



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 15, 2020 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2013-255

v.

City of Orange (Essex)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 the Council should accept the Administrative Law Judge’s Initial Decision concluding “. . . that no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with Ms. Gordon’s OPRA request . . . [because] [t]his particular part of the relief she is requesting on remand from the Appellate Division and by transmittal for further proceedings by the GRC has been appropriately addressed with the imposition of a \$1,000 penalty against former City Clerk Dwight Mitchell . . . the primary Custodian of Records.” *Id.* at 14. However, the Council should reject the Administrative Law Judge’s Order that “. . . petitioner’s complaint be DISMISSED with prejudice” because the Council in its June 26, 2018 Interim Order determined that “[i]f no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council’s October 31, 2017 Interim Order shall remain in full force and effect.” The Administrative Law Judge did conclude that no municipal official other than Mr. Mitchell should be subject to the penalty; therefore, the complaint should not be dismissed because the Council’s October 31, 2017 Interim Order remains in full force and effect.

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 15th Day of December 2020

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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2013-255

v.

**City of Orange (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All disability insurance payments City Clerk Dwight Mitchell has received from the City of Orange, a municipality self-insured through the Orange Insurance Fund, from January 1, 2010, to June 25, 2013.
2. All sick days accumulated by City Clerk Dwight Mitchell from January 1, 2010, to June 25, 2013.

Custodian of Records: Madeline F. Smith³
Request Received by Custodian: June 25, 2013
Response Made by Custodian: July 11, 2013
GRC Complaint Received: September 10, 2013

Background

June 26, 2018 Council Meeting

At its June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be

¹ No legal representation listed on record.

² Represented by Garcia Robert Montilus, Esq. (Orange, NJ).

³ City Clerk Dwight Mitchell was the original Custodian.

reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council reached its decision that Dwight Mitchell was the Custodian at the time of the request and response based upon OPRA's clear definition that a custodian of records in a municipality is the municipal clerk, that Dwight Mitchell was the Clerk at the time of the request and response, that the City did not provide the GRC with official notice designating someone other than Clerk Mitchell to act as the custodian of records during the time of the request and response, and that at all times relevant no one notified the GRC that there was a custodian of records other than the statutorily delineated Custodian. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

2. Notwithstanding the fact that the GRC did not make a mistake requiring reconsideration, pursuant to N.J.A.C. 5:105-2.10(a) the Council, at its own discretion, may reconsider any decision it renders. Therefore, because the Council's October 31, 2017 Interim Order directs former City Clerk Dwight Mitchell to suffer a pecuniary penalty, and because there were several other municipal employees who had some involvement with this matter, this complaint should be referred to the Office of Administrative Law for a hearing to make factual findings based on witnesses' testimony to determine whether any municipal official other than Mr. Mitchell should be ordered to pay the civil penalty pursuant to N.J.S.A. 47:1A-11(a). If a municipal official other than Mr. Mitchell is found to be subject to the penalty, that person's position or former position, name and address (if a former employee) shall be identified. If no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council's October 31, 2017 Interim Order shall remain in full force and effect.

Procedural History:

On June 28, 2018, the Council distributed its June 26, 2018 Interim Order to all parties. On August 18, 2018, the Government Records Council ("GRC") transmitted this complaint to the Office of Administrative Law ("OAL").

On October 2, 2020, the Honorable Andrew M. Baron, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter. The ALJ's Initial Decision provided the parties thirteen (13) days from mailing to submit to the GRC exceptions to the decision. On October 21, 2020, the GRC received exceptions from the Complainant.⁴

On November 12, 2020, the GRC sought a forty-five (45) day extension to accept, reject, or modify the ALJ's Initial Decision. On December 15, 2020, the GRC followed up with the OAL on the status of its extension request.

⁴ October 15, 2020 was the thirteenth (13th) day following mailing of the Initial Decision. Although the GRC did not receive the exceptions until October 21, 2020, the evidence of record reveals they were mailed on October 14, 2020. As such, the GRC will consider the exceptions to have been timely delivered to the GRC on the date of mailing.

Analysis

Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ's Initial Decision set forth in pertinent part, that:

*While Ms. Gordon's dissatisfaction with the City Clerk's office and Corporation Counsel may be well founded, I **CONCLUDE** that no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with Ms. Gordon's OPRA request. This particular part of the relief she is requesting on remand from the Appellate Division and by transmittal for further proceedings by the GRC has been appropriately addressed with the imposition of a \$1,000 penalty against former City Clerk Dwight Mitchell who had not yet retired from his position as City clerk and the primary Custodian of Records.*

ORDER

*It is **ORDERED** that petitioner's complaint be **DISMISSED** with prejudice.*

Complainant's Exceptions to the Initial Decision

The Complainant objected to the ALJ's Initial Decision finding that, other than Mr. Mitchell, ". . . no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with [Complainant's] OPRA request." The Complainant argued that Deputy Municipal Clerk Madeline Smith was acting as the custodian of records in the absence of the Custodian, Mr. Mitchell, who was on an extended absence. The Complainant asserted that Ms. Smith stated that she became the Deputy City Clerk on July 2, 2013, and was in that position assuming the duties of Mr. Mitchell during the time of the Complainant's OPRA request. The Complainant argued that this personnel assignment was a "fact also accepted by the OAL Court." The Complainant stated that, as such, the ALJ should have decided that Ms. Smith was responsible for the denial. The Complainant argued that because Mr. Mitchell was on an extended absence from work during the time of her request, Ms. Smith was the responsible custodian of records. The Complainant further argued that the civil penalty assessed against Mr. Mitchell should be transferred to Ms. Smith, who was the actual custodian of records at the time.

The Complainant also argued as a second point that the ALJ rejected her arguments that unresponsive records were disclosed in response to her OPRA request. The Complainant asserted that Ms. Smith should have responded that there were no records responsive to her request. Instead, the Complainant argued that both Ms. Smith and Assistant City Attorney Avram White, who assured the GRC of the records' content, violated OPRA.

