



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

Michael Carrow
Complainant

Complaint No. 2012-111

v.

Borough of Newfield (Gloucester)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007)..
2. Because the Newfield Fire Company was not created by the Borough of Newfield and thus is not an “instrumentality or agency” of the Borough, the Company is not a public agency subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1. Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011). *See also* Chaves v. JFK Medical Center (Middlesex), GRC Complaint No. 2009-217 (March 2011), Nash v. Children’s Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006) and Cole v. Newton Memorial Hospital, GRC Complaint No. 2009-68 (February 2010).
3. Although the Custodian failed to timely respond to the Complainant’s OPRA request thus resulting in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the GRC has determined that the Newfield Fire Company is not a public agency subject to the provisions of OPRA. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s untimely response 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 28, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael Carrow¹
Complainant**

GRC Complaint No. 2012-111

v.

**Borough of Newfield (Gloucester)²
Custodian of Records**

Records Relevant to Complaint: Copies of:³

1. List of all expenditures from Newfield Fire Company No. 1 (“Company”) accounts from January 2009 to March 21, 2012.
2. All minutes from January 2010 to March 21, 2012.
3. Criteria for Company scholarship fund.

Request Made: March 21, 2012

Response Made: April 10, 2012

Custodian: Toni Van Camp

GRC Complaint Filed: April 12, 2012⁴

Background

March 21, 2012

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.

April 2, 2012

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the eighth (8th) business day following receipt of such request. The Custodian provides access to a list of Company members and check stubs from a Company account.

April 5, 2012

Letter from the Custodian to Chief Mason. The Custodian states she recently forwarded to Chief Mason the Complainant’s OPRA request seeking records from the

¹ No legal representation listed on record.

² Represented by John C. Eastlack, Jr., Esq., of Weir & Partners, LLP (Cherry Hill, NJ).

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

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

Company. The Custodian states that the Company previously supplied her with a list of current members on January 1, 2012.⁵

The Custodian states that a review of Chief Mason's response indicates that he did not respond to all of the Complainant's request items. The Custodian further states that in response to the Complainant's OPRA request Item No. 1, Chief Mason attached check stubs in a document entitled "Fire Commissioner's Account 2009-March 2012." The Custodian states that these records do not constitute a sufficient response. The Custodian notes that it is her understanding that the Company has a second (2nd) account for which no records were provided. The Custodian states that Chief Mason must indicate whether any records responsive to the Complainant's OPRA request Items No. 2 and 3 exist, and if so, produce same.

The Custodian notes that the Company is a "public agency" for purposes of OPRA and is therefore subject to its provisions. The Custodian states that Chief Mason is thus required to respond to each request item regardless of whether the responsive records are disclosable. The Custodian states that if he considers a record to be exempt from disclosure, he must provide a specific lawful basis for said denial. The Custodian further states that if no record responsive to a particular item exists, Chief Mason is required to clearly state same. The Custodian also states that she has previously advised Chief Mason that OPRA requests could seek records electronically stored or stored offsite but that must be produced nonetheless.

The Custodian states that not complying with OPRA carries significant penalties and the Borough could be subject to not only those penalties but applicable attorney's fees. The Custodian states that upon receipt of this letter, Chief Mason must comply with the Complainant's OPRA request.

April 10, 2012

E-mail from Chief William Mason ("Chief Mason") to the Custodian.⁶ Chief Mason states that the Company is a New Jersey registered non-profit corporation and is not a public agency as defined under OPRA. Chief Mason states that the Company has provided information regarding public money spent pursuant to N.J.S.A. 40A:14-34.⁷ Chief Mason states that the Borough has all records pertaining to public money expended

⁵ This record is not at issue in the instant complaint because it was provided to the Complainant on April 10, 2012.

⁶ The Custodian forwarded this e-mail to the Complainant on April 10, 2012, as indicated by both parties.

