). The GRC further declines to order disclosure of the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5 because the Complainant failed to provide competent, credible evidence to refute the Custodian's Statement of Information certification.
4. The Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request Item No. 7. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these records because the Custodian provided same to the Complainant by attaching same to the Statement of Information.
 5. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request Item No. 8 existed and 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 No. 8 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
 6. The Custodian's failure to timely respond in writing to the Complainant's OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), resulted in a "deemed" denial, and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's OPRA request Item No. 2 seeking salary information. However, the Custodian certified in the Statement of Information that he was providing records responsive to the Complainant's OPRA request Item Nos. 1, 2 and 7. The GRC also declined to order disclosure of the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5. Further, the drawings responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 8 because no records existed. 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. 2011-330

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint:

1. Closed session minutes from the Township of Livingston's ("Township") September 6, 2011 and September 12, 2011 meetings.
2. 2011 salaries for all Township employees.
3. Gibson, Tarquini estimates of construction cost for municipal/police complex per 2.4.3 of contract with the Township.
4. Gibson, Tarquini analysis of owning and operating the municipal/police complex per 3.4.6 of contract with the Township.
5. Gibson, Tarquini approval of Change Order No. 105.
6. Gibson, Tarquini "as built" drawings of the municipal/police complex per 3.4.10 of contract with the Township.
7. 2010 Corrective Action Plan attached to R-11-195.
8. Letters to Verizon and Shen Yun regarding solicitation of Kanvorsar Ordinance.

Request Made: October 3, 2011

Response Made: None

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 October 3, 2011.
- Letter from the Complainant to the Custodian dated October 14, 2011.
- Letter from the Complainant to the Custodian dated October 28, 2011.

The Complainant states that he submitted an OPRA request to the Township on October 3, 2011. The Complainant states that he set an appointment to inspect records on

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 14, 2011. The Complainant states that following his appointment on October 14, 2011, he wrote the Custodian noting that he was shown no records responsive to the subject OPRA request.

The Complainant contends that the Custodian failed to respond to this OPRA request.

The Complainant does not agree to mediate this complaint.

November 30, 2011

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated October 3, 2011 with the Custodian's notes thereon.
- Records responsive to the OPRA request.

The Custodian certifies that no 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 October 3, 2011. The Custodian certifies that although he did not provide a written response to the Complainant, records were provided as part of the Complainant's inspection on October 14, 2011.

Complainant's OPRA request Item No. 1: Minutes

The Custodian certifies that upon receipt of the OPRA request, the responsive minutes were provided to Counsel for review and advice on necessary redactions. The Custodian certifies that Counsel referred the minutes back to the Custodian, who made the appropriate redactions to the September 12, 2011 minutes for contract negotiations pursuant to the Open Public Meetings Act ("OPMA"). The Custodian certifies that those minutes were available at that time; however, he was waiting to obtain all responsive records before providing the minutes to the Complainant. The Custodian certifies that the minutes are attached.

Complainant's OPRA request Item No. 2: 2011 Salaries

The Custodian certifies that he e-mailed the Chief Financial Officer ("CFO"), requesting the responsive record. The Custodian certifies that the CFO made the salaries available on October 4, 2011. The Custodian certifies that he was waiting to obtain all responsive records before providing the salaries to the Complainant. The Custodian certifies that the salaries are attached.

Complainant's OPRA request Item Nos. 3, 4, 5 and 6: Gibson, Tarquini records

The Custodian certifies that he sought records from the Township Engineer, to which the Township Engineer advised he only had the drawings responsive to No. 6. The

Custodian certifies that the Township Engineer further advised that he would have to get authorization from the Police Chief in order to disclose the drawings due to security purposes. The Custodian certifies that the Police Chief never gave authorization; thus, access is denied for security issues pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that the records responsive to the remaining items were part of a large box of records provided to the Complainant for inspection on October 14, 2011.

Complainant's OPRA request Item No. 7: Corrective Action Plan

The Custodian certifies that the Corrective Action Plan and relevant resolution were publically posted as required at the Township's September 6, 2011 meeting; the Complainant was in attendance and gave public comment. The Custodian further certifies that these records were posted to the Township's website in advance of the meeting and are still available as of this date. The Custodian certifies that these records were inadvertently not provided and are attached.

Complainant's OPRA request Item No. 8: Letters

The Custodian certifies that no records responsive to this OPRA request item exist.

December 6, 2011

Letter from the Complainant to the GRC. The Complainant asserts that this complaint is a prime example of where the Custodian knowingly and willfully violated OPRA. The Complainant asserts that had he not filed this complaint, it is likely he would not have been provided with any records.

