



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

March 22, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-342

v.

Township of Livingston (Essex)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s February 26, 2013 Interim Order because the Custodian provided the responsive records to the Complainant via e-mail and simultaneously submitted certified confirmation of compliance to the GRC within the prescribed time frame.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian’s September 8, 2011 response for an extension was invalid and the Custodian failed to bear his burden of proving a lawful denial of access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 26, 2013 Interim Order. 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 22nd Day of March, 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: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2011-342

v.

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

Records Relevant to Complaint: Electronic copies of the following:

1. Encumbrance detail pursuant to Resolution R-11-192 in the amount of \$389,976.00.
2. Vincentsen, Thompson, Meade, Inc., (“VTM”) analysis and supporting detail justifying per ton change from \$39.00 to \$46.00.
3. Chanree’s request for additional \$1,200,000.00.
4. VTM’s analysis of their estimated cost for Change Order 95-98(B).
5. Supporting document including total cost, cost per ton, confirmation of tonnage delivered to dump site for the following:
 - a. Contract with Chanree – Allowance Schedule Item No. 3.
 - b. R-08-196 Items C and D.
 - c. R-08 197 Items B,C and D
 - d. R-08-207 Items B, C and E.
 - e. R-08-217 Item A.
 - f. R-09-164 Items F, G, I and J.
 - g. R-09-184 transportation offsite, additional contamination soil.
 - h. R-09-186 transportation offsite, additional contamination soil.
 - i. R-09-216 Item C.
 - j. R-09-257 Items A and C.
 - k. R-10-169 Item A.
 - l. R-11-67 Item A (confirm tonnage delivered to dump site).
 - m. R-11-173 Item A (confirm tonnage delivered to dump site).
6. VTM’s analysis of R-10-131 Item C and supporting detail.
7. R-10-131 Item A, supporting detail.
8. R-10-186 specific with the New Jersey Department of Environmental Protection’s (“NJDEP”) requirements.
9. Contract with Chanree –contract negotiation Item No. 19 and supporting detail.
10. Change Order No. 102, 103 and 104 – correspondence to and from NJDEP and lab reports confirming soil was contaminated.

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).

Request Made: August 3, 2011

Response Made: August 15, 2011

GRC Complaint Filed: November 1, 2011³

Background

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

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian's failure to 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 invalid because he failed to respond in writing requesting same within the extended time frame.
2. The Custodian unlawfully denied access to the 26 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. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose these records to the Complainant via e-mail.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

The Council distributed its Interim Order to all parties on February 27, 2013. On March 6, 2013 the Custodian responded to the Council's Interim Order. In his legal certification (with attachments), the Custodian certifies that he previously provided the responsive 26 pages of records to the Complainant via e-mail on February 8, 2012 in response to a separate OPRA request. The Custodian certifies he is again forwarding all records to the Complainant via e-mail.

Analysis

Compliance

At its February 26, 2013 meeting, the Council ordered the Custodian to:

“...the Custodian must disclose [26 pages of records] to the Complainant via e-mail. ... The Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if applicable, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.”

The Council disseminated its Order on February 27, 2013. The Custodian responded on March 6, 2013, the fifth (5th) business day after receipt of the Order, providing the responsive records to the Complainant via e-mail and sending certified confirmation of compliance to the GRC.

Therefore, the Custodian complied with the Council's February 26, 2013 Interim Order because the Custodian provided the responsive records to the Complainant via e-mail and simultaneously submitted certified confirmation of compliance to the GRC within the prescribed time frame.

Knowing & Willful

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

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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 to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian’s September 8, 2011 response for an extension was invalid and the Custodian failed to bear his burden of proving a lawful denial of access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 26, 2013 Interim Order. 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 complied with the Council’s February 26, 2013 Interim Order because the Custodian provided the responsive records to the Complainant via e-mail and simultaneously submitted certified confirmation of compliance to the GRC within the prescribed time frame.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian’s September 8, 2011 response for an extension was invalid and the Custodian failed to bear his burden of proving a lawful denial of access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 26, 2013 Interim Order. 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

March 15, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-342

v.

Township of Livingston (Essex)
Custodian of Record

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

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). 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.
2. The Custodian unlawfully denied access to the 26 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. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose these records to the Complainant via e-mail.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

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

Interim Order Rendered by the
Government Records Council
On The 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

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2011-342

v.