⁷ N.J.S.A. 40A:14-34 provides that "[t]he governing body of any municipality may raise and appropriate funds to be granted to the boards of fire commissioners of any fire district or volunteer fire companies located therein, up to a total appropriation of \$ 90,000.00 annually. In any municipality in which there are more than three such boards or companies, or both, the governing body may raise and appropriate an additional \$ 30,000.00 annually for each such additional board or company. Any such board or company shall use not less than 50% of the funds received pursuant to this section for the purchase of fire equipment, materials and supplies. All funds appropriated under this section shall be accounted for to the governing body annually. Any municipality may appropriate such additional sums as it may deem necessary for the purchase of fire equipment, supplies and materials for use by fire companies or boards, the title to which shall remain with the municipality, provided that the funds shall be controlled and disbursed by the municipality. In the case of a joint purchase made by the governing bodies of two or more municipalities pursuant to the provisions of the "Consolidated Municipal Service Act," ... (C. 40:48B-1 et seq.), the title to the purchase shall be held by the joint meeting formed by the contracting governing bodies.

or granted on behalf of the Company and should be able to easily provide same. Chief Mason further states that he also previously provided to the Borough a list of Company members, which is public information.

Chief Mason finally states that the other request items are either exempt as proprietary corporate information or does not exist and are therefore not subject to disclosure under OPRA.

April 12, 2012

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

- Complainant’s OPRA request dated March 21, 2012.
- E-mail from Chief Mason to the Custodian dated April 10, 2012

The Complainant states that he submitted an OPRA request to the Custodian on March 21, 2012. The Complainant states that on April 2, 2012, the Custodian provided a list of the Company’s members as well as check stubs from one of the Company’s accounts. The Complainant states that on April 10, 2012, the Custodian provided him with a copy of Chief Mason’s April 10, 2012 e-mail indicating that Chief Mason believed the Company was not a public agency subject to the provisions of OPRA.

The Complainant agrees to mediate this complaint.

April 25, 2012

Offer of Mediation sent to the Custodian.

April 26, 2012

The Custodian agrees to mediate this complaint. The Custodian’s Counsel’s submits a letter noting that the Borough of Newfield (“Borough”) requests that Chief Mason participate in the mediation process as he is the individual in possession of the records sought by the Complainant.

April 27, 2012

Complaint referred to mediation.

May 16, 2012

Complaint referred back from mediation. The GRC informs the Custodian that according to her April 10, 2012 response to the Complainant, the Borough has asserted that the Company is a non-profit 501(c)(3) corporation and is not a public agency subject to the provisions of OPRA. The GRC states that this complaint is being referred back to the GRC to determine whether the Company is a public agency under OPRA.

May 16, 2012

E-mail from the Complainant to the GRC. The Complainant states that in order to clarify, Chief Mason has claimed that the Company is not subject to the provisions of OPRA. The Complainant states that he submitted another OPRA request seeking the Company’s 501(c)(3) number and that Chief Mason denied access stating that the

Company's 501(c)(3) number does not exist. The Complainant states that one would assume that the Company is thus not a registered non-profit 501(c)(3) corporation if no number exists.

May 17, 2012

E-mail from the Custodian to the GRC. The Custodian states that the Borough is not contending that the Company is a non-profit 501(c)(3) corporation not subject to the provisions of OPRA. The Custodian states that in a previous complaint before the GRC, Graumann v. Borough of Newfield (Gloucester), GRC Complaint No. 2010-87 (August 2010), the Company was subject to the provisions of OPRA.⁸

The Custodian states that the Company is a volunteer organization partially funded by the Borough.

May 22, 2012

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

May 22, 2012

Letter from the GRC to Chief Mason. The GRC states that on April 10, 2012, Chief Mason sent an e-mail to the Custodian in which he stated that the Company is not a public agency subject to the provisions of OPRA. The GRC states that in order to determine whether the Company is a public agency pursuant to OPRA, the GRC needs the following items:

- Certificate of Incorporation for the Company, or other documentation that brought the Company into existence.
- The bylaws for your organization.
- A legal certification stating if any ordinance, resolution or agreements exist which discuss the relationship between the Company and any State or local government agency.

The GRC states that Chief Mason's response is due by no later than May 30, 2012. The GRC advises that submissions received after this deadline date may not be considered by the Council for adjudication.