The Complainant first notes that the Custodian provided no argument for why he did not respond in writing. The Complainant further notes that salaries are immediate access records. N.J.S.A. 47:1A-5(e). The Complainant argues that the Custodian certifies in the SOI that some records were available prior to his October 14, 2011 inspection; however, the Custodian failed to provide these records until filing this SOI.

The Complainant contends that the Custodian cannot argue that the Township Engineer only possessed the drawings responsive to his Item No. 6 and then argue that the other records were in a box obtained from the Township Engineer. The Complainant further argues that the box provided for inspection on October 14, 2011 was in response to another OPRA request and the Custodian gave no indication that the records responsive to this request would be contained therein.

The Complainant disputes the Custodian's certification that the Corrective Action Plan and resolution are posted on the website, although he further argues that the records should have been provided regardless of whether they were posted on the website. The Custodian further disputes that the drawings are exempt from access as security because he has previously received floor plans for the municipal/police complex once the contract was approved. The Complainant contends that the Custodian's failure to obtain

authorization to release the drawings does not alleviate the Custodian's obligation to provide the drawings.

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 he 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 also provides that:

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

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request ... In the event a custodian fails to respond within seven business days after receiving a request, the

failure to respond shall be deemed a denial of the request ...” (Emphasis added.) N.J.S.A. 47:1A-5(i).

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). As also prescribed under N.J.S.A. 47:1A-5(i), a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).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).

The Custodian herein certified in the SOI that he did not respond to the Complainant’s OPRA request in writing. Thus, the Custodian’s failure to respond in writing results in a “deemed” denial.

Additionally, OPRA contains a separate response timeline for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to salaries, among other types of records. 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.

The Complainant’s OPRA request Item No. 2 at issue herein sought “2011 salaries for all Township employees.” Public employee salaries are specifically identified in OPRA as immediate access records. N.J.S.A. 47:1A-5(e). *See also* Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). Thus, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to this request item, because the Custodian has an obligation to respond to OPRA requests 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, 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, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either

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.

granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra. Further, the Custodian’s failure to respond immediately to the Complainant’s OPRA request Item No. 2 for salaries results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e). See Herron, supra.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... [a] government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... *emergency or security information* or procedures for any buildings or facility which, if disclosed, *would jeopardize security* of the building or *facility or persons therein*.” (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.

Complainant’s OPRA request Item Nos. 1 and 2

The Custodian certified in the SOI that he was in possession of the minutes responsive to Item No. 1 on September 12, 2011 and the salaries responsive to Item No. 2 on October 4, 2011. The Custodian certified that he waited to provide the responsive

records until he obtained all records responsive to the Complainant's entire OPRA request. Additionally, the Custodian attached copies of same to the SOI.

The GRC must determine whether the Custodian was required to produce the records available for disclosure at the time he received same or whether the Custodian could withhold same pending the compilation of the remaining records.

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

Here, the Custodian failed to provide copies of those records responsive to the Complainant's OPRA request Item Nos. 1 and 2 that were available "as soon as possible" pursuant to OPRA's mandate to make government records "readily accessible for inspection, copying or examination." N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-1. Further, the Custodian's withholding of the responsive records which were available for disclosure before the Custodian obtained all other responsive records, placed an unnecessary limitation on "... the public's right of access." N.J.S.A. 47:1A-1.

Therefore, the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item Nos. 1 and 2 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that staving his response until he compiled all records was lawful, as this practice would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive records because the evidence of record indicates that the Custodian provided the Complainant with access to same as part of the SOI.

Complainant's OPRA request Item Nos. 3 through 6

The Custodian certified in the SOI that the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5 were provided to the Complainant for inspection on October 14, 2011. The Custodian certified that regarding Item No. 6, the Township Engineer advised that he needed authorization from the Police Chief to disclose the drawings. The Custodian certified that the Police Chief never gave this authorization; thus, access to the responsive drawings is denied pursuant to N.J.S.A. 47:1A-1.1.

The Complainant disputed the Custodian's SOI comments regarding these request items. Regarding request Item Nos. 3, 4 and 5, the Complainant contended that his

inspection on October 14, 2011 was related to another OPRA request and that the Custodian gave no indication that the records responsive herein were part of the inspection. Regarding request Item No. 6, the Complainant disputed the Custodian's basis for denial because he previously received floor plans for the municipal/police building once the contract was approved. The Complainant argued that the Custodian's failure to obtain authorization from the Police Chief did not abrogate his obligation to obtain and provide the responsive drawings.

Regarding request Item No. 3, 4 and 5, the evidence supports the Complainant's argument that the Custodian did not advise him that the responsive records were part of the Complainant's October 14, 2011 inspection. In fact, the GRC has already determined that the Custodian's failure to respond in writing resulted in a "deemed" denial. However, the Custodian certified in the SOI that he provided all records as part of this inspection. Absent the Custodian's failure to advise the Complainant of this fact, the Complainant also failed to provide competent, credible evidence to refute that those records were included in the box. As such, the GRC declines to order disclosure of these records.

