



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

December 18, 2012 Government Records Council Meeting

Darnell Hardwick
Complainant

Complaint No. 2011-52

v.

NJ Department of Transportation
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 *Reconsideration* 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 because the Complainant has failed to establish in his request for reconsideration of the Council’s August 28, 2012 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. Thus, the Complainant’s request for reconsideration is 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 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting

Darnell Hardwick¹
Complainant

GRC Complaint No. 2011-52

v.

New Jersey Department of Transportation²
Custodian of Records

Records Relevant to Complaint:

1. New Jersey Department of Transportation's ("DOT") workforce development plan/AA plans for the years 2010 and 2011 that were prepared for the approval of the NJ Civil Service Commission
2. The Federal Affirmative Action Five (5) year plan update for 2010
3. The Federal Affirmative Action Five (5) year plan update for 2011
4. Disciplinary, promotional and hiring statistics from the Division of Human Resources quarterly reports for the years 2009 and 2010³
5. Agendas and all monthly meeting minutes from the Employee EEO Advisory Committee for the years 2009 and 2010
6. Agendas and all monthly meeting minutes from the Senior Leadership EEO Advisory Committee for the years 2009 and 2010.

Request Made: February 10, 2011

Response Made: February 11, 2011

Custodian: Eric Handelman⁴

GRC Complaint Filed: March 3, 2011⁵

Background

August 28, 2012

Government Records Council's ("Council") Final Decision. At its August 28, 2012 public meeting, the Council considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by

¹ No legal representation listed on record.

² Represented by DAG Laszlo M. Szabo, on behalf of the NJ Attorney General.

³ The Complainant states in his OPRA request that the Federal Affirmative Action Five (5) Year Plan Update for 2009 specifically states that "DCF/AA receives disciplinary, promotional and hiring statistics from the Division of Human Resources on a quarterly basis."

⁴ The Custodian at the time of the Complainant's OPRA request and Statement of Information was Alfred J. Brenner, III.

⁵ The GRC received the Denial of Access Complaint on said date.

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s February 10, 2011 OPRA request, because the Custodian properly requested an extension of time until March 9, 2011 to respond to said request. Thus, the requested seventeen (17) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. See Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).

August 30, 2012

Council’s Final Decision distributed to the parties.

September 6, 2012

Complainant’s Motion for Reconsideration attaching the following:

- E-mail from the Custodian to the Complainant dated March 3, 2011⁶
- OPRA request dated August 30, 2012
- E-mail from the Custodian to the Complainant dated August 31, 2012.

The Complainant requests that the Council reconsider the August 28, 2012 Final Decision of his Denial of Access Complaint pursuant to *N.J.A.C. 5:105-2.0*. The Complainant asserts that a mistake and new evidence requires the Council to reconsider this matter. The Complainant states that the Council’s Findings and Recommendations favor the Custodian. The Complainant also states that after reviewing the cases cited by the Council, the factual detail summary and written record support the Complainant’s position. The Complainant further states that cases listed in the Findings and Recommendations Conclusion No. 1 support a factual explanation with respect to the custodian requesting a reasonable extension of time within the statutorily mandated seven (7) business days.

⁶ The Complainant did not include this e-mail along with his Denial of Access Complaint because this e-mail did not exist at the time he filed his complaint.

The Complainant states that Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011) was overturned in the GRC's March 27, 2012 meeting.⁷ The Complainant also states that the custodian failed to respond to the complainant's OPRA request within the two (2) week extension of time and thus resulted in a deemed denial. The Complainant further states that the evidence of record did not support a conclusion that the complainant's OPRA request represented a substantial disruption of the business of the City of Plainfield Police Department.

The Complainant states that in Criscone v. Town of Guttenberg (Hudson), 2010-69 (November 2010), the custodian responded in writing on the sixth (6th) business day following receipt of the complainant's request, requesting an extension of time to fulfill the OPRA request until April 2, 2010, and cited to the volume of the complainant's request and the lack of staff in the Clerk's office. The Complainant also states that in O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010), the custodian failed to respond in writing, including properly requesting an extension of time within the statutorily mandated seven (7) business days, thus resulting in a deemed denial.

The Complainant states that in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009), the custodian responded in writing on the sixth (6th) business day requesting an extension of time until April 4, 2008 because the complainant submitted twelve (12) OPRA requests and responding to all requests in one week would substantially disrupt the operations of his agency. The Complainant also states in Starkey v. New Jersey Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009) that because the complainant's three (3) OPRA requests were voluminous, it is reasonable that the custodian required additional time beyond the statutorily mandated seven (7) business days to fulfill the requests.

