



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**

**January 28, 2014 Government Records Council Meeting**

Larry A. Kohn  
Complainant

v.

Township of Livingston (Essex)  
Custodian of Record

Complaint Nos. 2013-55, 2013-56,  
2013-57 and 2013-58

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 Complainant has failed to establish in his request for reconsideration of the Council’s October 29, 2013 Final Decision that 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. The Complainant failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Council already factored into the totality of the circumstances those issues raised by the Complainant in support of his argument that the Council should refer the complaint to the Office of Administrative Law for a knowing and willful hearing. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of 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).

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 28<sup>th</sup> Day of January, 2014

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: January 30, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*  
Supplemental Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2013-55, 2013-56,  
2013-57 and 2013-58<sup>2</sup>**

v.

**Township of Livingston (Essex)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 21, 2012 OPRA request: Electronic copies via e-mail of:

1. Claim narrative provided to “Lawless” referenced in the June 2, 2008 executive session minutes.
2. Formal recommendation from “Lawless” for forensic accountant referenced in the June 2, 2008 executive session minutes.
3. Update on litigation prepared by “Lawless” referenced in the May 4, 2009 executive session minutes.
4. “CM 91” referenced in the June 8, 2009 executive session minutes.
5. Status update prepared by “Lawless” referenced in the September 21, 2009 executive session minutes.
6. Attorney’s report – September, October and November preview referenced in the November 9, 2009 executive session minutes.
7. Update from Counsel referenced in the April 12, 2010 executive session minutes.
8. September 1, 2010 update referenced in the September 13, 2010 executive session minutes.
9. E-mail from “Lawless” referenced in the October 10, 2011 executive session minutes.
10. “Lawless” report referenced in the July 2, 2012 executive session minutes.
11. Log of Change Orders, listing “Added Value Received” referenced in the July 16, 2012 executive session minutes.
12. Proposed agreement referenced in the October 1, 2012 executive session minutes.

December 26, 2012 OPRA request: Electronic copies via e-mail of current balance for the Library Building fund and any other funds/trusts maintained by the Library independent of their 2012 operating budget.<sup>4</sup>

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

<sup>3</sup> Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

Larry A. Kohn v. Township of Livingston (Essex), 2013-55, 2013-56, 2013-57 & 2013-58 – Supplemental Findings and Recommendations of the Executive Director 1

January 14, 2013 OPRA request: Electronic copies via e-mail of the certification of availability of funds for R-12-220.

January 22, 2013 OPRA request: Electronic copies via e-mail of Account No. T-14-55-850-010-463 “Reserve for Accumulated Absences” supporting documentation for a November 8, 2011 disbursement of \$232,000 on Reference No. 5132-6.

**Custodian of Record:** Glenn Turtletaub

**Request Received by Custodian:** December 21, 2012; December 28, 2013;  
January 14, 2013; January 23, 2013

**Response Made by Custodian:** January 7, 2013; January 10, 2013;  
February 13, 2013; January 31, 2013

**GRC Complaint Received:** February 20, 2013

### Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 22, 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, found that:

1. The Custodian complied with the Council’s September 24, 2013 Interim Order because he provided the Complainant with the responsive records via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. Notwithstanding the Custodian’s “deemed” denial of all four (4) OPRA requests and the Custodian’s failure to provide (4) records to the Complainant in five (5) months, the Custodian did not unlawfully deny access to the Complainant’s January 22, 2013 OPRA request and the Council declined to address the December 26, 2012 and January 14, 2013 OPRA requests because the Complainant acknowledged receipt of or did not dispute that no records exist. Further, the Custodian timely complied with the Council’s September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Procedural History:

On November 1, 2013, the Council distributed its Final Decision to all parties. On November 14, 2013, the GRC received the Complainant’s request for reconsideration of the

---

<sup>4</sup> The Complainant requested additional records that are not at issue in this complaint.

Council's Final Decision asserting extraordinary circumstances. The Complainant disputes the Council's holding that the Custodian did not knowingly and willfully deny access to responsive records under the totality of the circumstances and believes the complaint should be referred to the Office of Administrative Law ("OAL") to develop the record.

### 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 GRC received the Complainant's request for reconsideration of the Council's October 29, 2013 Final Decision on November 14, 2013, nine (9) business days from the issuance of the Council's Order.

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).

