



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**June 30, 2015 Government Records Council Meeting**

Michael K. Sharp  
Complainant

Complaint No. 2014-279

v.

Fairfield Township (Cumberland)  
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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 this complaint be dismissed because the Complainant withdrew the complaint via letter dated April 16, 2015. Therefore, no further adjudication is required.

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 30<sup>th</sup> Day of June, 2015

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: July 2, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 30, 2015 Council Meeting**

**Michael K. Sharp<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-279**

v.

**Fairfield Township (Cumberland)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Two (2) separate requests were filed by the Complainant, each dated June 18, 2014, and requesting copies of the following records:

1. “Any and all bids and estimates pertaining to the cap of the convenience center to include the cost estimate for the rubbish clean-up of the convenience center mandated by the State of N.J.”
2. “Any and all DEP documents pertaining to the convenience center and the capping of center being mandated by the State of N.J. Any and all estimates and cost documents for the drainage project completed at the convenience center.”

**Custodian of Record:** Carla Smith  
**Requests Received by Custodian:** June 18, 2014  
**Responses Made by Custodian:** None  
**GRC Complaint Received:** August 4, 2014

**Background**

**December 16, 2014 Council Meeting:**

At the December 16, 2014, public meeting, the Government Records Council (“Council”) considered the December 9, 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, found that:

1. The Custodian failed to comply with the terms of the Council’s October 28, 2014, Interim Order because the Custodian did not provide certified confirmation of compliance to the Executive Director that she disclosed to the Complainant the records set forth in paragraph #2 of said Order within the time provided for

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

<sup>2</sup> Represented by Douglas Burry, Esq. (Mt. Holly, NJ).

compliance, as extended. The Council thus finds that the Custodian, Carla Smith, is hereby in contempt of the Council's Order.

2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 28, 2014, Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. As such, her failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated period, resulted in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i); (b) she denied access to the requested records and failed to provide a legal reason for denying such access. N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-5, N.J.S.A. 47:1A-6; (c) she failed to cooperate with the GRC by responding to the GRC's numerous requests for information, thereby hindering the GRC in their efforts 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..." pursuant to N.J.S.A. 47:1A-7(b); and (d) she failed to comply with the terms of the Council's October 28, 2014, Interim Order, and as such is in contempt of said Order. Accordingly, the Custodian's actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

#### Procedural History:

On December 17, 2014, the Council distributed its Order to all parties. On February 13, 2015, the GRC transmitted the Complaint to OAL. On June 1, 2015, OAL transmitted the complaint back to the GRC because the Complainant withdrew the complaint in writing to the OAL on April 16, 2015.

#### Analysis

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew the complaint via letter dated April 16, 2015. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

Reviewed By: Joseph Glover  
Executive Director

June 23, 2015



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

December 16, 2014 Government Records Council Meeting

Michael K. Sharp  
Complainant

Complaint No. 2014-279

v.

Fairfield Township (Cumberland)  
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council (“Council”) considered the December 9, 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:

1. The Custodian failed to comply with the terms of the Council’s October 28, 2014 Interim Order because the Custodian did not provide certified confirmation of compliance to the Executive Director that she disclosed to the Complainant the records set forth in paragraph #2 of said Order within the time provided for compliance, as extended. The Council thus finds that the Custodian, Carla Smith, is hereby in contempt of the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 28, 2014 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6. As such, her failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated period resulted in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i); (b) she denied access to the requested records and failed to provide a legal reason for denying such access. N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-5, N.J.S.A. 47:1A-6; (c) she failed to cooperate with the GRC by responding to the GRC’s numerous requests for information, thereby hindering the GRC in their efforts 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...” pursuant to N.J.S.A. 47:1A-7(b); and (d) she failed to comply with the terms of the Council’s October 28, 2014 Interim Order, and as such is in contempt of said Order. Accordingly, the Custodian’s actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 16<sup>th</sup> Day of December, 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: December 17, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 16, 2014 Council Meeting**

**Michael K. Sharp<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-279**

v.