The Complainant asked the GRC to find that Deputy Municipal Clerk Madeline Smith was the custodian of records in this matter from its inception to its September 30, 2014 Final Decision. As such, the Complainant argued that the Council should transfer its prior assessment of the civil penalty from Mr. Mitchell to Ms. Smith. The Complainant also stated that the Council should find that the "City gave a false response to the Council's April 29, 2014 Interim Order" (sic) and that a true response is still outstanding. The Complainant asserted that the Council should also find that Assistant City Attorney White knowingly and willfully prevented Complainant's receipt of the lawful response to the OPRA request and should also be subject to a civil penalty.⁵

The Complainant, based upon her argument in the exceptions, clearly wants the Council to reconsider all of its prior decisions with respect to this complaint. However, such was not the purpose of the OAL proceeding. The Council had previously addressed the unlawful denial of access in its April 29, 2014 Interim Order by finding that the Custodian failed to provide the Complainant with a specific lawful basis for denying access. As such, the Council ordered the Custodian to disclose the requested records to the Complainant. The Council also previously

⁵ The Complainant also stated that she has a reconsideration of the ALJ's decision pending before the OAL. The Complainant claims that the ALJ's Initial Decision contains a number of inaccuracies. For this reason, she is asking the Council to delay any further adjudication on this complaint with respect to the ALJ's Initial Decision until after she obtains the OAL's disposition on her reconsideration request. The Complainant also filed supplemental exceptions out of time (mailed on November 5, 2020 and received by the GRC on November 21, 2020); therefore, the GRC will not consider same. However, the supplemental submission did state that the request for reconsideration of the ALJ's decision was rejected.

reached its decision that Dwight Mitchell was the Custodian of Record at the time of the request and response, that the City did not provide the GRC with official notice designating someone other than Clerk Mitchell to act as the custodian of record during the time of the request and response, and that at all times relevant no one notified the GRC that there was a custodian of record other than the statutorily-designated Custodian. And by Interim Order dated October 31, 2017, the Council directed former City Clerk Dwight Mitchell, the statutorily delineated Custodian, to pay a civil penalty pursuant to N.J.S.A. 47:1A-11(a).

The Council's June 26, 2018 Interim Order referred this matter to the OAL for the very limited purpose of determining whether any municipal official *other than Mr. Mitchell* should be ordered to pay the civil penalty pursuant to N.J.S.A. 47:1A-11(a). The GRC is not persuaded by the Complainant's argument in the exceptions that the Council should either modify or reject the ALJ's decision.

The ALJ fairly summarized the Custodian's testimony and evidence before him, explaining how he weighed the proofs and why he credited certain testimony. The ALJ's conclusions are aligned and consistent with those credibility determinations. As such, the GRC is satisfied that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Accordingly, the Council should accept the ALJ's Initial Decision concluding “. . . that no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with Ms. Gordon's OPRA request . . . [because] [t]his particular part of the relief she is requesting on remand from the Appellate Division and by transmittal for further proceedings by the GRC has been appropriately addressed with the imposition of a \$1,000 penalty against former City Clerk Dwight Mitchell . . . the primary Custodian of Records.” Id. at 14. However, the Council should reject the ALJ's Order that “. . . petitioner's complaint be DISMISSED with prejudice” because the Council in its June 26, 2018 Interim Order determined that “[i]f no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council's October 31, 2017 Interim Order shall remain in full force and effect.” The ALJ did conclude that no municipal official other than Mr. Mitchell should be subject to the penalty; therefore, the complaint should not be dismissed because the Council's October 31, 2017 Interim Order remains in full force and effect.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should accept the Administrative Law Judge's Initial Decision concluding “. . . that no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with Ms. Gordon's OPRA request . . . [because] [t]his particular part of the relief she is requesting on remand from the Appellate Division and by transmittal for further proceedings by the GRC has been appropriately addressed with the imposition of a \$1,000 penalty against former City Clerk Dwight Mitchell . . . the primary Custodian of Records.” Id. at 14. However, the Council should reject the Administrative Law Judge's Order that “. . . petitioner's complaint be DISMISSED with prejudice” because the Council in its June 26, 2018 Interim Order determined that “[i]f no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council's October 31, 2017 Interim Order shall remain in full force and effect.” The Administrative Law Judge did conclude that no municipal official

other than Mr. Mitchell should be subject to the penalty; therefore, the complaint should not be dismissed because the Council's October 31, 2017 Interim Order remains in full force and effect.

Prepared By: John E. Stewart

December 8, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 12959-18

AGENCY DKT. NO. 2013-255

KATALIN GORDON,

Petitioner,

v.

CITY OF ORANGE (ESSEX),

Respondent.

Katalin Gordon, petitioner, pro se

Chirag D. Mehta, Assistant City Attorney, for respondent (Gracia Robert Montilus, City Attorney, attorney)

Record Closed: July 28, 2020

Decided: October 2, 2020

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Katalin Gordon, filed a Denial of Access Complaint (Complaint No. 2018-16) with the New Jersey Government Records Council (GRC or Council) alleging that the City of Orange (the City) had denied access to records she had requested in an Open Public Records Act (OPRA) request she submitted on June 25, 2013 and July 24,

2013 regarding disability payments and ongoing litigation between the City of Orange and its Clerk, Dwight Mitchell.

PROCEDURAL HISTORY

The City Clerk received Gordon's initial OPRA request for records of all disability payments to City Clerk Dwight Mitchell on June 25, 2013. Responding on behalf of the Acting Clerk, Madeline Smith, Ms. Laressa Bradshaw, an employee but not a Clerk requested an extension of time to respond so she could consult with counsel for the City regarding the request. On July 9, 2013, petitioner gave consent to an extension of time for the City to respond through July 16, 2013. Some of the requested information, including payroll records was released, but the City declined to release disability payments and sick days accumulated by Mr. Mitchell due to what it deemed, "ongoing and pending litigation. A series of emails between the petitioner and the City ensued between July 3, 2013 and July 24, 2013, wherein Ms. Bradshaw, acting at the directing of Acting Clerk Madeline Smith, directed petitioner to file a second OPRA request which she did on July 24, 2013, requesting records of pending litigation between the City and City Clerk Dwight Mitchell from January 1, 2010 through current. On July 11, 2013, writing on behalf of the City Clerk's office, Ms. Bradshaw advised petitioner that the disability insurance payments to City Clerk Mitchell could not be released at the direction of the Law Department due to ongoing and pending litigation between the City and Mr. Mitchell. Two Deputy City Attorneys, Dan Smith and Avram White as well as Madeline Smith, Deputy Clerk, were copied on this correspondence. On July 18, 2013, petitioner asked Ms. Bradshaw to ask the Law Department for a specific OPRA reference justifying the denial of records. On July 23, 2013, Madeline Smith who took over as Acting Clerk, advised petitioner no further explanation was forthcoming, essentially the City stood by its decision. Not satisfied with the response, petitioner filed a Denial of Access Complaint with the Government Records Council.