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 Complainant failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Complainant 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 already factored into

the totality of the circumstances those issues raised by the Complainant in support of his argument that the Council should refer the complaint to the OAL for a knowing and willful hearing. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's October 29, 2013 Final Decision that 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. The Complainant failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Council already factored into the totality of the circumstances those issues raised by the Complainant in support of his argument that the Council should refer the complaint to the Office of Administrative Law for a knowing and willful hearing. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of 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).

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014



**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**

**October 29, 2013 Government Records Council Meeting**

Larry A. Kohn  
Complainant

Complaint Nos. 2013-55, 2013-56, 2013-57  
and 2013-58

v.

Township of Livingston (Essex)  
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 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, finds that:

1. The Custodian complied with the Council’s September 24, 2013 Interim Order because he provided the Complainant with the responsive records via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. Notwithstanding the Custodian’s “deemed” denial of all four (4) OPRA requests and the Custodian’s failure to provide (4) records to the Complainant in five (5) months, the Custodian did not unlawfully deny access to the Complainant’s January 22, 2013 OPRA request and the Council declined to address the December 26, 2012 and January 14, 2013 OPRA requests because the Complainant acknowledged receipt of or did not dispute that no records exist. Further, the Custodian timely complied with the Council’s September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an 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 29th Day of October, 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: November 1, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 29, 2013 Council Meeting**

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2013-55, 2013-56,  
2013-57 and 2013-58<sup>2</sup>**

v.

**Township of Livingston (Essex)<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 21, 2012 OPRA request: Electronic copies via e-mail of:

1. Claim narrative provided to “Lawless” referenced in the June 2, 2008 executive session minutes.
2. Formal recommendation from “Lawless” for forensic accountant referenced in the June 2, 2008 executive session minutes.
3. Update on litigation prepared by “Lawless” referenced in the May 4, 2009 executive session minutes.
4. “CM 91” referenced in the June 8, 2009 executive session minutes.
5. Status update prepared by “Lawless” referenced in the September 21, 2009 executive session minutes.
6. Attorney’s report – September, October and November preview referenced in the November 9, 2009 executive session minutes.
7. Update from Counsel referenced in the April 12, 2010 executive session minutes.
8. September 1, 2010 update referenced in the September 13, 2010 executive session minutes.
9. E-mail from “Lawless” referenced in the October 10, 2011 executive session minutes.
10. “Lawless” report referenced in the July 2, 2012 executive session minutes.
11. Log of Change Orders, listing “Added Value Received” referenced in the July 16, 2012 executive session minutes.
12. Proposed agreement referenced in the October 1, 2012 executive session minutes.

December 26, 2012 OPRA request: Electronic copies via e-mail of current balance for the Library Building fund and any other funds/trusts maintained by the Library independent of their 2012 operating budget.<sup>4</sup>

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

<sup>3</sup> Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

<sup>4</sup> The Complainant requested additional records that are not at issue in this complaint.

January 14, 2013 OPRA request: Electronic copies via e-mail of the certification of availability of funds for R-12-220.

January 22, 2013 OPRA request: Electronic copies via e-mail of Account No. T-14-55-850-010-463 “Reserve for Accumulated Absences” supporting documentation for a November 8, 2011 disbursement of \$232,000 on Reference No. 5132-6.

**Custodian of Record:** Glenn Turtletaub

**Request Received by Custodian:** December 21, 2012; December 28, 2013; January 14, 2013; January 23, 2013

**Response Made by Custodian:** January 7, 2013; January 10, 2013; February 13, 2013; January 31, 2013

**GRC Complaint Received:** February 20, 2013

### Background

September 24, 2013 Council Meeting:

At its September 24, 2013 public meeting, the Council considered the September 17, 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. Although the Custodian timely responded to the Complainant’s December 21 and December 26, 2012 and January 22, 2013 OPRA requests in writing requesting an extension of time to respond to said request, the Custodian’s failure to timely respond in writing within the extended deadlines result in a “deemed” denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, the Custodian’s failure to respond in writing to the Complainant’s January 14, 2013 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has unlawfully denied access to the four (4) records the Complainant identified in his March 29, 2013 letter to the Custodian. N.J.S.A. 47:1A-6. The Custodian shall disclose these records to the Complainant via e-mail. The Council should further decline to address the remaining request items because same were either provided or do not exist.
3. **The Custodian shall comply with item No. 2 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,<sup>5</sup> to the Executive Director.<sup>6</sup>**

4. Since the Custodian responded that no records responsive to the Complainant's January 22, 2013 OPRA request exist and further certified to this fact in the Statement of Information, and because the Complainant did not submit any evidence to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Further, the Council should decline to address the disclosability of the records at issue in the Complainant's December 26, 2012 and January 14, 2013 OPRA requests because he has acknowledged receipt of or has not disputed that no records exist.
5. 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.

