



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Paul Marinaccio
Complainant

Complaint No. 2012-23

v.

Borough of Fanwood (Union)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not fully complied with the terms of the Council’s April 30, 2013 Interim Order. Although the Custodian disclosed records to the GRC with a legal certification within the required five (5) business days, the Custodian failed to disclose the records directly to the Complainant in the medium requested. The Custodian also failed to provide a detailed document index explaining the lawful basis for each redaction. Nevertheless, the Complainant does not challenge the redactions.
2. The Custodian’s failure to timely respond to the Complainant’s January 23, 2012 OPRA request resulted in a “deemed” denial of said request. Additionally, the Custodian unlawfully denied access to request item nos. 2 and 4 of the Complainant’s July 28, 2011 OPRA request. Further, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to, request item nos. 2-3 of the Complainant’s January 23, 2012 OPRA request. However, the Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant’s July 28, 2011 OPRA request. As stated above, the Custodian failed to fully comply with the terms of the Council’s April 30, 2013 Interim Order. Nevertheless, the evidence of record provides that the Custodian attempted to comply with said Order by providing the requested records, along with a legal certification, to the GRC in the required timeframe. Thus, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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 28th Day of May, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 5, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Paul Marinaccio¹
Complainant**

GRC Complaint No. 2012-23

v.

**Borough of Fanwood (Union)²
Custodian of Records**

Records Relevant to Complaint:

OPRA Request Dated July 28, 2011:

1. Copies of blueprints and architectural drawings of the Fanwood Municipal Building/ Court House/Police Station located at 75 North Martine Avenue Fanwood, NJ.
2. All audio recordings and sound files downloaded between 5:00 PM and 6:00 PM on January 17, 2009 by the other policeman besides Marc Gottlick who was present at North Avenue and Sheelan's Crossing between those times and any equipment used by and/or assigned to him for use during that period.
3. All video images recorded, downloaded or preserved and/or captured by any other means between 5:00 PM and 6:00 PM on January 17, 2009 by any Fanwood policeman or equipment located at Sheelan's Crossing and North Avenue between those times.
4. All titles and positions held, salaries and dates of services of Susan MacMullan, Daniel Antonelli, Michele Jaker, and Marc Gottlick.

OPRA Request Dated January 23, 2012:

1. On a Cassette tape: all audio recordings and sound documented on any medium that included any words spoken by Marc Gottlick and any other policeman who was at any point located at North Avenue and Sheelan's Crossing between 5:00 PM and 6:00 PM on January 17, 2009. Include any sounds documented of them at any other location between those times.
2. All policies and procedures regarding use of cameras mounted to the windshields of patrol cars in a text file or word processing files, sent via e-mail.
3. All video images recorded on any medium of all activity that took place at, outside and inside the door through which the defendants enter the building to appear at Fanwood Municipal Court, provided on a DVD.

Request Made: July 28, 2011 and January 23, 2012

Response Made: August 5, 2011 and April 12, 2012

GRC Complaint Filed: January 24, 2012³

¹ No legal representation listed on record.

² Eleanor McGovern, Custodian of Records. Represented by Dennis Estis, Esq., of Greenbaum Rowe Smith & Davis, LLP (Woodbridge, NJ).

Background

At its April 30, 2013 public meeting, the Council considered the April 23, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request dated January 23, 2012. 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. The Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant's July 28, 2011 OPRA request because the Custodian legally certified that no records responsive to said request exist, and the Complainant has not provided any evidence to contradict the Custodian's certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian unlawfully denied access to request item no. 2 of the Complainant's July 28, 2011 OPRA request on the basis that the Custodian already provided the record under a different venue. See Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008). However, the Council declines to order disclosure of the recording because despite a "deemed" denial of the Complainant's January 23, 2012 OPRA request for the same recording, the Custodian made the recording available to the Complainant on April 12, 2012.
4. The Custodian unlawfully denied access to request item no. 4 of the Complainant's July 28, 2011 OPRA request on the basis that the request is not a proper OPRA request. Pursuant to Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. See also Morgano v. New Jersey Department of Treasury, Division of Pensions & Benefits, GRC Complaint No. 2011-145 (Interim Order dated December 18, 2012). As such, the Custodian must disclose the records responsive to request item no. 4 to the Complainant.
5. The Custodian failed to address request item nos. 2-3 of the Complainant's January 23, 2012 OPRA request in the Custodian's SOI submission. As such, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to the request, pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose the records responsive to request item no. 2 of