**Fairfield Township (Cumberland)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Two (2) separate requests were filed by the Complainant each dated June 18, 2014, and requesting copies of the following records:

1. “Any and all bids and estimates pertaining to the cap of the convenience center to include the cost estimate for the rubbish clean-up of the convenience center mandated by the State of N.J.”
2. “Any and all DEP documents pertaining to the convenience center and the capping of center being mandated by the State of N.J. Any and all estimates and cost documents for the drainage project completed at the convenience center.”

**Custodian of Record:** Carla Smith  
**Requests Received by Custodian:** June 18, 2014  
**Responses Made by Custodian:** None  
**GRC Complaint Received:** August 4, 2014

**Background<sup>3</sup>**

**October 28, 2014 Council Meeting:**

At the October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to

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

<sup>2</sup> Represented by Douglas Burry, Esq. (Mt. Holly, NJ).

<sup>3</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.

respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Because the Custodian failed to cite a lawful reason for denying access to the requested records, she shall disclose to the Complainant (1) all bids and estimates pertaining to the cap of the convenience center, (2) the cost estimate for rubbish clean-up at the convenience center, (3) all New Jersey Department of Environmental Protection documents pertaining to the convenience center and the capping of same, and (4) all estimates and cost documents for the drainage project completed at the convenience center.
3. **The Custodian shall comply with paragraph #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, to the Executive Director, or within five (5) business days from receipt of the Council's Interim Order the Custodian shall provide a certification to the Executive Director setting forth the lawful reason for denying access to the requested records, or any parts thereof.**
4. 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 October 29, 2014, the Council distributed its October 28, 2014 Interim Order to all parties. On November 6, 2014, the GRC received a telephone call from the Custodian's Counsel. Counsel requested an extension of time for the Custodian to comply with the Council's Interim Order. The GRC informed Counsel that a five (5) business day extension of time was granted for the Custodian to comply with the Order. The GRC confirmed the extension of time in writing via e-mail to the Custodian.<sup>4</sup>

#### Analysis

#### Compliance

On October 28, 2014, the Council ordered the above-referenced compliance. On October 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or

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<sup>4</sup> The GRC could not copy the Custodian's Counsel on the e-mail because he said that he does not maintain an e-mail address.



before November 6, 2014. On November 6, 2014, the Custodian's Counsel telephoned the GRC to request a five (5) business day extension of time for the Custodian to comply with the Council's Interim Order. The GRC granted the request for an extension of time and notified the Custodian via e-mail that compliance would now be due by 5:00 p.m. on November 14, 2014. The Custodian, however, failed to provide certified confirmation of compliance that she disclosed to the Complainant the records set forth in paragraph #2 of the Council's October 28, 2014 Interim Order within the time provided, as extended.

Accordingly, the Custodian failed to comply with the terms of the Council's October 28, 2014 Interim Order because the Custodian did not provide certified confirmation of compliance to the Executive Director that she disclosed to the Complainant the records set forth in paragraph #2 of said Order within the time provided for compliance, as extended. The Council thus finds that the Custodian, Carla Smith, is hereby in contempt of the Council's Order.

### **Council's October 28, 2014 Interim Order is Enforceable**

"The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 29, 2013 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law ("OAL") for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council, and thus is not an outstanding issue before the OAL.

### **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 (Berg); the

Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. As such, her failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated period resulted in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i); (b) she denied access to the requested records and failed to provide a legal reason for denying such access. N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-5, N.J.S.A. 47:1A-6; (c) she failed to cooperate with the GRC by responding to the GRC's numerous requests for information, thereby hindering the GRC in their efforts 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..." pursuant to N.J.S.A. 47:1A-7(b); and (d) she failed to comply with the terms of the Council's October 28, 2014 Interim Order, and as such is in contempt of said Order. Accordingly, the Custodian's actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the terms of the Council's October 28, 2014 Interim Order because the Custodian did not provide certified confirmation of compliance to the Executive Director that she disclosed to the Complainant the records set forth in paragraph #2 of said Order within the time provided for compliance, as extended. The Council thus finds that the Custodian, Carla Smith, is hereby in contempt of the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 28, 2014 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that the issue as to the disclosure of the records responsive to the request has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. As such, her failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or