#### Procedural History:

On September 25, 2013, the Council distributed its Interim Order to all parties. On September 26, 2013, the Custodian e-mailed to the Complainant the four (4) records required to be disclosed.

On October 1, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that he provided the Complainant with the four (4) records ordered for disclosure by the Council via e-mail on September 26, 2013. The Custodian certifies that the Complainant inspected these records twice and that any delay in scanning and providing same was inadvertent due to personal and staffing issues. The Custodian acknowledges that at the time of the SOI, the records were made available to the Complainant for inspection and that he reviewed same twice and requested copies.

#### Analysis

#### Compliance

At its September 24, 2013 meeting, the Council ordered the Custodian to disclose to the Complainant four (4) records and to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On September 25, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with said Order. Thus, the Custodian's response was due by close of business on October

---

<sup>5</sup> "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."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the records 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.

2, 2013. On September 26, 2013, the first (1<sup>st</sup>) business day after receipt of the Council's Order, the Custodian e-mailed the records to the Complainant. On October 1, 2013, the fourth (4<sup>th</sup>) business day after receipt of the Order, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's September 24, 2013 Interim Order because he provided the Complainant with the responsive records via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

### **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 “... [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 responses and/or lack thereof resulted in a “deemed” denial of all four (4) OPRA requests at issue. Moreover, the Custodian failed to provide (4) records the Complainant sought over a five-month period even after repeated reminders. The Custodian acknowledges that the Complainant reviewed and requested copies of the outstanding records at least twice. Although it is clear that the Custodian granted inspection of the records, the Custodian expressly provided this alternative to allow the Complainant to avoid a possible special service charge and to specifically identify the records for which he wished to receive copies. Thus, regardless of the fact that the Custodian granted inspection of the records, he did so for the purpose of providing copies of those records indicated by the Complainant and subsequently failed to provide same for over five months.

However, notwithstanding the Custodian's "deemed" denial of all four (4) OPRA requests and the Custodian's failure to provide (4) records to the Complainant in five (5) months, the Custodian did not unlawfully deny access to the Complainant's January 22, 2013 OPRA request and the Council declined to address the December 26, 2012 and January 14, 2013 OPRA requests because the Complainant acknowledged receipt of or did not dispute that no records exist. Further, the Custodian timely complied with the Council's September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 complied with the Council's September 24, 2013 Interim Order because he provided the Complainant with the responsive records via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
  
2. Notwithstanding the Custodian's "deemed" denial of all four (4) OPRA requests and the Custodian's failure to provide (4) records to the Complainant in five (5) months, the Custodian did not unlawfully deny access to the Complainant's January 22, 2013 OPRA request and the Council declined to address the December 26, 2012 and January 14, 2013 OPRA requests because the Complainant acknowledged receipt of or did not dispute that no records exist. Further, the Custodian timely complied with the Council's September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

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

October 22, 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

September 24, 2013 Government Records Council Meeting

Larry A. Kohn  
Complainant

Complaint Nos. 2013-55, 2013-56,  
2013-57 and 2013-58

v.

Township of Livingston (Essex)  
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant’s December 21 and December 26, 2012 and January 22, 2013 OPRA requests in writing requesting an extension of time to respond to said request, the Custodian’s failure to timely respond in writing within the extended deadlines result in a “deemed” denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, the Custodian’s failure to respond in writing to the Complainant’s January 14, 2013 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has unlawfully denied access to the four (4) records the Complainant identified in his March 29, 2013 letter to the Custodian. N.J.S.A. 47:1A-6. The Custodian shall disclose these records to the Complainant via e-mail. The Council should further decline to address the remaining request items because same were either provided or do not exist.
3. **The Custodian shall comply with item No. 3 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**

4. Since the Custodian responded that no records responsive to the Complainant's January 22, 2013 OPRA request exist and further certified to this fact in the Statement of Information, and because the Complainant did not submit any evidence to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Further, the Council should decline to address the disclosability of the records at issue in the Complainant's December 26, 2012 and January 14, 2013 OPRA requests because he has acknowledged receipt of or has not disputed that no records exist.
5. 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 24th Day of September, 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: September 25, 2013**

---

<sup>1</sup> "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."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the records 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  
September 24, 2013 Council Meeting**

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2013-55, 2013-56,  
2013-57 and 2013-58**

v.