The Complainant argues that the Findings and Recommendations conclusion No. 1 fails to define or discuss if the extension of time was reasonable, legitimate or warranted as the above cases held. The Complainant argues that in Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011) the custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the evidence of record did not support the custodian's proffered reason that the request represented a substantial disruption of the business.⁸ The Custodian also argues in Criscone, *supra*. and Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) the custodian attempted to legitimately provide the requestors with the records and asked for an extension of time on the sixth (6th) business day, unlike in the instant complaint where the Custodian's initial response was on the first (1st) day. The Complainant further argues that O'Shea, *supra*, supports his arguments. Lastly, the Complainant argues that in Starkey, *supra*, the custodian provided a legitimate reason (voluminous request) for the extension of time, was not the same in the instant complaint.

⁷ The Complainant's assertion is incorrect. In the March 27, 2012 decision, the Council ruled on a Supplemental Findings and Recommendations holding that the Custodian timely complied with the Council's Interim Order.

⁸ The issue of substantial disruption pursuant to N.J.S.A. 47:1A-5.g. is a separate issue from a valid extension of time. The Complainant is attempting to combine these two issues, which are separate. Darnell Hardwick v. New Jersey Department of Transportation, 2011-52 – Supplemental Findings and Recommendations of the Executive Director

The Complainant asserts that the Custodian initially asserted that the reason for requesting an extension until March 9, 2011 was because the Custodian might have to reach out to several units to obtain the responsive records. The Complainant also asserts that he provided the GRC with significant probative and competent evidence that the Custodian's proffered reason for an extension was not reasonable. The Complainant states that his request was directed to one (1) unit and not several units, specifically, the New Jersey Department of Transportation Civil Rights Unit. The Complainant argues that he properly denied the extension of time.

The Complainant states that he filed an OPRA request with the New Jersey Department of Transportation on August 30, 2012 and requested some of the same records relevant in his original OPRA request dated February 10, 2011.⁹ The Complainant also states that the Custodian responded stating, "this request is being forwarded to the appropriate Unit(s) to determine if records responsive to the request exist. Any existing records may be located in storage or in archives and therefore, will require an extension of time until September 25, 2010." The Complainant argues that the Custodian's reasoning is faulty because the Custodian already denied those records as advisory, consultative and deliberative material ("ACD") on March 3, 2011.¹⁰

The Complainant argues that the GRC is rewarding the Custodian by allowing him to circumvent the statutorily mandated seven (7) business day response requirement by initially responding to the Complainant's request with illegitimate blanket extensions of time. The Complainant also argues that although on February 11, 2011 the Complainant denied the request of extension of time until March 9, 2011, the GRC failed to consider the significant and competent evidence that the Complainant received a written agreement on February 11, 2011 via e-mail from the Custodian that he would provide the records on February 23, 2011. The Complainant further argues that the Custodian failed to request a new extension of time, or grant access or deny access by February 23, 2011, and thus violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Complainant argues that his Denial of Access Complaint was ripe on March 3, 2011 because 1) the Complainant's request was denied on February 23, 2011 because the Custodian failed to adhere to the written extended due date of February 23, 2011; 2) the March 9, 2011 extension of time is moot because the Custodian in the March 3, 2012 e-mail to the Complainant stated that the request was closed effective March 3, 2011;¹¹ 3) the Complainant's March 3, 2011 complaint was based on the February 23, 2011 denial of access records because the Custodian was clearly stalling with no responses or open-ended responses as in the evidence of the record in Starkey, supra; and 4) the Custodian never argued that the Complainant failed to timely file his Denial of Access Complaint

⁹ The Complainant only requested agendas and all monthly meeting minutes from the Employee EEO and the Senior Leadership EEO Advisory Committee for the years 2009 and 2010. In the Complainant's initial OPRA request dated February 10, 2011, he requested four (4) additional items.

¹⁰ The Complainant's August 30, 2012 OPRA request was made nearly eighteen (18) months after his original OPRA request dated February 10, 2011. At the time of the Complainant's February 10, 2011 OPRA request, these records could have contained ACD information, but eighteen (18) months later, these records may no longer be ACD.

¹¹ The Custodian sent the Complainant this e-mail *after* the Complainant filed his Denial of Access Complaint.

prior to the expiration of the time frame in his Statement of Information as cited in Sallie supra.

September 19, 2012

E-mail from Custodian's Counsel to the GRC objecting to the Complainant's request for reconsideration. Counsel argues that the Complainant's request for reconsideration should be denied because the Council's August 28, 2012 decision was not based upon a palpably incorrect or irrational basis and the Council did appropriately consider or appreciate the significance of probative, competent evidence submitted by the parties. See Cummings v. Bahr 295 N.J. Super. 374 (App. Div. 1996) and D'Atria v. D'Atria 242 N.J. Super. 392 (Ch. Div. 1990). Counsel also argues that the Complainant failed to demonstrate in his request for reconsideration that the Council's decision was arbitrary, capricious or unreasonable. See In re Taylor, 158 N.J. 656 (1999).

Counsel asserts that the Council properly held that the Custodian properly requested an extension of time under N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel states that the Council based its decision on the Custodian's certifications and supportive evidence (*i.e.* Custodian's Statement of Information certifying that it is DOT's policy that all privileged records must be reviewed by the Attorney General's Office). Counsel also states that the Council's decision was not "palpably incorrect or irrational" and appropriately considered or appreciated the significance of the probative, competent evidence submitted by the Custodian and the Complainant.