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

the Complainant's January 23, 2012 OPRA request, or alternatively certify that no records responsive exist, if such is the case. The Custodian need not disclose records responsive to request item no. 3 because said request is invalid since it is an open-ended request failing to identify a date or date range for the video recording. *See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005) (holding that "OPRA does not countenance open-ended searches of an agency's files.") *Id.* at 549.

6. **The Custodian shall comply with item nos. 4-5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

On May 1, 2013, the Council distributed its Interim Order to all parties. On May 6, 2013, the Custodian responded to the Council's Interim Order.⁶ The Custodian provided the GRC with a certification attaching the following records:

1. ADP payroll sheets for Susan MacMullan, Daniel Antonelli, Michele Jaker and Marc Gottlick. The Custodian certified that she redacted home addresses, social security numbers and dates of birth.⁷
2. The Police Department Standard Operating Procedure regarding "Mobile-Vision In Car Digital Recording Systems."

On May 7, 2013, the GRC forwarded the Custodian's certification, with attachments, to the Complainant. On May 8, 2013, the Complainant e-mailed the GRC asserting that the Custodian failed to provide all titles, positions held, and dates of service. On May 15, 2013, the Complainant e-mailed the GRC contending that Mark Gottlick held the position of Corporal in 2009 and the records provided by the Custodian do not indicate how long he held each position and what other positions he and the other individuals held.

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

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

⁶ The Custodian submitted her certification, with attachments, via facsimile. Also, there is no evidence in the Custodian's submission that she provided same to the Complainant.

⁷ The Custodian fails to provide a document index explaining the lawful basis for each redaction. However, the Complainant does not challenge the redactions.

Analysis

Compliance

On April 30, 2013, the Council ordered the Custodian to disclose the most comprehensive record that contained the requested personnel information, as well as all policies and procedures regarding use of cameras mounted to the windshields of patrol cars in a text file or word processing file, via e-mail. The Council's Order specifically indicated that "[s]atisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium." The Council also ordered the Custodian to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 1, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On May 6, 2013, within the required five (5) business days, the Custodian submitted a certification to the GRC, via facsimile, attaching the records ordered to be disclosed. The record is devoid of any evidence that the Custodian provided the records to the Complainant, thus, the GRC forwarded same to the Complainant via e-mail on May 7, 2013. Upon receipt, the Complainant asserted that the Custodian failed to disclose all titles, positions held, and dates of services for the named individuals. In support of his assertion, the Complainant states that Mark Gottlick held the position of Corporal in 2009. However, if the Complainant was seeking payroll and personnel records from a specific time period, the onus rests on the Complainant to indicate such in his OPRA request. Here, the Custodian reasonably interpreted the Complainant's OPRA request to seek the current most comprehensive record, which discloses each individual's name, title, position, salary, and dates of service.

Therefore, the Custodian has not fully complied with the terms of the Council's April 30, 2013 Interim Order. Although the Custodian disclosed records to the GRC with a legal certification within the required five (5) business days, the Custodian failed to disclose the records directly to the Complainant in the medium requested. The Custodian also failed to provide a detailed document index explaining the lawful basis for each redaction. Nevertheless, the Complainant does not challenge the redactions.

Knowing & Willful

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably

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)).