May 29, 2012

E-mail from Chief Mason to the GRC. Chief Mason requests an extension of time to submit the requested public agency information.

May 30, 2012

E-mail from the GRC to Chief Mason. The GRC states that it will generally grant one (1) extension of five (5) business days to submit public agency information. The GRC states that it thus grants Chief Mason an extension of time until June 6, 2012 to submit the information.

⁸ This complaint was settled in mediation; therefore, the GRC has no indication of the facts of said complaint because pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., the GRC cannot consider any submissions made during mediation.

June 5, 2012⁹

Custodian's SOI with the following attachments:

- Letter from the Custodian to Chief Mason dated April 5, 2012.
- E-mail from Chief Mason to the Custodian dated April 10, 2012.
- E-mail from Chief Mason to the Custodian dated April 19, 2012.¹⁰
- Check stubs for 2009, 2010 and 2011.

The Custodian 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 it is believed the records are to be maintained permanently.

The Custodian certifies that she received the Complainant's OPRA request on March 21, 2012. The Custodian certifies that on April 2, 2012, she provided to the Complainant with documents forwarded by Chief Mason. The Custodian certifies that she is not in possession of any of the responsive records.

The Custodian certifies that on April 5, 2012, the Custodian sent a letter to Chief Mason requesting that Chief Mason provide a response to the remainder of the Complainant's OPRA request. The Custodian certifies that she also reminded Chief Mason of his obligation to produce records under OPRA. The Custodian certifies that Chief Mason responded via e-mail on April 10, 2012 indicating that the Company is a non-profit 501 (c)(3) corporation and is therefore not a public agency. The Custodian certifies that Chief Mason provided no documentary evidence to support his assertion.

The Custodian certifies that the records at issue herein were not provided to her by Chief Mason for disclosure to the Complainant. The Custodian certifies that Chief Mason asserted that neither the Company's minutes nor criterion for the Company's scholarship exist. *See* E-mail from Chief Mason to the Custodian dated April 19, 2012. The Custodian certifies that she does not believe there is a lawful basis to deny access to the requested records and further believes that Chief Mason should disclose all responsive records to the Complainant.

June 6, 2012

Chief Mason's public agency information response with the following attachments:

- "Certificate of Incorporation, Nonprofit" dated March 19, 2012.
- Ordinance No. 2011-15 entitled "An Ordinance Amending Ordinance [No.] 2010-11 Chapter 25, Fire Department of the Code of the [Borough] and State of New Jersey, Entitled Fire Department" (undated).

⁹ The Custodian did not expressly certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007). However, the Custodian did certify that none of the responsive records at issue are in her possession.

¹⁰ This e-mail is in response to two (2) OPRA requests received by the Borough for Company records on April 12, 2012 and April 13, 2012. Neither OPRA request is at issue in this complaint.

- N.J.S.A. 40A:14-68 – “Contracts with volunteer fire companies; member holding public office.”
- N.J.S.A. 40A:14-54.1 – “Authority at scene of fire of fire official in charge of supervision or direction of operations.”
- N.J.S.A. 40A:14-55 – “Definitions relating to fire departments and exempt firemen.”
- N.J.S.A. 40A:14-2 – “County Fire Marshal; powers and duties.”
- N.J.S.A. 40A:14-7 – “Creation and establishment of fire departments and forces.”
- N.J.S.A. 40A:14-33 – “Municipality may contribute money for general purposes of incorporated volunteer fire departments.”
- N.J.S.A. 40A:14-34 – “Municipal appropriations to fire companies.”
- Company’s Bylaws.

Chief Mason states that he received special permission from the Company’s Board of Trustees to provide the Bylaws to the GRC because the Bylaws explicitly state that same not be provided to any non-members. Chief Mason states that the Company has been in continuous service since 1908 and just recently determined that the State has no record of the Company’s incorporation. Chief Mason states that based on advisement by Counsel, the Company reincorporated.