Counsel argues that the Council appropriately held that the Complainant's cause of action was not ripe because "the Complainant filed a Denial of Access Complaint with the GRC on March 3, 2011, prior to the March 9, 2011 extended deadline. Counsel also argues that the Custodian's response time had not expired prior to the Complainant's filing of the Denial of Access Complaint and thus was premature and invalid. Lastly, Counsel argues that the Complainant's request for reconsideration fails to proffer substantial reasons to support its reconsideration because he fails to clearly state the reasons for either a dispositive mistake or relevant new evidence.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's August 28, 2012 Final Decision?

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

Applicable case law holds that: "[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the

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

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that 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. *See Cummings, supra*. The Complainant failed to do so.

The Complainant argues that his Denial of Access Complaint filed on March 3, 2011 was ripe because 1) the Complainant's request was denied on February 23, 2011 by the Custodian's failure to adhere to the written extended due date of February 23, 2011; 2) the March 9, 2011 extension of time is moot because the Custodian in his March 3, 2012 e-mail to the Complainant stated that the request was closed effective March 3, 2011; 3) the Complainant's March 3, 2011 complaint was based on the February 23, 2011 denial of records because the Custodian was clearly stalling with no responses or open-ended responses as in the evidence of the record in Starkey, supra; and 4) the Custodian never argued that the Complainant failed to timely file his Denial of Access Complaint prior to the expiration of the time frame in his Statement of Information as cited in Sallie supra.

The Complainant argues that the March 9, 2011 extension of time is moot because the Custodian's e-mail to the Complainant dated March 3, 2011 stated that the Complainant's OPRA request was closed effective March 3, 2011. The Custodian submitted a copy of this e-mail dated March 3, 2011 along with his SOI and said e-mail was sent to the Complainant at 4:17 p.m. The evidence of record also indicates that the Complainant filed his Denial of Access Complaint with the GRC at 8:43 a.m. on March 3, 2011. The Custodian did not deny the Complainant's OPRA request at the time the Complainant filed his Denial of Access Complaint because no denial of access had occurred. Further, because no denial of access had occurred, and the Custodian's request for an extension until March 9, 2011 was reasonable, the Complainant failed to timely file his Denial of Access Complaint pursuant to Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009). Thus, the Complainant's submission fails to establish that his Denial of Access Complaint was ripe on March 3, 2011.

Therefore, because the Complainant has failed to establish in his request for reconsideration of the Council's August 28, 2012 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. Thus, the Complainant’s request for reconsideration is denied. Cummings, supra; D’Atria, supra; Comcast, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his request for reconsideration of the Council’s August 28, 2012 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. Thus, the Complainant’s request for reconsideration is 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012¹²

¹² This complaint was prepared and scheduled for adjudication at the Council’s November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.
Darnell Hardwick v. New Jersey Department of Transportation, 2011-52 – Supplemental Findings and Recommendations of the Executive Director



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GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

August 28, 2012 Government Records Council Meeting

Darnell Hardwick
Complainant

Complaint No. 2011-52

v.

New Jersey Department of Transportation
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council ("Council") considered the August 21, 2012 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. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant's February 10, 2011 OPRa request, because the Custodian properly requested an extension of time until March 9, 2011 to respond to said request. Thus, the requested seventeen (17) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. See Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).

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 August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Darnell Hardwick¹
Complainant**

GRC Complaint No. 2011-52

v.

**New Jersey Department of Transportation²
Custodian of Records**

Records Relevant to Complaint:

1. New Jersey Department of Transportation's ("DOT") workforce development plan/AA plans for the years 2010 and 2011 that were prepared for the approval to the NJ Civil Service Commission
2. The Federal Affirmative Action Five (5) year plan update for 2010
3. The Federal Affirmative Action Five (5) year plan update for 2011
4. Disciplinary, promotional and hiring statistics from the Division of Human Resources quarterly reports for the years 2009 and 2010³
5. Agendas and all monthly meeting minutes from the Employee EEO Advisory Committee for the years 2009 and 2010
6. Agendas and all monthly meeting minutes from the Senior Leadership EEO Advisory Committee for the years 2009 and 2010.

Request Made: February 10, 2011

Response Made: February 11, 2011

Custodian: Eric Handelman⁴

GRC Complaint Filed: March 3, 2011⁵

Background

February 10, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is e-mail.

¹ No legal representation listed on record.

² Represented by DAG Laszlo M. Szabo, on behalf of the NJ Attorney General.

³ The Complainant states in his OPRA request that the Federal Affirmative Action Five (5) Year Plan Update for 2009 specifically states that "DCF/AA receives disciplinary, promotional and hiring statistics from the Division of Human Resources on a quarterly basis."