Here, the Custodian’s failure to timely respond to the Complainant’s January 23, 2012 OPRA request resulted in a “deemed” denial of said request. Additionally, the Custodian unlawfully denied access to request item nos. 2 and 4 of the Complainant’s July 28, 2011 OPRA request. Further, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to, request item nos. 2-3 of the Complainant’s January 23, 2012 OPRA request. However, the Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant’s July 28, 2011 OPRA request. As stated above, the Custodian failed to fully comply with the terms of the Council’s April 30, 2013 Interim Order. Nevertheless, the evidence of record provides that the Custodian attempted to comply with said Order by providing the requested records, along with a legal certification, to the GRC in the required timeframe. Thus, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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 has not fully complied with the terms of the Council’s April 30, 2013 Interim Order. Although the Custodian disclosed records to the GRC with a legal certification within the required five (5) business days, the Custodian failed to disclose the records directly to the Complainant in the medium requested. The Custodian also failed to provide a detailed document index explaining the lawful basis for each redaction. Nevertheless, the Complainant does not challenge the redactions.
2. The Custodian’s failure to timely respond to the Complainant’s January 23, 2012 OPRA request resulted in a “deemed” denial of said request. Additionally, the Custodian unlawfully denied access to request item nos. 2 and 4 of the Complainant’s July 28, 2011

OPRA request. Further, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to, request item nos. 2-3 of the Complainant's January 23, 2012 OPRA request. However, the Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant's July 28, 2011 OPRA request. As stated above, the Custodian failed to fully comply with the terms of the Council's April 30, 2013 Interim Order. Nevertheless, the evidence of record provides that the Custodian attempted to comply with said Order by providing the requested records, along with a legal certification, to the GRC in the required timeframe. Thus, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013



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

INTERIM ORDER

April 30, 2013 Government Records Council Meeting

Paul Marinaccio
Complainant

Complaint No. 2012-23

v.

Borough of Fanwood (Union)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 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 dated January 23, 2012. 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. The Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant’s July 28, 2011 OPRA request because the Custodian legally certified that no records responsive to said request exist, and the Complainant has not provided any evidence to contradict the Custodian’s certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian unlawfully denied access to request item no. 2 of the Complainant’s July 28, 2011 OPRA request on the basis that the Custodian already provided the record under a different venue. See Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008). However, the Council declines to order disclosure of the recording because despite a “deemed” denial of the Complainant’s January 23, 2012 OPRA request for the same recording, the Custodian made the recording available to the Complainant on April 12, 2012.
4. The Custodian unlawfully denied access to request item no. 4 of the Complainant’s July 28, 2011 OPRA request on the basis that the request is not a proper OPRA request. Pursuant to Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the Custodian should have retrieved the most comprehensive record that contained the requested personnel



information and provided same to the Complainant. *See also* Morgano v. New Jersey Department of Treasury, Division of Pensions & Benefits, GRC Complaint No. 2011-145 (Interim Order dated December 18, 2012). As such, the Custodian must disclose the records responsive to request item no. 4 to the Complainant.

5. The Custodian failed to address request item nos. 2-3 of the Complainant's January 23, 2012 OPRA request in the Custodian's SOI submission. As such, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to the request, pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose the records responsive to request item no. 2 of the Complainant's January 23, 2012 OPRA request, or alternatively certify that no records responsive exist, if such is the case. The Custodian need not disclose records responsive to request item no. 3 because said request is invalid since it is an open-ended request failing to identify a date or date range for the video recording. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (holding that "OPRA does not countenance open-ended searches of an agency's files." *Id.* at 549.
6. **The Custodian shall comply with item nos. 4-5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 1, 2013

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Paul Marinaccio¹
Complainant**

GRC Complaint No. 2012-23

v.

**Borough of Fanwood (Union)²
Custodian of Records**

Records Relevant to Complaint:

OPRA Request Dated July 28, 2011:

1. Copies of blueprints and architectural drawings of the Fanwood Municipal Building/ Court House/Police Station located at 75 North Martine Avenue Fanwood, NJ.
2. All audio recordings and sound files downloaded between 5:00 PM and 6:00 PM on January 17, 2009 by the other policeman besides Marc Gottlick who was present at North Avenue and Sheelan's Crossing between those times and any equipment used by and/or assigned to him for use during that period.
3. All video images recorded, downloaded or preserved and/or captured by any other means between 5:00 PM and 6:00 PM on January 17, 2009 by any Fanwood policeman or equipment located at Sheelan's Crossing and North Avenue between those times.
4. All titles and positions held, salaries and dates of services of Susan MacMullan, Daniel Antonelli, Michele Jaker, and Marc Gottlick.