Chief Mason asserts that the Complainant, who is the Borough’s Council President, is using the GRC to harass the Company. Chief Mason argues that the Borough has no contract with the Company and provides no funds beyond those permitted by law. Chief Mason asserts that to the best of his knowledge, the Company has complied with their obligation under N.J.S.A. 40A:14-34 to provide annual reports for any money given by the Borough.

Chief Mason states that for an agency to be deemed a “public agency” for OPRA’s purposes, that agency has to be created by a municipality or any political subdivision to be considered a public entity. N.J.S.A. 47:1A-1.1. Chief Mason asserts that under State law, municipalities do not have the authority to create a volunteer fire company but may contract with one. N.J.S.A. 40A:14-68. Chief Mason contends that the Company was created by the members and not the Borough. Chief Mason further argues that in accordance with title 15A, the Company’s bylaws and membership cannot be superseded by municipal ordinance. Chief Mason asserts that Ordinance No. 2011-15 in many ways is invalid without a contract as set forth in N.J.S.A. 40A:14-68. Chief Mason further asserts that none of the seven (7) factors in the GRC’s “Handbook for Records Custodians” (5th Edition) apply to the Company. Chief Mason thus contends that the Company is not a public agency and does not have an obligation to comply with the provisions of OPRA.

Analysis

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

OPRA provides that:

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

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5(i).

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

The Custodian herein certified that she received the Complainant’s OPRA request on March 21, 2012 and responded providing some records on April 2, 2012, or eight (8) business days following receipt of the Complainant’s OPRA request. The evidence of record does not indicate that the Custodian sought an extension of time; thus, the Custodian’s response is untimely.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

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.

Whether the Newfield Fire Company is a public agency subject to the provisions of OPRA?

OPRA defines a public agency as:

“...[a]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.” N.J.S.A. 47:1A-1.1.

Most definitions of “public agency” under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act (“OPMA”) contains a definition of a “public body” which requires that an entity, “... (1) consist of ‘two or more persons’ and (2) be ‘collectively empowered as a voting body’ (3) ‘to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.’ N.J.S.A. 10:4-8a.” The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J. Super. 425 (App. Div. 2004).

In Lafayette Yard, the Appellate Division held that Lafayette Yard was both a “public body” subject to the open meetings requirements of the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq., and a “public agency” required under OPRA, and ordered disclosure of records to plaintiff.

In so doing, the Court noted the definition of a “public agency” in OPRA at N.J.S.A. 47:1A-1.1. and held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the City of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,
- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the “agency” and the corporation as the “redeveloper” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and

- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a ‘public body’ under OPMA. The [C]ourt further held that the corporation was ‘an ‘instrumentality’ created by the City and a ‘public agency’ under the OPRA for essentially the same reasons that it is a ‘public body’ under the OPMA.’” *Id.* at 442.

The decision of the Superior Court that Lafayette Yard qualified as a “public body” was affirmed by the New Jersey Supreme Court (The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005)). *See also Snyder v. American Association of Blood Banks*, 144 N.J. 269 (1996)(finding that the legislature did not create or authorize the AABB to perform a specific governmental purpose); Williams v. National Car Rental System, Inc., 225 N.J. Super. 164 (1988)(finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corporation v. NJ Sports and Exposition Authority, 195 N.J. Super. 542 (1984)(citing Wade v. N.J. Turnpike Authority, 132 N.J. Super. 92 (Law Div. 1975), (“The Court noted the official comment to N.J.S.A. 59:1-3: ‘The definition of ‘Public Entity’ provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.’”).

More recently, in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), the Supreme Court was tasked with reviewing the Appellate Division’s holding that the New Jersey State League of Municipalities (“League”) is not a public agency under OPRA. 413 N.J. Super. 423. The Court acknowledged that although the Appellate Division relied on its previous holding in Lafayette Yard, it erred in “... importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in [OPMA] ... [t]he language defining a ‘public body’ ... under OPRA are distinctly different.” *Id.* at 504-505. The Court thus held that a creation test, as opposed to a governmental function test, controlled in determining whether an entity was a public agency for purposes of OPRA. Specifically, the Court held that:

“In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ *See id.* at 535-36 ... The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with ... Lafayette Yard.” *Id.* at 507.