⁴ The Custodian at the time of the Complainant's OPRA request and Statement of Information was Alfred J. Brenner, III.

⁵ The GRC received the Denial of Access Complaint on said date.

February 11, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the same business day as receipt of such request.⁶ The Custodian states that he may have to reach out to several units to obtain responsive records. The Custodian requests an initial extension of time until March 9, 2011 to complete the Complainant's request. The Custodian states that if more than four (4) hours is required to obtain records responsive, the Complainant will be assessed a special service charge. The Custodian also states that if a special service charge is assessed, the Complainant will be required to submit a 50% deposit to proceed with the request.

February 11, 2011

E-mail from the Complainant to the Custodian. The Complainant thanks the Custodian for his timely response. The Complainant denies the Custodian's request for an extension of time until March 9, 2011 to respond to his OPRA request. The Complainant requests the Custodian to provide the records responsive to his request within the seven (7) business days.

February 11, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he will try to provide the records responsive to the Complainant's request by February 21, 2011.

February 11, 2011

E-mail from the Custodian to the Complainant. The Custodian states that since February 21, 2011 is a State holiday, the last business day to respond is February 23, 2011.

February 24, 2011

E-mail from the Complainant to the Custodian. The Complainant requests a status of his OPRA request because the Custodian's response was due on February 23, 2011.

February 24, 2011

E-mail from the Custodian to the Complainant. The Custodian states that the records are currently in the review process. The Custodian also states that once the review is completed, he will contact the Complainant.

February 25, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's e-mail dated February 24, 2011. The Complainant states that in his e-mail dated February 11, 2011, he denied the Custodian's initial request for an extension of time until March 9, 2011 because the seventeen (17) day extension was unreasonable.

The Complainant also states that the Custodian's e-mail dated February 11, 2011 asserted that the Custodian would attempt to provide the Complainant with the records

⁶ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on February 11, 2011.

responsive by February 23, 2011. The Complainant states that he did not receive a written response on February 23, 2011 requesting an extension, granting access, denying access or seeking clarification. The Complainant requests the Custodian to provide him with a date certain as to when the records responsive to his requests will be provided.

February 25, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he is still waiting for a response and will respond to the Complainant's request as soon as possible.

February 28, 2011

E-mail from the Complainant to the Custodian. The Complainant states that this is his second (2nd) request for a date certain as to when the Custodian will provide the records responsive to his request.

March 1, 2011

E-mail from the Custodian to the Complainant. The Custodian also states that he is still reviewing the records responsive to the request and will notify the Complainant as soon as the records are available. The Custodian again requests an extension of time until March 9, 2011.

March 1, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the records responsive to request Item No. 1 through No. 3 are public records and should not require attorney review for possible advisory, consultative or deliberative ("ACD") material. The Complainant also states that per the Custodian's e-mail dated February 24, 2011, the Custodian advised the Complainant that these records were in the Custodian's possession and were in the review process. The Complainant further states that the Custodian's request for an extension of time is unreasonable. The Complainant requests that the Custodian grant or deny access by March 2, 2011. The Complainant states that the Custodian violated OPRA by not requesting an extension of time, granting access, denying access or seeking clarification by the due date of February 23, 2011. The Complainant grants the Custodian's extension of time until March 9, 2011 for request Item No. 4.

March 3, 2011

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

- Complainant's OPRA request dated February 10, 2011
- E-mail from the Custodian to the Complainant dated February 11, 2011
- E-mail from the Complainant to the Custodian dated February 11, 2011
- E-mail from the Custodian to the Complainant dated February 11, 2011
- E-mail from the Complainant to the Custodian dated February 11, 2011
- E-mail from the Complainant to the Custodian dated February 24, 2011
- E-mail from the Custodian to the Complainant dated February 24, 2011
- E-mail from the Complainant to the Custodian dated February 25, 2011
- E-mail from the Custodian to the Complainant dated February 25, 2011

- E-mail from the Complainant to the Custodian dated February 28, 2011
- E-mail from the Custodian to the Complainant dated March 1, 2011
- E-mail from the Complainant to the Custodian dated March 1, 2011⁷

The Complainant states he submitted an OPRA request to DOT on February 10, 2011. The Complainant states that the original Custodian responded on February 11, 2011 via e-mail confirming receipt of the Complainant's request. The Complainant further states that in the Custodian's e-mail dated February 11, 2011 the Custodian requested an extension of time until March 9, 2011 because the requested records may not be readily available and the Custodian may have to reach out to several units within DOT to obtain the records responsive. The Complainant additionally states that via e-mail on February 11, 2011, he denied the Custodian's request for an extension of time. The Complainant states that the Custodian responded stating that DOT will do its best to provide the responsive records by February 21, 2011. The Complainant also states that the Custodian sent a corrected e-mail on February 11, 2011 stating that the due date is February 23, 2011 not February 21, 2011 because of the State holiday. The Complainant further states that the Custodian did not respond to his OPRA request by February 23, 2011, thus the Custodian violated N.J.S.A. 47:1A-5.i.