OPRA Request Dated January 23, 2012:

1. On a Cassette tape: all audio recordings and sound documented on any medium that included any words spoken by Marc Gottlick and any other policeman who was at any point located at North Avenue and Sheelan's Crossing between 5:00 PM and 6:00 PM on January 17, 2009. Include any sounds documented of them at any other location between those times.
2. All policies and procedures regarding use of cameras mounted to the windshields of patrol cars in a text file or word processing files, sent via e-mail.
3. All video images recorded on any medium of all activity that took place at, outside and inside the door through which the defendants enter the building to appear at Fanwood Municipal Court, provided on a DVD.

Request Made: July 28, 2011 and January 23, 2012

Response Made: August 5, 2011 and April 12, 2012

GRC Complaint Filed: January 24, 2012³

¹ No legal representation listed on record.

² Eleanor McGovern, Custodian of Records. Represented by Dennis Estis, Esq., of Greenbaum Rowe Smith & Davis, LLP (Woodbridge, NJ).

Background⁴

Request and Response:

On July 28, 2011, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above listed records. On August 5, 2011, the sixth (6th) business day following the Custodian’s receipt of said request, the Custodian responded to said request in writing. The Custodian responds to the Complainant’s OPRA request as follows:

- Request Item No. 1: Building plans are protected from disclosure pursuant to OPRA.
- Request Item No. 2: You received the audio records relating to your case.
- Request Item No. 3: There are no video images recorded related to your case.
- Request Item No. 4: This is not a proper OPRA request.

Denial of Access Complaint:

On January 24, 2012, the Complainant filed this Denial of Access Complaint asserting that the Custodian denied his OPRA request without justification. The Complainant contends that the Custodian’s response to request item no. 2 refers to a CD the Complainant received in response to another OPRA request.⁵

Statement of Information:

On March 7, 2012, the Custodian submitted a Statement of Information (“SOI”) in response to the Complainant’s Denial of Access Complaint. The Custodian certifies that the Borough does not maintain the requested blueprints requested in item no. 1 of the Complainant’s OPRA request. The Custodian certifies that she denied access to request item no. 2, the audio recording, but certified that the requested tapes were transmitted to the Complainant under a different venue. The Custodian certifies that there are no videos responsive to the Complainant’s request item no. 3. Finally, the Custodian certifies in response to request item no. 4 that it is her understanding the requestor is to provide explicit requests and here, he failed to provide a timeframe and is seeking information rather than a record.

Additional Information:

On June 15, 2012, the Complainant amended this Denial of Access Complaint to include his OPRA request dated January 23, 2012, wherein the Complainant seeks the records listed above. The Complainant states that he did not receive any response to this OPRA request from the Custodian.

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

⁴ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ Said OPRA request is the subject of GRC Complaint No. 2011-226.

On March 7, 2013, the Custodian submitted an SOI in response to the Complainant's amended Denial of Access Complaint. The Custodian certifies that regarding request item no. 1, she previously sent the Complainant a CD which may have been indecipherable. The Custodian certifies that on April 12, 2012 she notified the Complainant that she recopied the requested CD and same was available for pickup and payment of \$2.00. The Custodian certifies the Complainant never paid for the record. The Custodian fails to address request item nos. 2-3 of the Complainant's OPRA request dated January 23, 2012.⁶

Analysis⁷

Timeliness

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).⁸ 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 Complainant amended his initial Denial of Access Complaint to include his OPRA request dated January 23, 2012, asserting that the Custodian failed to respond to said OPRA request. On the Complainant's OPRA request, the Complainant included a United States Postal Service Certified Mail tracking number.⁹ On February 25, 2013, the GRC accessed the United States Postal Service's "Track & Confirm" website¹⁰ inputting the Certified Mail tracking number contained on the Complainant's January 23, 2012 OPRA request. The results provided indicate that the request was delivered at 10:10 am on January 23, 2012 in Fanwood, NJ.