**Township of Livingston (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 21, 2012 OPRA request: Electronic copies via e-mail of:

1. Claim narrative provided to “Lawless” referenced in the June 2, 2008 executive session minutes.
2. Formal recommendation from “Lawless” for forensic accountant referenced in the June 2, 2008 executive session minutes.
3. Update on litigation prepared by “Lawless” referenced in the May 4, 2009 executive session minutes.
4. “CM 91” referenced in the June 8, 2009 executive session minutes.
5. Status update prepared by “Lawless” referenced in the September 21, 2009 executive session minutes.
6. Attorney’s report – September, October and November preview referenced in the November 9, 2009 executive session minutes.
7. Update from Counsel referenced in the April 12, 2010 executive session minutes.
8. September 1, 2010 update referenced in the September 13, 2010 executive session minutes.
9. E-mail from “Lawless” referenced in the October 10, 2011 executive session minutes.
10. “Lawless” report referenced in the July 2, 2012 executive session minutes.
11. Log of Change Orders, listing “Added Value Received” referenced in the July 16, 2012 executive session minutes.
12. Proposed agreement referenced in the October 1, 2012 executive session minutes.

December 26, 2012 OPRA request: Electronic copies via e-mail of current balance for the Library Building fund and any other funds/trusts maintained by the Library independent of their 2012 operating budget.<sup>3</sup>

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

Larry A. Kohn v. Township of Livingston (Essex), 2013-55, 2013-56, 2013-57 & 2013-58 – Findings and Recommendations of the Executive Director



January 14, 2013 OPRA request: Electronic copies via e-mail of the certification of availability of funds for R-12-220.

January 22, 2013 OPRA request: Electronic copies via e-mail of Account No. T-14-55-850-010-463 “Reserve for Accumulated Absences” supporting documentation for a November 8, 2011 disbursement of \$232,000 on Reference No. 5132-6.

**Custodian of Record:** Glenn Turtletaub

**Request Received by Custodian:** December 21, 2012; December 28, 2013; January 14, 2013; January 23, 2013

**Response Made by Custodian:** January 7, 2013; January 10, 2013; February 13, 2013; January 31, 2013

**GRC Complaint Received:** February 20, 2013

### **Background**<sup>4</sup>

#### Requests and Responses:

##### December 21, 2012 OPRA request

On December 21, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 7, 2013, the Custodian responded in writing seeking five (5) additional business days for Counsel to review the responsive records and redact where necessary. On January 14, 2013, the Complainant requested a status update because the statutorily mandated time frame expired. On January 16, 2013, the Custodian requested an extension of seven (7) business days because of an ongoing review of the responsive records. The Custodian noted that he would provide responsive records on a rolling basis as Counsel’s review is completed.

On February 14, 2013, thirteen (13) business days after the expiration of the extended time frame, the Custodian provided records for request item Nos. 3, 4, 5, 6, 7, 8, 10 and 12. The Custodian further advised that the Township Manager is reviewing request item Nos. 1, 2, 9 and 11 and will need two (2) additional weeks to search for and review responsive records. On March 4, 2013, the Custodian responded advising that the records responsive to item No. 1 are voluminous and contained in a binder the disclosure of which may warrant a special service charge. The Custodian states that, as an alternative, the Complainant may inspect the binder and determine whether some pages will satisfy this item. The Complainant further stated that no record responsive to item Nos. 2 and 11 existed and he provided the Complainant a record responsive to item No. 9.

---

<sup>4</sup> 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.

Larry A. Kohn v. Township of Livingston (Essex), 2013-55, 2013-56, 2013-57 & 2013-58 – Findings and Recommendations of the Executive Director

#### December 26, 2012 OPRA request

On December 26, 2012, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 10, 2013, the Custodian responded seeking an extension of five (5) business days to retrieve the records from off-site storage. On February 14, 2013, nineteen (19) business days after the expiration of the extended time frame, the Custodian disclosed two (2) records and advised that there is no Library Building Fund as it has been exhausted.

