



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-362

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’s failure to respond immediately to the Complainant’s OPRA request for contracts 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). Moreover, the Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5(g) and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), because he failed to specifically state that no records responsive to the request existed at the time of his response.
2. The Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA request 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 contract responsive to the Complainant’s OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant’s OPRA request seeking a contract and further insufficiently responded to the Complainant’s OPRA request by not stating that no record responsive existed, the Custodian did not unlawfully deny access to the requested contract because no record existed at the time of the Complainant’s OPRA request. 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. 2011-362

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: E-mail copies of the contract with Nature's Choice Corp. per R-11-227.³

Request Made: November 8, 2011

Response Made: November 14, 2011

Custodian: Glenn Turteltaub

GRC Complaint Filed: November 23, 2011⁴

Background

November 23, 2011

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

- Complainant's OPRA request dated November 8, 2011.
- E-mail from the Custodian to the Complainant dated November 14, 2011.
- R-11-227

The Complainant states that he submitted an OPRA request to the Township of Livingston ("Township") on November 8, 2011. The Complainant states that the Custodian responded on November 14, 2011 denying access to the responsive record as "... inter-agency or intra-agency advisory, consultative, or deliberative ..." ("ACD") material and requesting that the Complainant withdraw his complaint pending with the GRC.

The Complainant first expresses confusion with the Custodian's request to withdraw this complaint, considering that same was not filed at the time of the Custodian's response. The Complainant notes that he has no intention of withdrawing this complaint.

¹ No legal representation listed on record.

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

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

The Complainant states that the single reason for filing this complaint is the Custodian's denial of access to the responsive contract. The Complainant notes that the Township approved R-11-227, which authorized an agreement with Nature's Choice Corp. on November 7, 2011. The Complainant asserts that the Custodian denied access to such record as ACD material, but failed to indicate which "agencies" were still reviewing the contract.

The Complainant asserts that the crux of this complaint is at what point does an agreement or contract become a government record subject to access. The Complainant asserts that his position is that a contract is a government record when it is approved by the governing body at a public meeting. The Complainant further asserts that under this premise, the responsive contract is an immediate access record subject to immediate disclosure pursuant to N.J.S.A. 47:1A-5(e).

The Complainant further contends that because the requested contract was an attachment to R-11-227, same should have been made available to the public simultaneously with the release of the resolution. The Complainant contends that denying public access to the contract prior to approval by the Mayor and Council is contrary to the purpose of the Open Public Meetings Act ("OPMA"). The Complainant acknowledges that the GRC has no authority over OPMA, but asserts that the GRC has the ability to determine when a record becomes a government record subject to disclosure under OPRA. The Complainant asserts that he hopes this complaint allows the GRC to adopt a stance similar to his own for resolution attachments.

The Complainant does not agree to mediate this complaint.

December 5, 2011

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

- Complainant's OPRA request dated November 8, 2011 with the Custodian's notes thereon.
- E-mail from the Custodian to the Complainant dated November 14, 2011.

The Custodian certifies that his search for the requested records involved sending the OPRA request to the Purchasing Manager, Township Manager and Custodian's Counsel.

The Custodian also certifies that no records that may have been 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 November 9, 2011. The Custodian certifies that he responded via e-mail on November 14, 2011 denying access to the responsive contract as ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that notwithstanding his denial of access based on Counsel's advice, the record sought does not exist. The Custodian certifies that R-11-227

authorized the Township Manager to enter into an agreement with Nature's Choice Corp. for removal of debris resulting from a recent snowstorm, at which time the Governor declared a state of emergency. The Custodian certifies that because of the emergency and Township's need to respond to same, a written agreement could not be prepared prior to the November 7, 2011 vote on R-11-227. The Custodian certifies that the law further required approval by not only the Township, but also the New Jersey Department of Community Affairs, Division of Local Government Services ("DLGS"). The Custodian certifies that any agreement or contract would still be subject to review by the Township thereafter, and would have been undergoing review, revision or rejection by DLGS at the time of the Complainant's OPRA request.

The Custodian thus contends that even if a written agreement existed on November 7, 2011, same would still have been ACD material. The Custodian states that OPRA excludes ACD material from the definition of a government record, which "is rooted in the notion that the sovereign has an interest in protecting the integrity of deliberations." In Re: Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000). The Custodian states that the aim of the ACD exemption is to protect the quality of government decisions by shielding communications received by decision makers from public disclosure. *See Gannett v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005). The Custodian states that the exemption is based on a belief that the government has an obligation to protect from public review disclosure of documents containing opinions, recommendations and advice. The Custodian states that public agencies are thus not obligated to disclose ACD material. Kesner v. NJ Dept. of Banking & Insurance, GRC Complaint No. 2003-67 (February 2004)(*Citing Integrity, supra*, at 84).