The Complainant states that he e-mailed the Custodian on February 24, 2011 requesting a status of his OPRA request. The Complainant also states that the Custodian responded on February 24, 2011 asserting that the records were in the review process and that he would contact the Complainant once the review was completed. The Complainant further states that he e-mailed the Custodian on February 25, 2011 stating that he denied the Custodian's initial request for an extension of time until March 9, 2011 because the seventeen (17) day extension was unreasonable. The Complainant additionally states that he did not receive a response from the Custodian on February 23, 2011 either requesting an extension, granting access, denying access or seeking clarification.

The Complainant states that on February 25, 2011, he requested that the Custodian provide him with a date certain as to when the records responsive to his requests will be provided. The Complainant also states that the Custodian responded via e-mail on February 25, 2011 informing the Complainant that he was still awaiting a response and would respond to the Complainant's request as soon as possible. The Complainant asserts that the Custodian provided an open-ended response by not providing a date certain. The Complainant states that he replied on February 28, 2011 again requesting a date certain when the Custodian will provide the records responsive. The Complainant also states that the Custodian responded on March 1, 2011 stating that the Complainant's request was still being processed and reviewed and would respond to the Complainant's request as soon as possible. The Complainant further states that in the Custodian again requested an extension of time until March 9, 2011 to respond to the Complainant's request.

⁷ The Complainant also attaches copies of the Council's Findings and Recommendations in, Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and Alterman, Esq. (on behalf of Louis Mercurio) v. Borough of Haledon (Passaic), GRC Complaint No. 2010-117 (November 2010);

The Complainant states that he responded on March 1, 2011 denying the extension of time to provide the records responsive to request Item No. 1 through No. 3 because the records responsive are public records and should not require attorney review for possible ACD material. The Complainant states that he further requested the Custodian to provide the records responsive to request Item No. 1 through No. 3 by March 2, 2011. The Complainant further states that he also granted the Custodian's request for an extension of time until March 9, 2011 for request Item No. 4. The Complainant states that he did not receive the records responsive for request Item No. 1 through No. 3 on March 2, 2011. The Complainant also states that he does not understand why the records that should be readily available are going through a review.

The Complainant argues that regarding the Custodian's initial request for an extension until March 9, 2011, the Complainant has made numerous OPRA requests to DOT and the initial responses are identical in regards to language and initial extension of time requests. The Complainant contends that his request was directed to one (1) unit in DOT; therefore, the Custodian's initial request for an extension was not legitimate.

Additionally, the Complainant argues that the Custodian violated N.J.S.A. 47:1A-5.i. by failing to respond to the Complainant's request by February 23, 2011 either requesting an extension of time, granting access, denying access or seeking clarification. The Complainant also argues that the Custodian knowingly and willfully violated OPRA because the Custodian had full knowledge that his actions were wrongful, intentional and deliberate. The Complainant further argues that it is clear that the Custodian violated OPRA because the records responsive to his request should be on file and readily available without a lengthy review. The Complainant asserts that if the records are in the Custodian's possession, such records should be provided immediately.

The Complainant further contends that although the Custodian provided a written response to his request within the seven (7) business days, the Complainant denied the Custodian's request for an extension of time and the Custodian failed to respond within the seven (7) business days. The Complainant further asserts that the Custodian's e-mail dated February 24, 2011 represents an insufficient response because he failed to provide a date certain as to when he would provide the records responsive. The Complainant argues that since the Council concluded that the Custodian violated OPRA in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), his 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 Complainant does not agree to mediate this complaint.

March 3, 2011

E-mail from the Custodian to the Complainant.⁸ The Custodian states that the records responsive to request Item No. 1 do not exist. The Custodian also states that the 2010 report responsive to request Item No. 2, is in draft form and is exempt pursuant to N.J.A.C. 16:1A-4.3(a)(16). The Custodian further states that the 2010 report responsive to request Item No. 2 was submitted to the Federal Highway Administration ("FHWA")

⁸ The Custodian attaches a privilege log stating which records responsive to the Complainant's request are denied.

and will be available once approved. The Custodian additionally states that the 2011 report responsive to request Item No. 3 does not exist. The Custodian provides the records responsive to request Item No. 4. The Custodian also states that the Employee EEO Advisory Committee agendas and meeting minutes responsive to request Item No. 5 are considered advisory, consultative or deliberative material and thus exempt pursuant to N.J.S.A. 47:1A-1.1. The Custodian also states that agendas and meeting minutes for the Senior Leadership EEO Advisory Committee for the years 2009 and 2010 responsive to request Item No. 6 do not exist.