The Custodian, however, failed to legally certify to the date she received the Complainant's January 23, 2012 OPRA request. The Custodian did certify that she notified the Complainant on April 12, 2012, nearly three (3) months following the date of his January 23, 2012 OPRA request, that the requested audio recording was available upon payment of \$2.00.

⁶ The Custodian only addresses item no. 1 of the Complainant's January 23, 2012 OPRA request because the Complainant stated on his amended complaint form "regarding item #1 only." However, the Complainant's statement regarding "item #1 only" refers to request item #1 being the subject of other Denial of Access Complaints filed and pending with the GRC.

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁸ 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.

⁹ Tracking No. 7011200000094290270.

¹⁰ https://tools.usps.com/go/TrackConfirmAction_input.

The Custodian failed to provide any proof of her response, if any, to the Complainant's request items no. 2-3 of the January 23, 2012 OPRA request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request dated January 23, 2012. 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*.

Unlawful Denial of Access

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 Custodian denied access to request item no. 1 of the Complainant's July 28, 2011 OPRA request, a request for blueprints and architectural drawings, on the basis that building plans are protected from disclosure under OPRA. However, in the Custodian's SOI, the Custodian legally certified that no blueprints exist on file. Additionally, the Custodian denied access to request item no. 3 of the Complainant's July 28, 2011 OPRA request, a request for video images, on the basis that no video images exist. The Custodian certified to this fact in her SOI.

Therefore, the Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant's July 28, 2011 OPRA request because the Custodian legally certified that no records responsive to said request exist, and the Complainant has not provided any evidence to contradict the Custodian's certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

The Custodian denied access to request item no. 2 of the Complainant's July 28, 2011 OPRA request, a request for audio recordings, on the basis that the Complainant already received the requested audio recording. In the Custodian's SOI, the Custodian certified that she denied the Complainant's request under OPRA, but provided the recording under another venue. The Complainant again requested the audio recording on January 23, 2012. The Custodian certified in her SOI that she notified the Complainant on April 12, 2012 that the recording was available for pickup.

In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted).

The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. In the adjudication of the Denial of Access Complaint, the Council's decision noted the certification of the custodian that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public; moreover, the complainant admitted that he was actually in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Housing Authority, GRC Complaint No. 2005-145 (May 2007).

Here, despite the fact that the Custodian had previously provided the Complainant with the requested audio recording, there is no evidence in the record to substantially verify that the Complainant was still in possession of the requested audio recording at the time of the Complainant's July 28, 2011 OPRA request.

Therefore, the Custodian unlawfully denied access to request item no. 2 of the Complainant's July 28, 2011 OPRA request on the basis that the Custodian already provided the record under a different venue. *See Bart, supra*. However, the Council declines to order disclosure of the recording because despite a "deemed" denial of the Complainant's January 23, 2012 OPRA request for the same recording, the Custodian made the recording available to the Complainant on April 12, 2012.

The Custodian denied access to request item no. 4 of the of the Complainant's July 28, 2011 OPRA request, a request for personnel information, on the basis that the request was not a proper OPRA request. In the Custodian's SOI, the Custodian asserted that it is her understanding the requestor is to provide explicit requests and here, he failed to provide a timeframe and is seeking information rather than a record.

The language the Complainant used in request item no. 4 comes directly from OPRA itself at N.J.S.A. 47:1A-10 which provides that "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record..." The Council has previously addressed whether an OPRA request seeking this specific information is a valid OPRA request.

In Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the complainant sought access to the custodian's title, position, salary and length of service from 2003 through 2004. The custodian denied access to the request contending that the complainant did not specifically identify a government record. The Council reasoned that:

"OPRA indicates that such records may be found in an employee's personnel and/or pension records because OPRA provides that 'the personnel or pension records... shall not be considered a government record...except that an individual's name, *title, position, salary...length of service* shall be a government record...' (Emphasis added) N.J.S.A. 47:1A-10."