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

Records Relevant to Complaint: Electronic copies of the following:

1. Encumbrance detail pursuant to Resolution R-11-192 in the amount of \$389,976.00.
2. Vincentsen, Thompson, Meade, Inc., (“VTM”) analysis and supporting detail justifying per ton change from \$39.00 to \$46.00.
3. Chanree’s request for additional \$1,200,000.00.
4. VTM’s analysis of their estimated cost for Change Order 95-98(B).
5. Supporting document including total cost, cost per ton, confirmation of tonnage delivered to dump site for the following:
 - a. Contract with Chanree – Allowance Schedule Item No. 3.
 - b. R-08-196 Items C and D.
 - c. R-08-197 Items B,C and D
 - d. R-08-207 Items B, C and E.
 - e. R-08-217 Item A.
 - f. R-09-164 Items F, G, I and J.
 - g. R-09-184 transportation offsite, additional contamination soil.
 - h. R-09-186 transportation offsite, additional contamination soil.
 - i. R-09-216 Item C.
 - j. R-09-257 Items A and C.
 - k. R-10-169 Item A.
 - l. R-11-67 Item A (confirm tonnage delivered to dump site).
 - m. R-11-173 Item A (confirm tonnage delivered to dump site).
6. VTM’s analysis of R-10-131 Item C and supporting detail.
7. R-10-131 Item A, supporting detail.
8. R-10-186 specific with the New Jersey Department of Environmental Protection’s (“NJDEP”) requirements.
9. Contract with Chanree –contract negotiation Item No. 19 and supporting detail.
10. Change Order No. 102, 103 and 104 – correspondence to and from NJDEP and lab reports confirming soil was contaminated.

¹ No legal representation listed on record.

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

Request Made: August 3, 2011
Response Made: August 15, 2011
Custodian: Glenn Turteltaub
GRC Complaint Filed: November 1, 2011³

Background

November 21, 2011

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

- Complainant’s OPRA request dated August 3, 2011.
- E-mail from the Custodian to the Complainant dated September 8, 2011.
- Letter from the Custodian to the Complainant dated September 22, 2011.
- Letter from the Complainant to the Custodian dated October 3, 2011.
- Letter from the Complainant to the Custodian dated October 3, 2011.
- Letter from the Complainant to the Custodian dated October 14, 2011 (with attachments).

The Complainant states that he submitted an OPRA request to the Township of Livingston (“Township”) on August 3, 2011 seeking the relevant records via e-mail. The Complainant states that he had a conversation with the Custodian some point thereafter regarding the request.⁴ The Complainant states that on September 8, 2011, the Custodian e-mailed him advising that it would take an additional one (1) to two (2) weeks to prepare a response and noting that the Complainant rightly expected that it would take more time to fulfill this request. The Complainant states that the Custodian sent a formal response to him on September 22, 2011 noting that several records were available for review. The Complainant states that the Custodian further requested that due to the volume of the responsive records, he suggested that the Complainant inspect the records and identify those he wished to have scanned and e-mailed.

The Complainant states that on October 3, 2011, he sent two (2) letters to the Custodian. The Complainant states that the first (1st) letter requested that the Custodian ensure that the analysis sought in request Item Nos. 4 and 6 is included in the records provided. The Complainant states that the second (2nd) letter, he refuted the Custodian’s response to Item No. 2 that no analysis existed. The Complainant states that he argued that the non-existence of the analysis is a direct contradiction of comments made by VTM representatives at a Council meeting.

The Complainant states that he subsequently scheduled an appointment to review all the responsive records, which he did on October 14, 2011. The Complainant states that following inspection, on the same day, he sent a letter to the Custodian confirming that he reviewed records. The Complainant states that he advised the Custodian that he would not provide comments on the records until he received copies of records requested at the appointment. The Complainant notes that he identified these records with blue tab

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

⁴ The Complainant does not indicate the substance of this conversation.

markers. The Complainant states that he further advised the Custodian that he believed this request remained open. The Complainant states that as of this date, the Custodian has not provided him with copies of the records sought.

The Complainant does not agree to mediate this complaint.

December 1, 2011

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

- Complainant's OPRA request dated August 3, 2011 with the Custodian's notes thereon.
- Letter from the Custodian to the Complainant dated August 15, 2011.
- E-mail from the Custodian to the Complainant dated September 8, 2011.
- Letter from the Custodian to the Complainant dated September 22, 2011 (with attachments).

The Custodian certifies that his search for the requested records involved forwarding the OPRA request to the Township employees who may have possessed the responsive records.

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

The Custodian certifies that he received the Complainant's OPRA request on August 5, 2011. The Custodian certifies that he sent a letter to the Complainant on August 15, 2011 advising that he forwarded the OPRA request to several employees and that two (2) additional weeks would be needed to prepare a response. The Custodian certifies that he further advised the Complainant that several of the request items do not identify documents and are overly broad: the Township will need time to retrieve the relevant resolutions to determine what the Complainant is seeking. The Custodian certifies that he advised the Complainant that they could meet to clarify the items to speed up the response process. The Custodian certifies he subsequently e-mailed the Complainant on September 8, 2011 stating that an additional one (1) to two (2) weeks would be needed.

The Custodian certifies that on September 22, 2011, he sent a letter to the Complainant advising the following:

1. Encumbrance pursuant to R-11-192: The Chief Financial Officer ("CFO") advises that R-11-192 did not authorize the payment of a specific amount, but that the encumbrance identified in the request was authorized by R-11-197. The encumbrance detail is attached.
2. VTM analysis for ton charge change: The Township Engineer advises that there was no analysis. Please refer to change order now available for review.
3. Chanree request: The Township Engineer makes this record available for review.
4. VTM analysis of cost for Change Order 95-98 B: The Township Engineer advises that original change orders are available for review.