March 4, 2011

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

March 6, 2011

Complainant’s amended Denial of Access Complaint with the following attaching an e-mail from the Custodian to the Complainant dated March 3, 2011 with attachments.⁹ The Complainant asserts that the Custodian’s response dated March 3, 2011 was insufficient. The Complainant also asserts that the privilege log fails to include a record index that identifies each record requested and the specific legal basis for a denial of access to said records. The Complainant states that the Custodian only provided a blanket dates for the agendas responsive to request Item No. 4 from September 14, 2009 through November 17, 2010 and does not identify each date the meetings were held. The Complainant disputes the applicability of the ACD exemption for the agendas because agendas are factual issues that will be discussed during the course of a meeting.

The Complainant states that the Custodian failed to identify all the minutes responsive to request Item No. 4 and instead only provided blanket dates from March 20, 2009 through June 25, 2009. The Complainant asserts that the Custodian should have disclosed the minutes with redactions for ACD material where necessary. The Complainant asserts that the Custodian was stalling in providing the Complainant the requested records because no more than four (4) records responsive to request Item No. 4 needed attorney review. The Complainant also asserts that since the remaining records did not exist, the Custodian should have responded to his request within the mandated seven (7) business days.

The Complainant states pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” The Complainant also states that pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) a factual nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. The Complainant states that by filing his Denial of Access Complaint, the Custodian responded to his OPRA request. The Complainant further asserts that because of the totality of the circumstances, the Custodian knowingly and willfully violated OPRA.

⁹ The Custodian attaches a privilege log stating which records responsive to the Complainant’s request are denied.

March 7, 2011

E-mail from the GRC to the Custodian. The GRC resends its request for the SOI sent to the Custodian because the Complainant amended his Denial of Access Complaint. The GRC informs the Custodian that the SOI is due on March 14, 2011.

March 14, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated February 10, 2011
- E-mail from the Custodian to the Complainant dated February 11, 2011
- E-mail from the Complainant to the Custodian dated February 11, 2011
- E-mail from the Custodian to the Complainant dated February 11, 2011
- E-mail from the Custodian to the Complainant dated February 11, 2011
- E-mail from the Complainant to the Custodian dated February 24, 2011
- E-mail form the Custodian to the Complainant dated February 24, 2011
- E-mail from the Complainant to the Custodian dated February 25, 2011
- E-mail from the Custodian to the Complainant dated February 25, 2011
- E-mail from the Complainant to the Custodian dated February 28, 2011
- E-mail from the Custodian to the Complainant dated March 1, 2011
- E-mail from the Complainant to the Custodian dated March 1, 2011
- E-mail from the Custodian to the Complainant dated March 3, 2011 with attachments.¹⁰

The Custodian certifies that his search for the requested records included sending an e-mail on February 11, 2011 to the Administrative Division liaison to provide the records. The Custodian also certifies that on the Administrative Division liaison provided the records responsive to the Custodian on February 22, 2011 with a privilege log listing the privileged records. The Custodian further certifies that it is DOT’s policy that all privileged records must be reviewed by Attorney General’s Office. The Custodian additionally certifies that the records responsive were scanned and forwarded to the Attorney General’s office for review on February 24, 2011. Lastly, the Custodian certifies that he received a response from the Attorney General’s office on March 3, 2011 and accordingly responded the Complainant’s OPRA request on the same day.

The Custodian also certifies that records retention requirement has not expired and thus, records have not been destroyed in accordance with Records Management Services.

The Custodian includes the following document index as part of his SOI:

List of all records responsive to the Complainant’s OPRA request	List the records Retention Requirement and Disposition	List of all records provided to the Complainant in their	If records were disclosed with redactions, give a	If records were denied in their entirety, give a general	List the legal explanation and statutory citation for
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¹⁰ The Custodian attaches the records responsive to request Item No. 4.

(include the number of pages for each record)	Schedule for each records responsive to the Complainant's OPRA request	<u>entirety or with redactions</u> (include the <u>date</u> such records provided)	general nature description of the redactions	nature description of the record.	the denial of access to records in their <u>entirety or with redactions.</u>
NJDOT workforce development plan/AA plans for the years 2010 and 2011 that were prepared for the approval to the NJ Civil Service Commission	Agency #G100000 – Record Series #0701-0000-retain in Agency three (3) years than destroy	Records do not exist	N/A	N/A	N/A
Federal Affirmative Action Five (5) year plan update for 2010 and 2011 – 187 pages	Agency #G100000 – Records Series #0701-0000 – retain in Agency three (3) years than destroy	None provided	N/A	NJDOT's annual Affirmative Action goals regarding federal and state Affirmative Action requirements	<i>N.J.A.C.</i> 16:1A-4.3(a)(16): Work papers, memoranda or reports that are determined by the Department to be a draft or work in progress.
Disciplinary, promotional and hiring statistics from the Division of Human Resources quarterly reports for the years 2009 and 2010 0 73 pages.	Agency #G100000 – Records Series #0701-0000 – retain in Agency three (3) years than destroy.	Record provided in entirety on March 3, 2011.	N/A	N/A	N/A
Agendas and monthly	Agency #G100000 –	None provided	N/A	EEO Advisory	<u>N.J.S.A.</u> 47:1A-1.1,

meeting minutes from Employee EEO Advisory Committee for 2009 & 2010 – 12 pages	Record Series #1409-001 – permanent than archives.			Committee Meeting Agendas and Minutes	inter-agency or intra-agency advisory, consultative or deliberative material.
Agendas and monthly meeting minutes from Senior Leadership EEO Advisory Committee for 2009 & 2010	Agency #G100000 – Record Series #1409-001 – permanent than archives.	Records do not exist	N/A	N/A	N/A