At the April 29, 2014 public meeting the GRC considered the Findings and Recommendations of the Council Staff and related documentation submitted by the parties and issued an Interim Order, establishing that the custodian did not establish its burden of showing that the City timely responded to petitioner's OPRA requests. The

GRC also determined that the City's July 11, 2013 response to petitioner was insufficient because there was no specific legal basis provided to deny the records. The City Custodian of Records was given five business days to comply with appropriate redactions. The GRC deferred an analysis as to whether the initial denial was willful and wanton until compliance with the Order was Certified. At the March 26, 2019, public meeting the GRC considered the March 19, 2019, Supplemental Findings and Recommendations of the Council Staff and related documentation submitted by the parties and issued an Interim Order, dated March 26, 2019 (March Interim Order). The June 26, 2018 Order referred the matter to the Office of Administrative Law (OAL) for a proof hearing to determine whether Mr. Mitchell, or other employees of the City who were involved in the denial of information to petitioner should be financially accountable under the penalty section of OPRA.

At its meeting on September 30, 2014, the Government Records Council considered Supplemental Findings and Recommendations of the Executive Director and related documents submitted by the parties. The Council determined that the Custodian of Records had in fact complied with the Council's prior Order of April 29, 2014 in that she provided the disability payments and sick days accumulated by former Clerk Dwight Mitchell, and, although the Custodian did not respond to petitioner's initial OPRA requests in a timely manner by its failure to provide a legal basis for denying the records, the Custodian's actions did not rise to the level of a knowing and unreasonable denial of access under the totality of the circumstances.

Not satisfied with the determination that there was no willful and wanton withholding of information, petitioner brought an appeal before the Appellate Division. On June 26, 2017, the Appellate Division determined that further proceedings on the issue of willful and wanton withholding of information were warranted and remanded the matter back to the Government Records Council for further proceedings.

On October 17, 2017, following the remand from the Appellate Division, the Government Records Council met again, and adopted findings that former City Clerk Dwight Mitchell, who still retained the title of City Clerk while petitioner made her initial

OPRA requests, was liable to pay a civil penalty in the amount of \$1,000 (one thousand dollars) the minimum statutory fine for an OPRA violation.

The GRC met one final time to adopt Supplemental Findings, that in addition to Mr. Mitchell, who remained as City Clerk even while collecting his full salary which the City characterized as disability, if there were other City officials, who may have been involved in the withholding of documents, the matter should be transmitted to the Office of Administrative Law for factual findings on this issue.

On August 18, 2018, the Government Records Council transmitted the matter to the Office of Administrative Law for a hearing to determine if any other official, in addition to Mr. Mitchell, should be responsible for paying a penalty under OPRA for willful and wanton withholding of information.

The hearing was held on February 19, 2019, and again on December 19, 2019, pending receipt of the parties' post-hearing submissions, which were submitted on March 5, 2020. Shortly thereafter, the onset of Covid followed with a shutdown of the physical office of the Office of Administrative Law coupled with a series of Executive Orders extending the time for open and pending agency matters and decisions.

FACTUAL DISCUSSION AND FINDINGS

Petitioner testified on her own behalf. Madeline Smith, the former Acting Clerk testified on behalf of the respondent.

Preliminary Facts

After due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following preliminary facts:

Katalin Gordon is a senior citizen and a longtime resident of the City of Orange. As a concerned citizen and taxpayer, she frequently attends City council meetings, and

monitors the actions of members of the Council and various City officials. Sometime in 2013, Ms. Gordon sought information from the Office of the City Clerk concerning whether City Clerk Dwight Mitchell, who had been absent from his position for some time was receiving disability or other forms of salary payments from the City.

Accordingly, on June 25, 2013, petitioner filed a formal OPRA request with the Office of the Clerk, requesting:

- 1) All disability insurance payments City Clerk Dwight Mitchell has received from the City of Orange, from January 1, 2010 to current; and
- 2) All sick days accumulated by City Clerk Dwight Mitchell from January 1, 2010 to current.

On July 3, 2013 Ms. Bradshaw, an employee of the Office of the City Clerk, acknowledged the request, and after meeting with James Wolfe, Esq, and Avram White of the City's Corporation Counsel office, an extension to respond was requested by Ms. Bradshaw on behalf of the Clerk's office. After taking a short period to consider the extension request, the petitioner Ms. Gordon gave her consent.

Between the July 4th holiday, and then Ms. Bradshaw being out of the office due to illness, it took the City some time to develop and provide a response.

On July 11, 2013, Ms. Bradshaw, on the advice of Mr. Wolfe and Mr. White of the counsel's office, declined to provide the information based on "ongoing and pending litigation."

Thereafter, on July 18, 2013, petitioner asked for more specific reasons why the information could not be released under OPRA. After consulting with Madeline Smith, who had been appointed to serve as Deputy Clerk for the City, Ms. Gordon, was not given more specific reasons, but was asked to file another OPRA request concerning the OPRA legal reasons for the denial, as Ms. Smith deemed it a new topic.

In her follow up dated July 23rd, Ms. Smith refers to various citizens who try to keep their OPRA requests open by asking follow up questions. Ms. Smith seems to suggest that

Ms. Gordon falls into this category, and Ms. Smith seems to complain that her office needs to be more efficient with the volume of requests it is receiving.

Although conflicted about doing so, on July 24, 2013, Ms. Gordon complied with the City's request, and filed a second OPRA request seeking the following information:

"Please provide all records in your possession or those parts of the same that are accessible through OPRA from January 2010 to current, which show ongoing and pending litigation involving City Clerk, Dwight Mitchell."

On August 2, 2013, the City, by its representative employee Ms. Bradshaw, responded to Ms. Gordon stating that Assistant City Attorney Avram White had reviewed the second OPRA request, and had determined that the documents fall into one or more of the following categories:

- 1) Inter-agency advisory, collaborative or deliberative material.
- 2) Records that are subject to attorney-client privilege
- 3) Information which is a communication between a public agency and its insurance carrier.
- 4) Information generated by or on behalf of public employers or public employees in connection with any grievance filed by or on behalf of an individual
- 5) Ongoing investigations any records pertaining to an investigation in progress by any public agency if disclosure of such record records shall be detrimental to public interest.

A meeting with Mr. White was suggested. Ms. Gordon agreed to meet on August 5, 2013, which coincided with the seven-day response time to her second request. It is unknown if such a meeting took place, and Ms. Gordon moved forward with a formal complaint before the Government Records Council.

It is not necessary here to repeat and restate the entirety of the proceedings before the Government Records Council. The Interim Orders of the GRC dated April 29, 2014, September 30, 2014 are self-explanatory, as are the Appellate Division

decision of June 2017 remanding the matter to the GRC on the issue of willful and wanton actions, and the final GRC Order assessing a penalty against Dwight Mitchell and transmitting the matter for further proceedings to the Office of Administrative Law to determine if a penalty should be assessed against any other City officials involved in the delayed OPRA response to Ms. Gordon.

Ms. Gordon alleges that a penalty should also be assessed against Assistant City Attorney Avram White for misrepresentations and false statements she contends he made to the GRC. She also seeks to have a penalty assessed against Deputy Clerk Madeline White for her failure to seek independent legal advice concerning the release of the requested records after the Corporation Counsel directed her not to release the records.