#### January 14, 2013 OPRA request

On January 14, 2013, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 28, 2013, the Complainant requested a status update because the statutorily mandated time frame expired. On February 13, 2013, fifteen (15) business days after expiration of the statutorily mandated time frame, the Custodian responded in writing stating that no responsive record exists.

#### January 22, 2013 OPRA request

On January 22, 2013, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 31, 2013, the Custodian responded in writing seeking an extension of time until February 7, 2013, to respond. On February 13, 2013, four (4) business days after the expiration of the extended time frame, the Custodian sought seven (7) additional days to respond because he is awaiting a response from the Chief Financial Officer (“CFO”). On March 1, 2013, the Custodian advised that no responsive records exist.

#### Denial of Access Complaints:

On February 20, 2013, the Complainant filed these Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant contends that he never received a response to his December 21, 2012 OPRA request even after seeking a status update on January 14, 2013. The Complainant contends that the Custodian failed to respond to his December 26, 2012 and January 22, 2013 OPRA requests within the extended time frame. The Complainant further contends that the Custodian failed to respond to his January 14, 2013 OPRA request within the statutorily mandated time frame.

#### Statements of Information:

On March 8 and March 19, 2013, the Custodian filed Statements of Information (“SOI”) for these complaints.

#### December 21, 2012 OPRA request

The Custodian certifies that he received the Complainant’s OPRA request on December 21, 2012. The Custodian certifies that he reviewed the closed session minutes and on January 7, 2013, provided records to the Custodian’s Counsel for her review and redaction, if necessary.

The Custodian certifies that on January 16, 2013, following his assistant's review of the files in the Custodian's possession, the request was forwarded to the Township Manager to search for those records not located. The Custodian certifies that he provided records for eight (8) items on February 14, 2013, explained the reason for the delay and sought additional time to locate records responsive to the last four (4) items. The Custodian certifies that on February 27, 2013, the Manager's Office provided a response to the Custodian and on March 1, 2013, the Manager reviewed the records and determined no redactions were necessary. The Custodian certifies that he responded to the Complainant on March 4, 2013, advising that no records for two (2) of the items existed, provided records for the third (3<sup>rd</sup>) item and requested that the Complainant inspect the binder responsive to the fourth (4<sup>th</sup>) item. The Custodian certifies that after some scheduling issues, the Complainant has not inspected the binder as of March 19, 2013.

The Custodian contends that the Complainant's OPRA request sought failed to identify specific government records and could have been denied under MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>5</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); however, the Custodian attempted to accommodate the request. The Custodian notes that the Complainant failed to acknowledge in his complaint the Custodian's timely request for an extension of time. The Custodian asserts that the Custodian and Township staff spent significant time reviewing the minutes, determining what records were requested, retrieving the records and providing same. The Custodian asserts that the Township Manager and staff spent over a day and a half searching for and retrieving the binder responsive to item No. 1.

The Custodian certifies that all records that exist have been made available to the Complainant at this time and that inspection of the binder will hopefully fully satisfy the Complainant's OPRA request. The Custodian asserts that his actions were not knowing and willful. The Custodian further seeks guidance from the GRC as to what constitutes "readily identifiable records" so that he may best respond to unclear, voluminous and open-ended requests in the future.

#### December 26, 2012 OPRA request

The Custodian certifies that he received the Complainant's OPRA request on December 28, 2012. The Custodian certifies that due to the Township's 200th anniversary, the request was not forwarded to the CFO, Comptroller and Library Director until January 9, 2013. The Custodian certifies that on January 9, 2013, the CFO advised that the Library would have to provide the responsive records.

The Custodian certifies that on January 11, 2013, the Library Bookkeeper provided the Custodian five (5) copies of the "Livingston Public Library, Statement of Assets" dated November 30, 2012 and advised that a December assessment would not be available until 2013. The Custodian certifies that he mistakenly believed that the copies were for a Council meeting and did not realize the records were responsive to the Complainant's OPRA request. The

---

<sup>5</sup> Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

Larry A. Kohn v. Township of Livingston (Essex), 2013-55, 2013-56, 2013-57 & 2013-58 – Findings and Recommendations of the Executive Director

Custodian certifies that it was not until he received a letter from the Complainant on February 11, 2013, that he realized the records were responsive. The Custodian certifies that the Custodian's Assistant obtained a copy of the December 2012 assessment on February 14, 2013, and both records were promptly provided to the Complainant.