The Custodian certifies that he received the Complainant’s OPRA request on February 11, 2011 seeking “1) DOT’s workforce development plan/AA plans for the years 2010 and 2011 that were prepared for the approval to the NJ Civil Service Commission; 2) The Federal Affirmative Action Five (5) year plan update for 2010; 3) The Federal Affirmative Action Five (5) year plan update for 2011; 4) Disciplinary, promotional and hiring statistics from the Division of Human Resources quarterly reports for the years 2009 and 2010; 5) Agendas and all monthly meeting minutes from the Employee EEO Advisory Committee for the years 2009 and 2010; 6) Agendas and all monthly meeting minutes from the Senior Leadership EEO Advisory Committee for the years 2009 and 2010.” The Custodian certifies that on March 3, 2011 via e-mail he informed the Complainant that the records responsive to request Item No. 1 do not exist. The Custodian certifies that he also informed the Complainant that the 2010 report responsive to request Item No. 2 is in draft form and was submitted to the FHA for approval. The Custodian further informed the Complainant that the 2011 report responsive to request Item No. 3 does not exist.

The Custodian argues that NJDOT cannot produce a record that was not “made, maintained or kept on file or that has been received in the official course of business.” N.J.S.A. 47:1A-1.1. The Custodian also argues that the Appellate Division held in Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005) that if a requested government record does not exist, the Department is not required to create such a document and the request must be denied. The Custodian further argues that the Appellate Division held in Bent v. Twp. of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) that a public agency cannot comply with an OPRA request if the requested records do not exist and that unless such records were “made, maintained or kept on file” by the custodian, the requestor has no relief or remedy under OPRA. The Custodian certifies that no record responsive to request Item No. 1 exists. The Custodian further certifies that no

2011 report responsive to request Item No. 3 exists. The Custodian additionally certifies that the agendas and meeting minutes responsive to request Item No. 6 do not exist.

The Custodian certifies that he denied the Complainant access to the agendas and meeting minutes of the responsive to request Item No. 5 because such records are exempt from disclosure under OPRA as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian argues that a government agency must satisfy two (2) prerequisites in order to be entitled to rely on the ACD exemption; 1) the records must have been generated “before the adoption of an agency’s policy or decision” Gannett N.J. Partners v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) and 2) the records “must contain opinions, recommendations or advice about agency policies.” The Custodian argues that this exemption does not apply if the records only contain factual material.

The Custodian argues that the Complainant’s request Item No. 5 for the agendas and meeting minutes falls squarely within the ACD exemption. The Custodian also argues that the need for unrestricted deliberations and free flow of ideas and advice is the reason for this exemption. The Custodian certifies that this exemption afforded under OPRA acknowledged the need for advisory bodies to exchange ideas and opinions freely before finalizing their recommendations and/or findings outweighs the public’s need for the agendas and minutes of their meetings.

March 18, 2011

E-mail from the Complainant to the GRC. The Complainant argues that the Custodian knew and admitted that the records responsive to request Item Nos. 1, 3 and 6 do not exist prior to February 23, 2011 and that the Custodian should have denied these records within the seven (7) business days. The Complainant further argues that the Custodian did not contact the Complainant at all on February 23, 2011 and thus the Custodian’s response was a deemed denial. The Complainant additionally asserts that the records responsive to request Item No. 5 did not contain any privileged material and thus the Custodian’s failure to provide these records on February 23, 2011 results in a deemed denial.

The Complainant contends that the Custodian violated N.J.S.A. 47:1A-6 because while seeking legal advice on how to respond appropriately to a request is reasonable, it is not a lawful basis for delaying a response to an OPRA request. The Complainant asserts that the Custodian should have obtained a written agreement from the Complainant extending the time period to respond. The Complainant also asserts that the Custodian improperly denied him access to the minutes and agendas responsive to request Item No. 5. The Complainant asserts that if the Custodian’s argument is that the functions of an advisory body are a specific exemption in OPRA, then many State agencies are not following this exemption. The Complainant also asserts that the Custodian cannot employ the ACD exemption as a blanket denial.

The Complainant states that he is an employee at DOT and served on the Employee EEO Advisory Committee for two (2) years from the beginning of 2007 through end of 2008. The Complainant states that he is including copies of the agendas and minutes while he was on the committee to show that there are factual issues in the minutes. The Complainant states that he has a vested interest in the agendas and minutes

responsive to request Item No. 5 because he submitted an application to return to the committee and would like to know what was discussed at these meetings.