The Complainant filed this complaint after receiving a response from Chief Mason in which he advised that the Company is not a public agency subject to the provisions of OPRA. Both the Complainant and the Custodian contend that the Company is in fact subject to the provisions of OPRA.

Thus, the GRC must apply the creation test in determining whether the Company is a “public agency” under OPRA.

In support of the Company’s position, Chief Mason submitted the Company’s Non-profit certificate, Bylaws, as well as several statutes. The Company’s Bylaws provide that non-members are not permitted to view the Bylaws, attend meetings or participate in elections of Company officers. A thorough review of the Bylaws elicits that the Borough has no control over the day-to-day operations of the Company. Additionally, Ordinance No. 2011-15 indicates that the Borough did not establish the Company, proclaiming that “[t]here is, and has been established, within the [Borough] a fire company ... which was created and established and is hereby continued to be recognized by the [Borough].”

Of the relevant statutes supplied by Chief Mason and others located by the GRC, one in particular sheds light on the relationship between a volunteer fire company and a municipality:

“In a municipality not having a paid or part-paid fire department and force, the governing body, by ordinance, *may contract* with a volunteer fire company or companies in such municipality, for purposes of extinguishing fires, upon such terms and conditions as shall be deemed proper. The members of any such company shall be under the supervision and control of said municipality and in performing fire duty shall be deemed to be exercising a government function; however, the appointment or election of the chief ... shall remain the prerogative of the membership of the fire company as set forth in the company’s certificate of incorporation or bylaws.” (Emphasis added.) N.J.S.A. 40A:14-68.

Moreover, New Jersey statute allows for contracting municipalities to contribute money to volunteer fire companies and hold the titles to any equipment purchases on behalf of that company. N.J.S.A. 40A:14-33 *and* N.J.S.A. 40A:14-34.

These statutes speak to the type of relationship existing between a municipality and volunteer fire company; however, it does not speak to the creation of said company. After further review, N.J.S.A. 40A:14-7 enables a municipality to create a “... paid or part-paid fire department or force ...” yet volunteer fire companies are omitted from this statute. N.J.S.A. 40A:14-70(1) requires volunteer fire companies forming in fire districts or in communities containing other volunteer organizations with similar objectives to present an application to the local board of fire commissioners. Again, there is nothing in this statute that allows a municipality to create a volunteer fire organization.

In applying the creation test, the facts heavily support that the Company is not a public agency subject to the provisions of OPRA. Specifically, the Company was not created by the Borough; rather, the Borough contracts with the Company. Under the creation test, as applied by the Supreme Court in Fair Share Housing Center, *supra*, it is clear that the Company was created and is run on a day-to-day basis by the members. Although the Company clearly performs a governmental function and is supplemented by the Borough according to relevant statute, the Company is not a creation of the Borough.

Therefore, because the Company was not created by the Borough and thus is not an “instrumentality or agency” of the Borough, the Company is not a public agency subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1. Fair Share Housing Center, supra. See also Chaves v. JFK Medical Center (Middlesex), GRC Complaint No. 2009-217 (March 2011), Nash v. Children’s Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006) and Cole v. Newton Memorial Hospital, GRC Complaint No. 2009-68 (February 2010).

Whether the Custodian’s untimely response rises 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 failed to timely respond to the Complainant’s OPRA request thus resulting in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the GRC has determined that the Company is not a public agency subject to the provisions of OPRA. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it

is concluded that the Custodian's untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007)..
2. Because the Newfield Fire Company was not created by the Borough of Newfield and thus is not an "instrumentality or agency" of the Borough, the Company is not a public agency subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1. Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011). *See also* Chaves v. JFK Medical Center (Middlesex), GRC Complaint No. 2009-217 (March 2011), Nash v. Children's Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006) and Cole v. Newton Memorial Hospital, GRC Complaint No. 2009-68 (February 2010).
3. Although the Custodian failed to timely respond to the Complainant's OPRA request thus resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the GRC has determined that the Newfield Fire Company is not a public agency subject to the provisions of OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's untimely response 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.

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February 19, 2013