The Custodian certifies that no agreement existed; thus, he did not deny access to any records. The Custodian further asserts that if an agreement existed, same would be exempt as ACD material per Counsel's advice. The Custodian further asserts that the GRC has no authority over OPMA and cannot address the Complainant's contention of when a record becomes subject to access. The Custodian contends that he did not knowingly and willfully violate OPRA under the totality of the circumstances.

December 9, 2011

Letter from the Complainant to the GRC with the following attachments:

- R-11-241
- DLGS "Emergency Procurement Report."

The Complainant states that R-11-227 used the term "agreement" while the meeting agenda used the term "contract." The Complainant contends that the terms "contract" and "agreement" should be used interchangeably.

The Complainant states that the Custodian denied access to the contract as ACD material, but later argues in the SOI that no record exists. The Complainant questions whether it is legal for the Custodian to expand on his denial of access after a complaint has been filed. The Complainant further disputes the Custodian's SOI certification that no record existed at the time of the Complainant's OPRA request and asks whether such a record exists at present. The Complainant further asserts that N.J.S.A. 40A:11-6 provides

that all details involved in an emergency contract should be "... reduced to writing ... as soon as practicable." The Complainant asserts that this provision suggests that a written contract is required and should exist. *See also* DLGS's regulations at *N.J.A.C.* 5:34-6.1. and *N.J.S.A.* 19:44A-20.12. The Complainant contends that the Custodian never argued in the SOI why the agreement could not have been reduced to writing following the approval of R-11-227, which is clearly required by law.

The Complainant contends that it is possible that the Township abandoned the entire contract with Nature's Choice Corp. and no work was ever performed. The Complainant asserts that this, however, is not likely given that the Township approved R-11-241 stating that Nature's Choice Corp. provided \$25,000 worth of services and that the remaining contract amount be cancelled. The Complainant questions whether a company can perform work for a public agency without having a contract, encumbering funds and without identifying the accounts to be charged. The Complainant asserts that he agrees with the Custodian's characterization of the ACD exemption in OPRA, but believes that the exemption does not apply in this instance. The Complainant argues that once the Township approved R-11-227, the resulting contract or agreement was no longer ACD material.

The Complainant disputes that the GRC will have to exercise authority under OPMA in order to determine at what point a resolution attachment becomes a government record subject to access.

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 acknowledges that the Township suffered from a storm; however, many of the OPRA-related issues found within have been consistent since before the storm and have continued since. 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.

December 27, 2011

Complainant's amended Denial of Access Complaint with the following attachments:

- OPRA request dated December 9, 2011.
- Letter from the Custodian to the Complainant dated December 21, 2011.

The Complainant states that as part of a separate OPRA request, the Complainant sought the audit trail to which the Nature's Choice Corp. contract was charged. The Complainant states that attached is the trail showing that the contract was encumbered on

November 7, 2011 and Purchase Order (“PO”) No. 11-04915 was charged to the account on the same date. The Complainant contends that a PO is considered a contract “... detailing all pertinent information of a sale.” (Citation omitted). The Complainant contends that these documents confirm that a contract/PO existed at the time of the subject OPRA request for which access was denied. The Complainant contends that he has not received that record as of this date.

January 10, 2012

Custodian’s legal certification attaching PO No. 11-04915 dated December 16, 2011. The Custodian certifies that regardless of whether a PO is a legal contract, the records are treated differently within the context of municipal finance. The Custodian certifies that contracts entries are made in the system to encumber funds for future use that typically, but not always, result in the award of an actual contract by resolution of the Township. The Custodian certifies that POs are then charged against the contract rather than the account because the total funds of the contract estimated to be expended are already encumbered.

The Custodian certifies that in the case of the Nature’s Choice Corp. contract, same was awarded on November 7, 2011 through the adoption of R-11-227. The Custodian certified that the contract was entered into the system to recognize same. The Custodian certifies that the software used by the Township, from Edmunds & Associates, records all subsequent POs charged to that contract as the same date as the original contract regardless of the actual date of the PO. The Custodian certifies that consequently, all POs appear in the account and vendor transaction histories with the same date. The Custodian thus certifies that PO No. 11-04915 appears in the system with a November 7, 2011 date but was actually entered into the system on December 16, 2011.

Analysis

Whether the Custodian timely and sufficiently responded to the Complainant’s OPRA request?

OPRA provides that:

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

OPRA provides that:

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

The Custodian initially responded to the Complainant's OPRA request seeking contracts on the fourth (4th) business day after receipt of same denying access to the requested contract as ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequent to the filing of this complaint, the Custodian certified in the SOI that no record responsive existed.