The Complainant asserts that under OPRA a public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet the recognized basis for confidentiality. The Complainant also asserts that pursuant to N.J.S.A. 47:1A-1.1 there is a strong public policy in favor of a citizen's right of access. The Complainant states that the Custodian did not meet the burden of proof and requests that the Council conduct an *in camera* examination of the records.

Analysis

Whether the Custodian lawfully requested an extension of time to respond to the Complainant's OPRA request?

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 provides that:

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

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...* If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the

request. The *requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA 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 stated in his Denial of Access Complaint that the Custodian requested an extension of time until March 9, 2011 to respond to the Complainant’s OPRA request. The Complainant also stated that he denied the Complainant’s request for the extension of time. The Complainant argued that a seventeen (17) business day extension was unreasonable because these records should be readily available.

Thus, the GRC must address whether the Custodian lawfully sought an extension of time to respond to the Complainant’s OPRA request.

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.¹¹ 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).

Further, OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

¹¹ 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.

The Complainant timely responded to the Complainant's OPRA request, requesting an extension of time until March 9, 2011. The Complainant denied the Custodian's request for an extension of time via e-mail on February 11, 2011 and instead requested the Custodian to provide the records responsive within seven (7) business days. The Custodian responded via e-mail on February 11, 2011 stating that he would provide the records by February 23, 2011. The Complainant e-mailed the Custodian on February 25, 2011 stating that he denied the Custodian's original request for an extension of time because the seventeen (17) business day extension was unreasonable and requested the Custodian to provide him with a date certain as to when the records responsive to his requests will be provided. The Custodian e-mailed the Complainant on March 1, 2011 again requesting an extension of time until March 9, 2011 to respond to the Complainant's request because he was still reviewing the records responsive to the request. The Complainant e-mailed the Custodian on March 1, 2011 stating that the Custodian's request for an extension was unreasonable and requested that the Custodian grant or deny access by March 2, 2011. The Complainant asserts that the Custodian's request for an extension of time is unreasonable because the Complainant's OPRA request involved one (1) unit within DOT and the records are readily available. The Custodian certified in the SOI that it is DOT's policy that the records sought are subject to privilege and that all privileged records must be reviewed by the Attorney General's Office.

In Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011), the Complainant filed an OPRA request on November 5, 2009. The Custodian responded to the request in writing on the fourth (4th) business day following receipt of such request, requesting an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The Complainant did not agree to the Custodian's request for an extension of time. The Council stated that:

“The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.”

In Rivera, the Council noted that the Custodian provided the Complainant with a written response to his OPRA requests on the fourth (4th) business day following receipt of said request, seeking a two (2) week extension of time to respond to said request; the Council determined that because the Custodian requested an extension of time in writing

within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

Moreover, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that “because the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time” the Custodian did not unlawfully deny access to the requested records. *See also* Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

In the matter now before the Council, the Custodian responded in writing to the Complainant’s OPRA request on the same business day as receipt of such request seeking a seventeen (17) business day extension to respond to the Complainant’s OPRA request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. *See* Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

Whether the Complainant’s Denial of Access Complaint should be dismissed as not ripe for adjudication?

In the instant complaint, the Custodian properly requested an extension of time until March 9, 2011 to respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Complainant filed a Denial of Access Complaint with the GRC on March 3, 2011, prior to the March 9, 2011 extended deadline.

As one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed a complaint with the GRC prior to being denied access to any records responsive to his request and before the

statutorily mandated seven (7) business day time frame for the Custodian to respond expired.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the Complainant forwarded a complaint to the GRC asserting that he had not received a response from the Custodian and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The Custodian argued in the SOI that the Complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. The Council held that:

“...because the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.”

In the matter currently before the Council, the Complainant acted in the same manner as the Complainant in Sallie, *supra*, by filing a Denial of Access Complaint with the GRC prior to a denial of access to the requested records by the Custodian. Additionally, the Complainant filed his complaint with the GRC prior to the expiration of the Custodian’s properly requested seventeen (17) business day extension of time.

Therefore, because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s February 10, 2011 OPRA request, because the Custodian properly requested an extension of time until March 9, 2011 to respond to said request. Thus, the properly requested seventeen (17) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. *See Sallie, supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i. *See Rivera v. City of Plainfield Police Department (Union)*, GRC Complaint No. 2009-317 (May 2011); *Criscione v. Town of Guttenberg (Hudson)*, GRC Complaint No. 2010-68 (November 2010); *Rivera v. Union City Board of Education (Hudson)*, GRC Complaint No. 2008-112 (April 2010), *O’Shea v. Borough of Hopatcong (Sussex)*, GRC Complaint No. 2009-223 (December 2010); *Starkey v. NJ Department of Transportation*, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied

access to any records responsive to the Complainant's February 10, 2011 OPRA request, because the Custodian properly requested an extension of time until March 9, 2011 to respond to said request. Thus, the requested seventeen (17) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).*

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012