Mr. White was not called or produced as a witness by either side during the OAL hearing. Ms. Smith did testify as did Ms. Gordon.

Testimony

Katalin Gordon

Ms. Gordon provided some background on the reason for the OPRA request and the subsequent litigation. She indicated that she and other residents who regularly monitor and attend council meetings became concerned that Dwight Mitchell, the City Clerk, was not in the office and not in attendance at the council meetings.

As a result, she submitted three separate OPRA requests, the first two of which requested documents concerning disability payments and all sick days paid to Mr. Mitchell from January 1, 2010 to July 2013. In addition to the penalty assessed against Mr. Mitchell, Ms. Gordon seeks to have a penalty assessed against Ms. Smith.

Her third OPRA request involved seeking clarification as to the legal basis for the denial. Later in her testimony Ms. Gordon confirmed she ultimately did receive the requested information after she filed a complaint with the Government Records Council,

and she went through the chronology of events from the time of her initial OPRA request through August 2013. She also continued that as far as she knew, Mr. Mitchell retained his status as the clerk until he retired, but she stated that Ms. Smith was the custodian.

Madeline Smith

Ms. Smith became the Deputy City Clerk for Orange in July 2013. She inherited the OPRA requests which were filed by Ms. Gordon the month before, and in July 2013 as well. Ms. Smith initially assigned one of the office's employees, Laressa Bradshaw to handle the inquiries. Ms. Smith took over in the absence of Dwight Mitchell, who retained the title of City clerk but was out on a long-term medical leave.

Ms. Smith indicated that she reported to the City council, not Mr. Mitchell. She does not dispute that she was the Custodian of Records for the City of Orange at the time.

With regard to the type of records Ms. Gordon was seeking, Ms. Smith indicated she had to wait for a response from the Finance Department, as the request involved salary, disability and sick leave information.

Due to the nature of the request, Ms. Smith and Ms. Bradshaw sought guidance from the City Law Department. They were directed by the law Department not to release the information due to ongoing and pending litigation between the City and Mr. Mitchell. On July 11, 2013, this was communicated to Ms. Gordon, and a series of emails ensued over the course of the next three weeks, with Ms. Gordon asking for a more specific basis for the withholding of the information under OPRA followed by the City's response to same. Although Ms. Gordon suggests Ms. Smith should have sought independent advice from the OPRA Clerk hotline, Ms. Smith abided by the advice she received from the legal department concerning the protected nature of the documents. At no time were there discussions about providing some of the documents in a redacted form. The documents were ultimately released following an Order of the Government Records Council.

Avram White

Though not a witness, Assistant City Attorney Avram White has at least two connections to Ms. Gordon's allegations of OPRA violations and the request to impose penalties. Mr. White, who was and is an Assistant City Attorney in the Orange Law Department, was the author of communications with Ms. White who sought guidance in June and July 2013 on how to address Ms. Gordon's OPRA requests concerning payments to Mr. Mitchell. The documentation of record shows that in Mr. White's opinion, due to ongoing and pending litigation between Mr. Mitchell and the City, Ms. White could not release the information. (Upon inspection of documents provided to Ms. Gordon in late 2018 in connection with this proceeding, the face sheet of what turned out to be a Worker's Compensation petition and the City's one page Answer were of such a generic nature, had these documents been supplied in hindsight, it may have averted the need for all of the subsequent proceedings that followed including this one.

Even if had testified, Mr. White would not have been classified as a custodian, therefore, there would not have been a legal basis to assess a penalty against him. Nonetheless, other than Mr. Mehta who took over the file, the law department seemed to display a "cavalier" attitude against Ms. Gordon that carried over into this proceeding, again, other than Mr. Mehta.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 47:1A-1 to -13 is commonly known as the Open Public Records Act, or OPRA. According to N.J.S.A. 47:1A-1, the New Jersey Legislature has found and declared it to be the public policy of this State that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [the OPRA] shall be construed in favor of the public's right of access," and that "all government records shall be subject to public access unless exempt from such access."

“Public agency” or “agency” includes 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. “Custodian of a government record” or “custodian” means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency’s director or governing body. N.J.S.A. 47:1A-1.1.

“Government record” or “record” means 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.”** N.J.S.A. 47:1A-1.1 (emphasis added). However, a government record does not include certain information deemed to be confidential for the purposes of the OPRA. N.J.S.A. 47:1A-1.1.

Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record. N.J.S.A. 47:1A-5(h). Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. N.J.S.A. 47:1A-5(i). 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, unless the requestor has elected not to provide a name, address, or

telephone number, or other means of contacting the requestor. Ibid. 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. Ibid. The requestor shall be advised by the custodian when the record can be made available. Ibid. If the record is not made available by that time, access shall be deemed denied. Ibid.

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may institute a proceeding to challenge the custodian's decision by filing an action in Superior Court or may file a complaint with the Government Records Council. N.J.S.A. 47:1A-6. The public agency shall have the burden of proving that the denial of access is authorized by law. Ibid. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. Ibid. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee. Ibid.

N.J.S.A. 47:1A-7(a) establishes a Government Records Council in the Department of Community Affairs. The GRC is authorized to receive, hear, review, and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian. N.J.S.A. 47:1A-7(b). If the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the GRC shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the "Administrative Procedure Act," insofar as they may be applicable and practicable. N.J.S.A. 47:1A-7(e). The GRC shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to OPRA. Ibid. 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 GRC may impose the penalties provided for in section N.J.S.A. 47:1A-11.

Pursuant to N.J.S.A 47:1A-11(a), a public official, officer, employee, or custodian who knowingly and willfully violates OPRA, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000

for an initial violation, \$2,500 for a second violation that occurs within ten years of an initial violation, and \$5,000 for a third violation that occurs within ten years of an initial violation.

Gordon's Denial of Access Complaint Form lists the following as the records to which access was denied:

On remand from the Appellate Division, the GRC on June 24, 2018, assessed a \$1,000 (one thousand dollar) penalty against City Clerk Dwight Mitchell, who remained the Clerk of record at the time of petitioner's initial requests of June and July 2013 respectively, even though he was not physically working in the office. Ironically, it is information that petitioner sought about payments from the City to Mr. Mitchell while he was out of the office on an extended medical leave and prior to his retirement that triggered the series of events that led to the imposition of the penalty due to a violation of OPRA. Petitioner seeks relief in this proceeding to have multiple penalties assessed against other officials in the Clerk's office, including but not limited to Deputy Clerk Madeline White, Chanel Smith, Maggie Hamier and Assistant City Attorney Avram White for their respective roles in the delayed disclosure of the records petitioner sought.