The Custodian asserts that the delay in providing the November assessment was inadvertent and his actions were not knowing and willful. The Custodian further asserts that the Complainant's OPRA request sought information instead of identifiable government records and could have been denied under MAG, 375 N.J. Super. at 546, Bent, 381 N.J. Super. at 37, NJ Builders Assoc., 390 N.J. Super. at 180) and Schuler, GRC 2007-151; however, the Custodian attempted to accommodate the request.

#### January 14, 2013 OPRA request

The Custodian certifies that he received the Complainant's OPRA request on January 14, 2013. The Custodian certifies that due to the Township's 200th anniversary, the request was not forwarded to the CFO until January 30, 2013. The Custodian certifies that on the same day, the CFO advised that no records existed. The Custodian responded on February 14, 2013 explaining the reasons for the delay and advising that no records exist.

The Custodian certifies that R-12-220 is a resolution passed by the Township approving settlement of litigation. The Custodian asserts that contrary to the Complainant's beliefs, a certification similar to the one requested is only required when entering into a contract. N.J.A.C. 5:30-5 et seq. The Custodian contends that whether the Complainant believed a record should have existed is of no moment: the GRC has no authority over the content of a record. Kwanzaa v. Dep't of Corrections, GRC Complaint No. 2004-167 (March 2005). The Custodian asserts that the delay in advising that no record existed was inadvertent and his actions were not knowing and willful.

#### January 22, 2013 OPRA request

The Custodian certifies that he received the Complainant's OPRA request on January 23, 2013. The Custodian certifies that due to the Township's 200th anniversary, the request was not forwarded to the CFO until January 30, 2013. The Custodian certifies that on the same day, the CFO advised that no records existed, but then requested an extension of time to perform a search. The Custodian certified that it was not until February 28, 2013 that the Custodian's Counsel verified with the CFO and advised the Custodian that no records existed. The Custodian certifies that he responded on March 1, 2013, advising the Complainant of this fact and providing a reason why no record existed.

The Custodian reasserts his stance that the GRC does not have the authority to adjudicate issues of content and that he did not knowingly and willfully violate OPRA.

## Additional Submissions:

### December 21, 2012 OPRA request

On March 22, 2013, the Complainant disputed that the search conducted was necessary given that the Custodian already provided the minutes to the Complainant in response to a previous OPRA request and would not need to search for them again. The Complainant further contends that reviewing the responsive records for redactions was unnecessary given that the Township's closed session resolutions state that items discussed in closed session would be made available to the public at the conclusion of the relevant matters. The Complainant further questions why the Custodian did not provide the first set of records until February 14, 2013, when the Custodian's Counsel finished her review on January 9, 2013. The Complainant disputes that his OPRA request was invalid because he used the exact terms found in the minutes prepared by the Custodian.

On March 29, 2013, the Complainant advises the Custodian that he reviewed the binder and is requesting that four (4) records be sent to him via e-mail. On April 10, 2012, the Complainant requests an update as to when he will receive the four (4) records. On April 22, 2013, the Complainant again requests an update. On May 28, 2013, the Complainant requests a third (3<sup>rd</sup>) update on when he will receive the four (4) records. On August 14, 2013, the Complainant requests a fourth (4<sup>th</sup>) update.

### December 26, 2012 OPRA request

On March 13, 2013, the Complainant acknowledges that he received the responsive records, but disputes the Custodian's argument that the request was invalid. The Complainant contends that the Custodian could have deemed the request invalid or sought clarification but did neither. The Complainant asserts that the Custodian cannot now argue that the request was invalid.

### January 14, 2013 OPRA request

On March 13, 2013, the Complainant states that he accepts that no record exists and further agrees that the requirement of a certificate for R-12-220 is not within the GRC's purview. The Complainant asserts that he will allow the GRC to adjudicate the remaining issues.

### January 22, 2013 OPRA request

On March 12, 2013, the Complainant questions why it took the Custodian a month to respond stating that no records exist when the CFO advised him of this fact on January 30, 2013. The Complainant further questions why the Custodian did not inform the Complainant of the results of the CFO's second search. The Complainant contends that the CFO's advice proves a transfer of funds occurred and that the supporting documentation should be the transaction "... made in an amount sufficient to replenish the Police salary and wage account." The Complainant contends that this statement negates the Custodian's argument that no records exist. The

Complainant asserts that in addition to the computational information, at a minimum there would be instructions authorizing the transfer.