Regarding request Item No. 6, the GRC has previously addressed requests for floor plans. In Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006), the complainant requested plans for a renovation of 901 Hudson Street. The custodian responded asserting that the requested plans were exempt from disclosure as proprietary information. The Council found that the "records are generally accessible to the public and are routinely filed with the planning or zoning board... [and] do not qualify as... proprietary information. However, the requested records may be exempt from disclosure if they contain ... information that could be potential used by a person seeking to enter the building illegally for the purpose of causing harm to persons in the building or taking and destroying property." ⁵ See also Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008).

Here, the Complainant sought "as built drawings," which are floor plans including any changes made to the plans. Consistent with the Council's previous holding, these floor plans provide information that could jeopardize the security of the building and are thus exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. That the Complainant may have previously received plans does not work to abrogate the security and safety exemption contained in OPRA.

As such, notwithstanding the Custodian's "deemed" denial, the "as built drawings" responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. and Cardillo, supra. The GRC further declines to order disclosure of the records responsive to the Complainant's OPRA request Item Nos.

⁵ The GRC ordered an *in-camera* review of the requested plans to determine if the records are exempt from disclosure for security information or procedures for any building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. Based on the *in camera*, the GRC held that the requested plans were exempt from OPRA pursuant to N.J.S.A. 47:1A-1.1.

3, 4 and 5 because the Complainant failed to provide competent, credible evidence to refute the Custodian's SOI certification.

Complainant's OPRA request Item No. 7

The Custodian certified in the SOI that the Corrective Action Plan and relevant resolution were posted publicly at the Township's September 6, 2011 meeting, at which the Complainant attended and gave public comments. The Custodian further certified that the records were also posted on the Township's website in advance of the meeting and are still available. The Custodian further certified that the records were inadvertently not provided and thus were attached to the SOI.

The Complainant argued that regardless of whether the records were posted to the website, the Custodian should have provided those records to the Complainant.

OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i). The Custodian herein never asserted that the responsive records were exempt from disclosure under OPRA for any reason. Instead, the Custodian admitted that he inadvertently failed to provide the responsive records and was attaching same to the SOI.

Therefore, the Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request Item No. 7. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these records because the Custodian provided same to the Complainant by attaching same to the SOI.

Complainant's OPRA request Item No. 8

The Custodian certified in the SOI that no responsive records existed. The Complainant did not provide any evidence to indicate that he disputed the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access." *Id.*

Here, the Custodian certified in the SOI that no records responsive to the Complainant's OPRA request Item No. 8 existed and 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 No. 8 pursuant to Pusterhofer, *supra*.

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 (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’s failure to timely respond in writing to the Complainant’s OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), resulted in a “deemed” denial, and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant’s OPRA request Item No. 2 seeking salary information. However, the Custodian certified in the SOI that he was providing records responsive to the Complainant’s OPRA request Item Nos. 1, 2 and 7. The GRC also declined to order disclosure of the records responsive to the

Complainant's OPRA request Item Nos. 3, 4 and 5. Further, the drawings responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 8 because no records existed. 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, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Custodian's failure to immediately respond to the Complainant's OPRA request Item No. 2 for salaries results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5(e). See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item Nos. 1 and 2 although such records were readily available for disclosure. Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving that staying his response until he compiled all records was lawful, as this practice would place an unnecessary limitation on the public's right to access. N.J.S.A. 47:1A-1. However, the Council declines to order disclosure of the responsive records because the evidence of record indicates that the Custodian provided the Complainant with access to same as part of the Statement of Information.
3. Notwithstanding the Custodian's "deemed" denial, the "as built drawings" responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. and Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006). The GRC further declines to order disclosure of the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5 because the Complainant failed to provide competent, credible evidence to refute the Custodian's Statement of Information certification.

4. The Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to the Complainant's OPRA request Item No. 7. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these records because the Custodian provided same to the Complainant by attaching same to the Statement of Information.
5. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request Item No. 8 existed and 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 No. 8 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. The Custodian's failure to timely respond in writing to the Complainant's OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), resulted in a "deemed" denial, and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's OPRA request Item No. 2 seeking salary information. However, the Custodian certified in the Statement of Information that he was providing records responsive to the Complainant's OPRA request Item Nos. 1, 2 and 7. The GRC also declined to order disclosure of the records responsive to the Complainant's OPRA request Item Nos. 3, 4 and 5. Further, the drawings responsive to the Complainant's OPRA request Item No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 8 because no records existed. 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.