With respect to the assessment of more penalties against other City officials in view of the foregoing, I **FIND** that petitioner has not established a basis for the assessment of more penalties to be imposed other than the penalty already imposed by the GRC against Mr. Mitchell. Ms. White, the Deputy Clerk, followed the advice and direction of the legal Department of the City. Whether or not I agree with the advice she received is not before me. In fact, an examination of Mr. Mitchell's Worker's Compensation petition, and the City's response, were generic in nature and could have and should have been provided to Ms. Gordon as part of her original inquiries in June and July 2013 respectively. There does not seem to be anything so inherent or confidential in either of those documents that were privileged that could not be turned over. Again though, while I may not agree with the legal advice Ms. White received, that is not before me, as the GRC and the Appellate Division have already ruled on this issue. Petitioner also suggests that Ms. White could have and should have disregarded the legal advice she received, and instead turned to an independent legal source such as the Clerk's OPRA hotline, in order to respond to the OPRA inquiry. As such, I **CONCLUDE** that having heard and observed Ms. Smith in

person, that it not a logical outcome, as it was a natural action for her to turn to her local Law Department for advice and counsel as to how to respond to petitioner's two inquiries. Notwithstanding the foregoing, I did see firsthand, evidence of a "cavalier" attitude by the Law Department regarding Ms. Gordon, first by the length of time it took the first attorney who appeared before me to enter an appearance, respond to interrogatories which led to cancellation of at least one hearing date. That attorney was ultimately replaced by Mr. Mehta who completed the case, and who I do not hold responsible for the errors of his predecessors.

Prior to the start of Ms. Smith's testimony on February 19, 2019, there was a colloquy with petitioner and the City attorney at the time regarding which witnesses who she wanted to call. Assistant City Attorney Avram White, against whom she alleges made false representations to the GRC for which petitioner wants held accountable by way of penalty was not identified by petitioner to be called to testify. While the advice he gave to Ms. Smith about withholding documents may have been suspect, without hearing from him in person, I do not see a basis to impose a penalty against him, nor was there a finding by the GRC in any of its proceedings that Mr. White made false statements or representations. I therefore **CONCLUDE** there is no further basis to assess more penalties against Mr. White or any other representatives of the Clerk's office or the Finance office in the City of Orange.

Likewise, there was no evidence that anyone directed Ms. Smith or Ms. Bradshaw to purposely drag out or deny Ms. Gordon's requests because they were frustrated with Ms. Gordon for making similar requests over time. Accordingly, I **FIND** that the City provided the records in accordance with the GRC Orders, and as such, I **CONCLUDE** that the totality of the circumstances reflects that the Clerk's office in Orange was in transition, with Mr. Mitchell out on medical leave, Ms. Smith having just been appointed to serve as Deputy Clerk, and Ms. Bradshaw out of the office due to illness for at least a week, all around the time of Ms. Gordon's respective OPRA requests. with OPRA requests and that the Deputy Clerk and Ms. Bradshaw were mindful of the time constraints to comply with Ms. Gordon's OPRA request. Since the requests involved salary and related information, they deemed it appropriate to consult with the Law Department before going further. Any records the City made, maintained, received, or kept on file relative to Ms. Gordon's OPRA

request, were maintained by the Finance Department, as testified to by Ms. Smith. It is understandable that while Ms. Gordon may have ultimately been entitled to the records, as ordered by the GRC, financial records from a three-year period do take some time to secure and produce. The record further reflects numerous emails between Ms. Gordon, the Orange Law Department and the Acting Clerk during that period relative to Ms. Gordon's OPRA request and to at least one other OPRA request she had made. Further, "[i]t is clear that willful misconduct requires 'much more' than mere negligence." Alston v. City of Camden, 168 N.J. 170, 185 (2001). The advice to the Deputy Clerk by Mr. White to withhold the information based on legal grounds, and the reliance by Ms. Smith on such advice may have been negligent, but does not rise to the level of willful and wanton, and without testimony from Mr. White on this issue, some of which may have been subject the attorney-client privilege anyway, the standard for the imposition of a financial penalty against Mr. White, Ms. Smith or anyone else involved in the delayed production of documents to Ms. Gordon has not been met.

While Ms. Gordon's dissatisfaction with the City Clerk's office and Corporation Counsel may be well founded, I **CONCLUDE** that no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with Ms. Gordon's OPRA request. This particular part of the relief she is requesting on remand from the Appellate Division and by transmittal for further proceedings by the GRC has been appropriately addressed with the imposition of a \$1,000 penalty against former City Clerk Dwight Mitchell who had not yet retired from his position as City clerk and the primary Custodian of Records.

ORDER

It is **ORDERED** that petitioner's complaint be **DISMISSED** with prejudice.

I hereby **FILE** my Initial Decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final

decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, P.O. Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 2, 2020

DATE



ANDREW M. BARON, ALJ

Date Received at Agency:

October 2, 2020 _____

Date Mailed to Parties:

October 2, 2020 _____

APPENDIX

Witnesses

For Petitioner:

Katalin Gordon

For Respondent:

Madeline Smith

Exhibits

For Petitioner:

- P-1 Respondent Submission to Government Records Council, dated May 9, 2014
- P-2 GRC Interim Order
- P-3 GRC Denial of Access Complaint
- P-4 GRC Correspondence to Dwight Mitchell, dated September 11, 2013
- P-5 Second OPRA Request, dated July 24, 2013
- P-6 Orange Personnel Policies and Procedures, dated May 27, 2014
- P-7 GRC Exec. Director to Gordon, dated July 22, 2014
- P-8 Gordon communication to GRC Exec. Director, dated June 3, 2014
- P-9 Third OPRA request, dated June 6, 2014
- P-10 City Appellate brief
- P-11 City Administrator Answers to Interrogatories



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2013-255

v.

City of Orange (Essex)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council ("Council") considered the June 19, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council reached its decision that Dwight Mitchell was the Custodian at the time of the request and response based upon OPRA's clear definition that a custodian of records in a municipality is the municipal clerk, that Dwight Mitchell was the Clerk at the time of the request and response, that the City did not provide the GRC with official notice designating someone other than Clerk Mitchell to act as the custodian of records during the time of the request and response, and that at all times relevant no one notified the GRC that there was a custodian of records other than the statutorily delineated Custodian. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.
2. Notwithstanding the fact that the GRC did not make a mistake requiring reconsideration, pursuant to N.J.A.C. 5:105-2.10(a) the Council, at its own discretion, may reconsider any decision it renders. Therefore, because the Council's October 31, 2017 Interim Order directs former City Clerk Dwight Mitchell to suffer a pecuniary penalty, and because there were several other municipal employees who had some involvement with this matter, this complaint should be referred to the Office of Administrative Law for a hearing to make factual findings based on witnesses' testimony to determine whether any municipal official other than Mr. Mitchell should



be ordered to pay the civil penalty pursuant to N.J.S.A. 47:1A-11(a). If a municipal official other than Mr. Mitchell is found to be subject to the penalty, that person's position or former position, name and address (if a former employee) shall be identified. If no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council's October 31, 2017 Interim Order shall remain in full force and effect.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2018

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 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2013-255

v.