### Analysis<sup>6</sup>

#### 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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>7</sup> 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, OPRA provides that:

*If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*

Id. (emphasis added).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007 OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were not provided until May 31, 2007. The Council held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

---

<sup>6</sup> 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.

<sup>7</sup> 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.

Larry A. Kohn v. Township of Livingston (Essex), 2013-55, 2013-56, 2013-57 & 2013-58 – Findings and Recommendations of the Executive Director

Id.

Here, the Custodian failed to timely respond to the Complainant's January 14, 2013 OPRA request and further failed to respond to the remaining OPRA requests within the extended time frames set forth in his initial responses to those requests. Thus, the Complainant's OPRA requests are "deemed" denied.

Therefore, although the Custodian timely responded to the Complainant's December 21, December 26, 2012 and January 22, 2013 OPRA requests in writing requesting an extension of time to respond to said request, the Custodian's failure to timely respond in writing within the extended deadlines results in a "deemed" denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). Moreover, the Custodian's failure to respond in writing to the Complainant's January 14, 2013 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, GRC 2007-11.

### **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.

#### **December 21, 2012 OPRA request**

The Complainant's OPRA request sought electronic copies of 12 items. The Custodian eventually provided access to all records or advised that records did not exist. The last outstanding record at issue is a binder responsive to item No. 1. On March 4, 2013, the Custodian offered the Complainant the chance to inspect the binder due to its voluminous nature and determine if he wished to receive copies of any records. The evidence of record indicates that the Complainant conducted an inspection of the binder on March 29, 2013, and identified four (4) records that he wished to receive via e-mail. Thereafter, the Complainant sent four (4) letters over the next five (5) months with no indication that the Custodian provided the Complainant access to these four (4) via e-mail. Thus, even though the Custodian was aware that he was offering inspection of records for the purpose of the Complainant identifying those records he wished to receive copies of, the Custodian unlawfully denied access to same by not subsequently providing the records in a timely manner.

Therefore, the Custodian has unlawfully denied access to the four (4) records the Complainant identified in his March 29, 2013 letter to the Custodian. N.J.S.A. 47:1A-6. The Custodian shall disclose these records to the Complainant via e-mail. The Council should further decline to address the remaining request items because same were either provided or do not exist.

### January 22, 2013 OPRA request

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

The Custodian advised the Complainant on March 1, 2013, that no responsive records existed and subsequently certified to this fact in the SOI. The Complainant disputed the Custodian's response arguing that at the least computation information and instructions authorizing the transaction would constitute the "supporting documentation" sought. The GRC is not satisfied that this information can be reasonably construed as supporting documentation. Specifically, computation information and instructions are information and not identifiable government records.

Thus, since the Custodian responded that no records responsive to the Complainant's January 22, 2013 OPRA request exist and further certified to this fact in the SOI, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49. Further, the Council should decline to address the disclosability of the records at issue in the Complainant's December 26, 2012 and January 14, 2013 OPRA requests because he has acknowledged receipt of or has not disputed that no records exist.

### 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. Although the Custodian timely responded to the Complainant's December 21 and December 26, 2012 and January 22, 2013 OPRA requests in writing requesting an extension of time to respond to said request, the Custodian's failure to timely respond in writing within the extended deadlines result in a "deemed" denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). Moreover, the Custodian's failure to respond in writing to the Complainant's January 14, 2013 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has unlawfully denied access to the four (4) records the Complainant identified in his March 29, 2013 letter to the Custodian. N.J.S.A. 47:1A-6. The Custodian shall disclose these records to the Complainant via e-mail. The Council should further decline to address the remaining request items because same were either provided or do not exist.
3. **The Custodian shall comply with item No. 3 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,<sup>8</sup> to the Executive Director.<sup>9</sup>**
4. Since the Custodian responded that no records responsive to the Complainant’s January 22, 2013 OPRA request exist and further certified to this fact in the Statement of Information, and because the Complainant did not submit any evidence to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). Further, the Council should decline to address the disclosability of the records at issue in the Complainant’s December 26, 2012 and January 14, 2013 OPRA requests because he has acknowledged receipt of or has not disputed that no records exist.
5. 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: Frank F. Caruso  
Senior Case Manager

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

September 17, 2013

---

<sup>8</sup> "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."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the records 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.

Larry A. Kohn v. Township of Livingston (Essex), 2013-55, 2013-56, 2013-57 & 2013-58 – Findings and Recommendations of the Executive Director