5. Supporting documentation: A large box of VTM records for soils are available for review.
6. VTM analysis of R-10-131: The Township Engineer advises that the change order is available for review.
7. R-10-131 Item A – supporting detail: The Township Engineer advises that the change order is available for review.
8. R-10-186 DEP requirements: The Remedial Investigation Report and Remedial Action Workplan for Historic Fill are available for review.
9. Contract Negotiation five (5) Items – Chanree: A large box of VTM records for soils are available for review.
10. Correspondence relevant to Change Orders: A large box of VTM records for soils are available for review.

The Custodian certifies that he further advised the Complainant that in lieu of e-mailing the voluminous amount of records, the Custodian suggested that the Complainant schedule an appointment to review the records and identify those he wished to receive via e-mail.

The Custodian certifies that the Complainant sent him two (2) letters on October 3, 2011 and subsequently came to the Township offices on October 14, 2011 to inspect the responsive records. The Custodian certifies that the Complainant sent him a letter on October 14, 2011 recapitulating the meeting. The Custodian certifies that subsequent to an unprecedented snowstorm on October 31, 2011, the Township was engaged in dealing with significant issues and power outages that forced the Township to rely on generators to conduct business. The Custodian certifies that no computers or nonessential electricity were used during that time.

The Custodian states that in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), the Superior Court held that OPRA "... is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." *Id.* The Custodian states that the Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." *Id.* at 549.

The Custodian contends that the Complainant's numerous requests for "supporting documentation" are invalid under OPRA. The Custodian asserts that the Complainant's insistence that he be provided with unidentifiable government records is similar to the request items at issue in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). The Custodian states that there, the Council held that "[b]ecause the Complainant's OPRA requests [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to [MAG, supra] and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)." The Custodian contends that it is not his responsibility to reconcile records nor identify, retrieve and

supply unspecified “supporting documentation.” The Custodian asserts that all he can do is provide records in the Township’s possession, which he did consistent with OPRA.

The Custodian asserts that the Complainant was not denied access to any records. The Custodian asserts that the Complainant’s disagreement with the content of the records is of no moment. *See Kwanzaa v. NJ Department of Corrections*, GRC Complaint No. 2004-167 (March 2005). The Custodian further contends that he did not knowingly and willfully violate OPRA or unreasonably deny access within the totality of the circumstances.

December 12, 2011

Letter from the Complainant to the GRC. The Complainant states that this letter shall serve to address the Custodian’s SOI.

The Complainant argues that the Custodian asserted in his August 15, 2011 letter that portions of the OPRA request were overly broad and may need clarification; however, the Custodian was able to provide multiple records for all items. The Complainant asserts that he cannot understand why the Custodian argues in the SOI that MAG, *supra*, applies to the Complainant’s OPRA request. The Complainant contends that the Custodian did not deny access to any records pursuant to MAG, *supra*, and further argues in the SOI that no records were denied.

The Complainant states that consistent with an established routine, the Complainant inspected records on October 14, 2011 and was given colored post-its to mark the pages of which he wished to receive copies. The Complainant states that he identified 26 individual pages and noted in his October 14, 2011 letter that he anticipated receiving the records. The Complainant states that it has now been 39 business days since the meeting and he has not received one record. The Complainant contends that for these reasons, the Custodian has knowingly and willfully failed to fulfill this OPRA request.

The Complainant contends that he is unsure why the Custodian presented an argument about the content of the responsive records. The Complainant asserts that he has not received any records and thus has made no judgment on the content of same.

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.

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* ...” (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).⁵ 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

⁵ 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 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.*

Here, the Custodian timely responded on August 15, 2011 stating that the Township needed an additional two (2) weeks to prepare a response. Thus, the Custodian was tasked with responding on August 29, 2011; however, he did not respond until September 8, 2011 noting that the Township needed a second (2nd) extension of time. Pursuant to N.J.S.A. 47:1A-5(i), the Custodian failed to respond within the extended time period and thus the Complainant’s OPRA request is “deemed” denied. 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.

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

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 multiple records. 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 several 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 provided all responsive records to the Complainant as is consistent with OPRA. The Custodian contended that the Complainant’s numerous requests for supporting documentation were invalid pursuant to MAG, supra, and Schuler, supra.⁶

The Complainant sent a letter to the GRC on December 12, 2011 stating that during his inspection on October 14, 2011, the Complainant affixed post-it notes to the 26 individual pages of records he wanted the Custodian to send to him via e-mail. The Complainant further stated it had been 39 days since his inspection and the Custodian has not provided the responsive records.

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 via e-mail. 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 26 pages of records with post-its. Thereafter, the Complainant contended in his Denial of Access Complaint that the Custodian failed to provide those records. There is no evidence in the record indicating that the Custodian has provided the 26 pages of records since then. 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.

⁶ 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.

Therefore, the Custodian unlawfully denied access to the 26 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. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose these records to the Complainant via e-mail.

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?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that he needed an extension of five (5) days to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). 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.
2. The Custodian unlawfully denied access to the 26 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. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose these records to the Complainant via e-mail.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified**

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁹

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁹ 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.