Regarding the timeliness of the Custodian's response, OPRA contains a separate response timeline for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to contracts, 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 at issue herein sought a contract, which is specifically identified in OPRA as an immediate access record. 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 the Complainant's OPRA request.

Regarding the sufficiency of the Custodian's response, OPRA provides that if a custodian cannot comply with a request for records, he "shall indicate the specific basis therefore..." N.J.S.A. 47:1A-5(g).

In Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), the custodian's counsel responded to the complainant's OPRA request within the statutorily mandated seven (7) business days denying access to the requested record pursuant to N.J.S.A. 47:1A-9, the Open Public Meetings Act and attorney-client privilege exemption. However, counsel later certified in the SOI that the Borough did not receive the requested record until October 16, 2007, after receipt of the complainant's OPRA request and subsequent Denial of Access complaint. The Council, tasked with determining whether counsel's initial response was appropriate under OPRA, held that "Counsel's response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant's September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)." *Id.* at pg. 12.

In the instant complaint, the Custodian initially denied access to the responsive contract pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian failed to advise the Complainant at the time of his response that no records responsive to the request existed. The Custodian's response herein is similar to the custodian's response in Shanker, *supra*, thus the Custodian's response was insufficient.

The Custodian's failure to respond immediately to the Complainant's OPRA request for contracts results in a violation of OPRA's immediate access provision at

N.J.S.A. 47:1A-5(e). See Herron, *supra*. Moreover, the Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5(g) and Shanker, *supra*, because he failed to specifically state that no records responsive to the request existed at the time of his response.

Whether the Custodian unlawfully denied access to the requested contract?

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.

In response to this complaint, the Custodian certified in the SOI that although Counsel advised him to deny access to the contract pursuant to N.J.S.A. 47:1A-1.1., no contract existed at the time of the Complainant’s OPRA request.

The Complainant responded on December 9, 2011 disputing that a contract did not exist based on statutory and regulatory obligations for the Township to have a written contract. The Complainant further asserted that the Custodian never argued why the requested contract could not have been reduced to writing following the approval of R-11-227. The Complainant subsequently filed an amended Denial of Access Complaint arguing that he recently received a PO, which the Complainant considers a contract,⁵ proving that the responsive contract/PO existed at the time of his OPRA request.

⁵ The Complainant provided a definition but omitted the citation for said definition.

The Custodian submitted a legal certification on January 10, 2012 in which he certified that the PO referenced in the Complainant's amended Denial of Access Complaint was actually dated December 16, 2011. The Custodian certified that the PO was dated November 7, 2011 in the audit trail because this was the date of the contract entry. The Custodian further certified that the software utilized by the Township uses the same date for all POs charged to a contract entry. The Custodian certified that the PO was actually entered into the system on December 16, 2011, as the date on the PO reflected.

The evidence of record herein supports the Custodian's SOI certification that no contract responsive to the Complainant's OPRA request existed at the time the Complainant submitted same. Specifically, even using the Complainant's logic that a PO is considered a contract, the Custodian provided proof that the alleged PO relied on by the Complainant was dated December 16, 2011. The Complainant provided no competent, credible evidence to refute this fact.

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 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 contract responsive to the Complainant's OPRA request pursuant to Pusterhofer, *supra*.

The GRC notes that the Complainant's December 9, 2011 question of whether the contract came into existence after the filing of the OPRA request is not relevant, because the Custodian was under no obligation to provide same. *See* Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). The GRC further declines to address whether the ACD exemption applies because no responsive record existed at the time of the Complainant's OPRA request. Additionally, the GRC does not have the authority to address whether a public agency has complied or should have complied with a State statute or regulation, as was raised by the Complainant in his December 9, 2011 letter. N.J.S.A. 47:1A-7(b). *See also* Van Pelt v. Edison Township Board of Education (Middlesex), GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must maintain).

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).

Although the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant’s OPRA request seeking a contract and further insufficiently responded to the Complainant’s OPRA request by not stating that no record responsive existed, the Custodian did not unlawfully deny access to the requested contract because no record existed at the time of the Complainant’s OPRA request. 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's failure to respond immediately to the Complainant's OPRA request for contracts 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). Moreover, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5(g) and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), because he failed to specifically state that no records responsive to the request existed at the time of his response.
2. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request 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 contract responsive to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant's OPRA request seeking a contract and further insufficiently responded to the Complainant's OPRA request by not stating that no record responsive existed, the Custodian did not unlawfully deny access to the requested contract because no record existed at the time of the Complainant's OPRA request. 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.