**City of Orange (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All disability insurance payments City Clerk Dwight Mitchell has received from the City of Orange, a municipality self-insured through the Orange Insurance Fund, from January 1, 2010, to June 25, 2013.
2. All sick days accumulated by City Clerk Dwight Mitchell from January 1, 2010, to June 25, 2013.

Custodian of Records: Madeline F. Smith³

Request Received by Custodian: June 25, 2013

Response Made by Custodian: July 11, 2013

GRC Complaint Received: September 10, 2013

Background

At its October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Appellate Division in Gordon v. City of Orange (Essex) Custodian of Record, 2017 N.J. Super. Unpub. LEXIS 1552, 2017 WL 2705438, reversed the Council’s September 30, 2014 Final Decision, found that the City willfully and deliberately denied the Complainant’s request, and remanded this matter back to the GRC for the imposition of appropriate penalties in accordance with OPRA, former City Clerk Dwight Mitchell shall pay a civil penalty in the amount of one thousand dollars

¹ No legal representation listed on record.

² Represented by Eric Pennington, Esq. (Orange, NJ).

³ City Clerk Dwight Mitchell was the original Custodian.

(\$1,000.00) for this initial violation pursuant to N.J.S.A. 47:1A-11(a). Pursuant to N.J.S.A. 47:1A-11(a), this penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999” and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant to N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

2. **Former City Clerk Dwight Mitchell shall comply with Item No. 1 above within five (5) business days from receipt of the Council’s Interim Order.**

Procedural History:

On November 1, 2017, the Council distributed its October 31, 2017 Interim Order to all parties. On November 13, 2017, the Complainant filed a request for reconsideration of the Council’s October 31, 2017 Interim Order based on a mistake.⁴ Therein, the Complainant argued that the Council should reconsider this complaint to establish whether Dwight Mitchell, who the Complainant admits was the municipal clerk at the time she submitted the complaint, and upon whom a civil penalty in the amount of one thousand dollars (\$1,000.00) was assessed, was also the Custodian. The Complainant set forth the following nine (9) “material facts” in support of her argument:

1. In paragraph 2 of the Denial of Access Complaint, the Complainant states that she inserted “Madeline Smith, Deputy City Clerk” as the custodian who denied the records.
2. Laressa Bradshaw, an employee in the Clerk’s Office, when communicating with the GRC copied Madeline Smith, not Dwight Mitchell.
3. In the certification of compliance dated May 9, 2014, Deputy Clerk Smith certified that (a) at the time the OPRA request was submitted, Margarette Homer was the Acting Deputy Clerk; (b) on July 1, 2013, Ms. Smith became the Deputy Municipal Clerk; and (c) on December 31, 2013 Dwight Mitchell retired as Municipal Clerk. The Complainant states that from these changes in the deputy clerk position the GRC should have concluded that “ ... the custodianship of the case is implied during the Clerk’s absence.”
4. That in GRC Complaint No. 2011-256, the GRC granted several extensions of time to Deputy Municipal Clerk Shinell Smith in order to give her time to take over the custodian’s role based on the GRC’s knowledge of the extended absence of Clerk Mitchell.⁵

⁴ The Complainant dated the Request for Reconsideration November 10, 2017. The Request for Reconsideration was postmarked November 13, 2017, and it was received by the GRC on November 21, 2017. The GRC will consider the document to have been delivered to the Council on the date of mailing, November 13, 2017.

⁵ The Complainant attached to the Request for Reconsideration a copy of an e-mail dated November 21, 2011, from former GRC case manager Darryl Rhone to Deputy Clerk Shinnel Smith.

5. In its Final Decision of GRC Complaint No. 2011-256, the GRC lists Shinell Smith as the custodian.
6. In GRC Complaint No. 2013-95, the GRC lists Margarete Homer as the custodian.
7. In response to the GRC's inquiry, City Attorney White replied that Clerk Mitchell's receipt of salary and disability payments were the same because Clerk Mitchell was on sick leave covered by disability insurance.
8. The records reflect that it was a Law Department attorney who directed the Custodian not to release the sought document, claiming that there was an ongoing and pending litigation that exempted the sought records from release.
9. It was also a Law Department attorney who advised the GRC that Clerk Mitchell was on disability sick leave. As the records reflect, Clerk Mitchell has not been cleared for disability leave or for compensation.

The Complainant cites to segments of the Appellate Division's remand. The Complainant then concludes by stating, "[i]n the matter of my other allegations the Appellate Court issued no decisions. As the Court returned the case to the GRC, it is now in the GRC's hands to review and adjudicate the remaining items as well."

The Complainant attached a certification to the Request for Reconsideration, which avers that, upon information and belief, Municipal Clerk Dwight Mitchell was on leave from June 25, 2013 until his retirement on December 31, 2013. The Complainant certifies that she regularly visited the Clerk's Office and the Clerk was absent on each occasion. The Complainant also certifies that she was told by Laressa Bradshaw, an employee in the Clerk's Office that the Clerk was on extended sick leave. The Complainant also avers that Deputy Clerk Madeline Smith wrote her shortly after her request was denied, declining to provide a legal explanation for the denial. The Complainant further certifies that during a City Council meeting the Council President stated that Clerk Mitchell was on extended sick leave.⁶

On November 15, 2017, the GRC e-mailed the Custodian's Counsel, requesting that Counsel forward to the GRC a certification acknowledging that former City Clerk Mitchell was served with a copy of the Council's October 31, 2017 Interim Order. In the alternative, the GRC asked Counsel to provide the GRC with Mr. Mitchell's last known address in the event he was no longer employed by the City of Orange in any capacity.⁷

On November 22, 2017, the Complainant e-mailed the GRC seeking prevailing party attorney fees.⁸

⁶ The Complainant did not provide dates for any of the referenced communications.

⁷ This correspondence was transmitted prior to receipt of the Complainant's request for reconsideration.

⁸ While OPRA allows for a prevailing party fee award, a complainant must be represented by an attorney in order to obtain fees. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (May 2013). Here, there is no evidence in the record indicating that the Complainant was represented by legal counsel. Thus, the GRC will not address the Complainant's request because she is not entitled to a fee award.