Thus, the Council held that:

“because the Custodian should have retrieved the most comprehensive record that contained the requested information and provided same to the Complainant, the Custodian’s denial of the Complainant’s OPRA request was unlawful pursuant to N.J.S.A. 47:1A-6. Accordingly the Custodian shall disclose any personnel record responsive to the Complainant’s OPRA request which contains the Custodian’s title, position, salary and length of service from 2003 through 2004.”

Notwithstanding the Council’s decision in Valdes, the Custodian in this instant matter also contends that the Complainant’s request is invalid because the Complainant failed to include a timeframe for the request. However, in Morgano v. New Jersey Department of Treasury, Division of Pensions & Benefits, GRC Complaint No. 2011-145 (Interim Order dated December 18, 2012), the complainant sought access to the “title, position, and salary, payroll records, length of service, date of separation and reason, the amount and type of pension received for City of Newark Police Officer, Elbert N. Eutsey also known as Jack Eutsey” without providing a timeframe for the request. Rather than determining that the request was invalid due to a lack of a timeframe, the Council held that “[s]ince the Custodian identified five (5) records responsive to the Complainant’s OPRA request and the Custodian failed to bear her burden of proving a lawful denial of access, Ms. O’Hare should have provided these records to the Complainant.”

Therefore, the Custodian unlawfully denied access to request item no. 4 of the Complainant’s July 28, 2011 OPRA request on the basis that the request is not a proper OPRA request. Pursuant to Valdes, *supra*, the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. *See also Morgano*, *supra*. As such, the Custodian must disclose the records responsive to request item no. 4 to the Complainant.

Finally, the Custodian failed to address request item nos. 2-3 of the Complainant’s January 23, 2012 OPRA request in the Custodian’s SOI submission. As such, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to the request, pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose the records responsive to request item no. 2 of the Complainant’s January 23, 2012 OPRA request, or alternatively certify that no records responsive exist, if such is the case. The Custodian need not disclose records responsive to request item no. 3 because said request is invalid since it is an open-ended request failing to identify a date or date range for the video recording. *See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005) (holding that “OPRA does not countenance open-ended searches of an agency's files.” *Id.* at 549.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request dated January 23, 2012. 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. The Custodian lawfully denied access to request item nos. 1 and 3 of the Complainant's July 28, 2011 OPRA request because the Custodian legally certified that no records responsive to said request exist, and the Complainant has not provided any evidence to contradict the Custodian's certification. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian unlawfully denied access to request item no. 2 of the Complainant's July 28, 2011 OPRA request on the basis that the Custodian already provided the record under a different venue. *See* Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008). However, the Council declines to order disclosure of the recording because despite a "deemed" denial of the Complainant's January 23, 2012 OPRA request for the same recording, the Custodian made the recording available to the Complainant on April 12, 2012.
4. The Custodian unlawfully denied access to request item no. 4 of the Complainant's July 28, 2011 OPRA request on the basis that the request is not a proper OPRA request. Pursuant to Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. *See also* Morgano v. New Jersey Department of Treasury, Division of Pensions & Benefits, GRC Complaint No. 2011-145 (Interim Order dated December 18, 2012). As such, the Custodian must disclose the records responsive to request item no. 4 to the Complainant.
5. The Custodian failed to address request item nos. 2-3 of the Complainant's January 23, 2012 OPRA request in the Custodian's SOI submission. As such, the Custodian failed to bear her burden of proving a lawful denial of access, or prove that the Custodian actually responded to the request, pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose the records responsive to request item no. 2 of the Complainant's January 23, 2012 OPRA request, or alternatively certify that no records responsive exist, if such is the case. The Custodian need not disclose records responsive to request item no. 3 because said request is invalid since it is an open-ended request failing to identify a date or date range for the video recording. *See*

MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (holding that “OPRA does not countenance open-ended searches of an agency's files.” *Id.* at 549.

6. **The Custodian shall comply with item nos. 4-5 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.¹²**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Dara L. Barry
Communication Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.