On November 27, 2017, in reply to the GRC's November 15, 2017 request, the City's Human Resource Manager notified the GRC of Mr. Mitchell's last known address. On the same date, the GRC informed the Human Resource Manager that a request for reconsideration of the Council's October 31, 2017 Interim Order was filed and that the GRC would be taking no further action on the complaint until the Council rendered a decision on the reconsideration.

Analysis

Reconsideration

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).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's October 31, 2017 Interim Order on November 13, 2017, six (6) business days following receipt of the Council's decision.

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, . . . 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

On October 27, 2014, the Complainant appealed the Council's September 30, 2014 Final Decision. On June 23, 2017, the Superior Court Appellate Division determined that there was insufficient evidence in the record to support the Council's finding that the City's denial was not willful and deliberate. The court concluded that the City's willful and deliberate denial of Gordon's request was evinced by its meritless claim that her request was overly broad and that the records requested involved issues regarding ongoing litigation when there was no litigation. As such, the

court reversed and remanded the Council's Decision for further proceedings regarding the imposition of appropriate penalties in accordance with OPRA. On October 31, 2017, the Council rendered an Interim Order in accordance with the court's decision that the City willfully and deliberately denied the Complainant's request, and directed former City Clerk Dwight Mitchell, the statutorily delineated Custodian, to pay a civil penalty pursuant to N.J.S.A. 47:1A-11(a).

On November 13, 2017, the Complainant requested reconsideration of the Council's Interim Order based on a mistake. The Complainant questioned whether Dwight Mitchell, who was the municipal clerk at the time she submitted the complaint, was also the custodian of records and culpable for the unlawful denial. The Complainant set forth nine (9) items listed as "material facts" in support of her argument for reconsideration. The GRC will examine these in turn.

In Item 1, although the Complainant asserted that she listed Madeline Smith as the custodian who denied the records, the alleged "fact" that Ms. Smith denied the records is not supported by the evidence of record. The Complainant submitted the OPRA request to "Dwight Mitchell, RMC" and named "City Clerk Dwight Mitchell" as the person whose personal records she was seeking. The response to the request was forwarded to the Complainant on correspondence with the letterhead "Municipal Clerk, Dwight Mitchell, RMC" and was prepared by Laressa Bradshaw, an employee in the Clerk's Office.

The GRC recognizes that it is often necessary for a superior employee to delegate authority to subordinate employees to carry out routine duties; however, by doing so that superior employee cannot delegate away his/her responsibility for the task carried out by the subordinate employees. The responsibility remains with the superior employee. The GRC has no knowledge of the organizational structure or internal operations of the City of Orange. However, it is clear that in this matter there were numerous persons performing various tasks, some of the positions identified are "deputy municipal clerk," "acting deputy clerk," and "confidential secretary." All of the persons in these positions are clearly subordinate to the municipal clerk and cannot supplant him as the statutorily mandated custodian of records. Moreover, neither Clerk Mitchell nor any other municipal official provided the GRC with evidence of formal action taken by the governing body appointing someone other than the municipal clerk as the custodian of records, whether during Clerk Mitchell's absence or otherwise.

OPRA is clear with respect to the identity of the custodian of records in a municipality. N.J.S.A. 47:1A-1.1 provides that a "[c]ustodian of a government record" or "custodian" means in the case of a municipality, the municipal clerk . . ." However, the GRC in practice will recognize another employee as the custodian of records if it is made clear that such employee is empowered by the municipality to act as the custodian or in the custodian's stead. For this information the GRC does not rely on what a complainant asserts in the complaint, but rather who is named in, and signs, the Statement of Information ("SOI"). In this complaint, the municipality failed to complete and submit the SOI, and for that reason the GRC in the April 22, 2014 Findings and Recommendations of the Executive Director, incorporated by reference into the Council's April 29, 2014 Interim Order, listed "Dwight Mitchell, City Clerk" as the Custodian of Records. The GRC further elaborated in footnote 3 that "[a]lthough Laressa Bradshaw responded to the complaint as well as to the Complainant's subsequent e-mails, ***no one notified the GRC that there was a custodian of records other than the statutorily delineated custodian, City Clerk Dwight***

Mitchell. Further, no Statement of Information setting forth the name of a custodian other than Dwight Mitchell was submitted by the City of Orange.” (Emphasis added).

In Item 2, the Complainant asserts that Laressa Bradshaw, when communicating with the GRC, copied Madeline Smith, not Dwight Mitchell. However, the July 11, 2013 response to the request was written on Dwight Mitchell’s letterhead and signed by Laressa Bradshaw as an employee of the “Clerk’s Office.” Several people, including Madeline Smith, were copied; however, the GRC did not find it unusual that Mr. Mitchell was not copied when a member of his staff was acting on his behalf by sending the correspondence.

Nowhere in the certification of compliance dated May 9, 2014, which was referenced in Item 3 by the Complainant, is a custodian of records other than the municipal clerk identified. In fact, the certification states that Mr. Mitchell “retired as the Municipal Clerk for the City of Orange Township” on December 31, 2013, which is over one-half year after the request which formed the basis of this complaint was submitted. The Complainant states that because there were several changes in the deputy clerk position the GRC should have concluded that “... the custodianship of the case is implied during the Clerk’s absence.” However, the GRC looks to the facts as presented in the evidence of record—it does not infer from changes in personnel assignments that someone other than the municipal clerk is the custodian. Here, no one notified the GRC that there was a custodian of records other than Clerk Mitchell. Moreover, the GRC was not presented with a copy of an ordinance, resolution, or any other evidence of formal action designating someone to act as the custodian of records during Clerk Mitchell’s absence.

In Items 4, 5 and 6 the Complainant references previous GRC complaints in which she stated that the GRC listed persons other than the municipal clerk as the custodian of records. These other decisions are not relevant to the instant complaint because the GRC was lacking facts in the instant complaint that were presented to the GRC in the other complaints.⁹

In Items 7, 8 and 9 the Complainant references communications between the City of Orange Law Department and the GRC. These communications, if properly identified by the GRC,¹⁰ were made sometime after the City’s May 9, 2014 certification of compliance was submitted. As such, they are irrelevant with respect to who was or was not the custodian of record at the time of the request and response in June and July of 2013. Alternatively, if the Complainant referenced these communications to emphasize the point that Clerk Mitchell was on sick and/or disability leave, they do not confirm that he was on such leave at the time of the request and response.

The Complainant concluded by stating, “[i]n the matter of my other allegations the Appellate Court issued no decisions. As the Court returned the case to the GRC, it is now in the GRC’s hands to review and adjudicate the remaining items as well.” The GRC is not sure what the Complainant was referencing with this statement; however, it appears she believes there are

⁹ A review of the case file in the other complaints referenced by the Complainant reveals that an SOI was filed in each of the complaints, and the person the GRC listed as the custodian was the person who signed the certification as the “. . . Custodian charged by the public agency with the responsibility for responding to the request for records on which [the] complaint is based[.]” No SOI identifying the custodian of records was filed in the instant complaint.

¹⁰ The Complainant did not provide dates for the transmission or receipt of the referenced communications.

additional allegations within this complaint that need to be adjudicated by the GRC. The Appellate Division remanded this matter back to the GRC “ ... *for further proceedings regarding the imposition of appropriate penalties in accordance with OPRA.*” Gordon v. City of Orange (Essex) Custodian of Record, Nos. A-4869-13T2, A-1272-14T1, 2017 N.J. Super. Unpub. LEXIS 1552 (App. Div. June 23, 2017) at *13. (Emphasis added).

In its October 31, 2017 Interim Order, the Council complied with the court’s mandate. The Council had previously addressed the unlawful denial of access in its April 29, 2014 Interim Order by finding that the Custodian failed to provide the Complainant with a specific lawful basis for denying access. As such, the Council ordered the Custodian to disclose the requested records to the Complainant. By Interim Order dated September 30, 2014, the Council found that the Custodian complied with its April 29, 2014 Interim Order by certifying that the requested records were disclosed to the Complainant. In the July 22, 2014 Supplemental Findings and Recommendations of the Executive Director, incorporated by reference into the Council’s September 30, 2014 Interim Order, the GRC acknowledged that the Complainant took exception to the content of the disclosed records. However the GRC, citing Kwanzaa v. Dep’t of Corr., GRC Complaint No. 2004-167 (March 2005), stated that the content of the records was not within the Council’s jurisdiction. Thereafter, the Council’s conclusion was noted by the court in Gordon, 2017 N.J. Super. Unpub. LEXIS 1552, by its declaration that:

The [GRC] rejected Gordon’s claim of unresponsiveness by reasoning that it is not within its jurisdiction to determine compliance with its order by interpreting and applying the City’s municipal code to information received from past OPRA requests.

[Gordon, *supra* at *4.]

Accordingly, the Complainant has no other allegations that are “now in the GRC’s hands to review and adjudicate.” All of the Complainant’s allegations were previously adjudicated.

With respect to the Complainant’s certification that she attached to the request for reconsideration, she was only able to provide personal knowledge regarding two matters: (1) that between June 25, 2013 and December 31, 2013, she regularly visited the Clerk’s Office and Clerk Mitchell was absent on each occasion; and (2) that she received correspondence from Deputy Clerk Madeline Smith subsequent to the denial of her request, wherein Ms. Smith declined to provide a legal explanation for denying access.¹¹ The balance of the certification contained hearsay.¹²

With respect to the first matter, the Complainant on page 1 of the request for reconsideration stated that she visited the municipality weekly. The Complainant did not mention the length of time she spent on each weekly visit; however, even if her visit lasted a few hours, it would not be sufficient to draw the conclusion that Clerk Mitchell was continuously absent from

¹¹ The Complainant did not provide the date of the correspondence she stated she received from Deputy Clerk Smith.

¹² The GRC may have been able to substantiate the Council President’s statement by reviewing the meeting minutes; however the Complainant did not provide the date of the City Council meeting.

June 25, 2013 to December 31, 2013. The second matter is not relevant to this complaint because the denial had previously been delivered to the Complainant.¹³

Here, the Council reached its decision that Dwight Mitchell was the Custodian at the time of the request and response based upon OPRA's clear definition that a custodian of records in a municipality is the municipal clerk; that Dwight Mitchell was the Clerk at the time of the request and response in June and July of 2013, that the City did not provide the GRC with a copy of any form of official notice designating someone other than Clerk Mitchell to act as the custodian of records during the time of the request and response, and that at all times relevant no one notified the GRC that there was a custodian of records other than the statutorily delineated Custodian.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council reached its decision that Dwight Mitchell was the Custodian at the time of the request and response based upon OPRA's clear definition that a custodian of records in a municipality is the municipal clerk, that Dwight Mitchell was the Clerk at the time of the request and response, that the City did not provide the GRC with official notice designating someone other than Clerk Mitchell to act as the custodian of records during the time of the request and response, and that at all times relevant no one notified the GRC that there was a custodian of records other than the statutorily delineated Custodian. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, notwithstanding the fact that the GRC did not make a mistake requiring reconsideration, pursuant to N.J.A.C. 5:105-2.10(a) the Council, at its own discretion, may reconsider any decision it renders. Therefore, because the Council's October 31, 2017 Interim Order directs former City Clerk Dwight Mitchell to suffer a pecuniary penalty, and because there were several other municipal employees who had some involvement with this matter, this complaint should be referred to the Office of Administrative Law for a hearing to make factual findings based on witnesses' testimony to determine whether any municipal official other than Mr. Mitchell should be ordered to pay the civil penalty pursuant to N.J.S.A. 47:1A-11(a). If a municipal official other than Mr. Mitchell is found to be subject to the penalty, that person's position or former position, name and address (if a former employee) shall be identified. If no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council's October 31, 2017 Interim Order shall remain in full force and effect.

¹³ The July 11, 2013 response denying access provided as follows "[t]he reason [for the denial] is that there is ongoing and pending litigation. The records requested involve issues regarding the ongoing litigation."

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council reached its decision that Dwight Mitchell was the Custodian at the time of the request and response based upon OPRA's clear definition that a custodian of records in a municipality is the municipal clerk, that Dwight Mitchell was the Clerk at the time of the request and response, that the City did not provide the GRC with official notice designating someone other than Clerk Mitchell to act as the custodian of records during the time of the request and response, and that at all times relevant no one notified the GRC that there was a custodian of records other than the statutorily delineated Custodian. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

2. Notwithstanding the fact that the GRC did not make a mistake requiring reconsideration, pursuant to N.J.A.C. 5:105-2.10(a) the Council, at its own discretion, may reconsider any decision it renders. Therefore, because the Council's October 31, 2017 Interim Order directs former City Clerk Dwight Mitchell to suffer a pecuniary penalty, and because there were several other municipal employees who had some involvement with this matter, this complaint should be referred to the Office of Administrative Law for a hearing to make factual findings based on witnesses' testimony to determine whether any municipal official other than Mr. Mitchell should be ordered to pay the civil penalty pursuant to N.J.S.A. 47:1A-11(a). If a municipal official other than Mr. Mitchell is found to be subject to the penalty, that person's position or former position, name and address (if a former employee) shall be identified. If no municipal official other than Mr. Mitchell is found to be subject to the penalty, the Council's October 31, 2017 Interim Order shall remain in full force and effect.

Prepared By: John E. Stewart

June 19, 2018