requesting an extension of time within the statutorily mandated period resulted in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i); (b) she denied access to the requested records and failed to provide a legal reason for denying such access. N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-5, N.J.S.A. 47:1A-6; (c) she failed to cooperate with the GRC by responding to the GRC’s numerous requests for information, thereby hindering the GRC in their efforts 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...” pursuant to N.J.S.A. 47:1A-7(b); and (d) she failed to comply with the terms of the Council’s October 28, 2014 Interim Order, and as such is in contempt of said Order. Accordingly, the Custodian’s actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

December 9, 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

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

Michael K. Sharp  
Complainant

Complaint No. 2014-279

v.

Fairfield Township (Cumberland)  
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian failed to cite a lawful reason for denying access to the requested records, she shall disclose to the Complainant (1) all bids and estimates pertaining to the cap of the convenience center, (2) the cost estimate for rubbish clean-up at the convenience center, (3) all New Jersey Department of Environmental Protection documents pertaining to the convenience center and the capping of same, and (4) all estimates and cost documents for the drainage project completed at the convenience center.
3. **The Custodian shall comply with paragraph #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>1</sup> to the Executive Director, or within five (5) business days from receipt of the Council's Interim Order the Custodian**

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<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."

**shall provide a certification to the Executive Director setting forth the lawful reason for denying access to the requested records, or any parts thereof.<sup>2</sup>**

4. 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 28<sup>th</sup> Day of October, 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: October 29, 2014**

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 28, 2014 Council Meeting**

**Michael K. Sharp<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-279**

v.

**Fairfield Township (Cumberland),<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Two (2) separate requests were filed by the Complainant each dated June 18, 2014, and requesting copies of the following records:

1. “Any and all bids and estimates pertaining to the cap of the convenience center to include the cost estimate for the rubbish clean-up of the convenience center mandated by the State of N.J.”
2. “Any and all DEP documents pertaining to the convenience center and the capping of center being mandated by the State of N.J. Any and all estimates and cost documents for the drainage project completed at the convenience center.”

**Custodian of Record:** Carla Smith  
**Requests Received by Custodian:** June 18, 2014  
**Responses Made by Custodian:** None  
**GRC Complaint Received:** August 4, 2014

**Background<sup>3</sup>**

**Request and Response:**

On June 18, 2014, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. The Custodian failed to respond to the Complainant’s requests.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</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.

### Denial of Access Complaint:

On August 4, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).<sup>4</sup> The Complainant asserts that he provided the OPRA requests to the Custodian on June 18, 2014, and that the Custodian did not respond to the requests.

### Statement of Information:

On August 21, 2014, the GRC sent the Custodian a request for the Statement of Information (“SOI”). On September 2, 2014, the GRC notified the Custodian that if the Custodian fails to provide the SOI to the GRC the complaint will proceed to adjudication based only on the information submitted in the Denial of Access Complaint. The Custodian failed to submit the SOI to the GRC.

### Additional Submissions:

On September 11, 2014, the GRC e-mailed the Complainant to inform him that the Denial of Access Complaint is incomplete because he failed to adequately identify the records he asserted were denied.<sup>5</sup> The GRC asked the Complainant to clearly identify the records that he contends were denied. The Complainant failed to respond to the GRC’s September 11, 2014 e-mail in a timely manner.

On September 17, 2014, the GRC again e-mailed the Complainant to inform him that the GRC did not receive a response to its September 11, 2014 e-mail. The Complainant was advised to contact the GRC immediately to clarify the complaint. On September 18, 2014, the Complainant telephoned the GRC and clarified the records requested.

## Analysis

### 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>6</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

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<sup>4</sup> The Complainant actually filed two Denial of Access Complaints with the GRC; one for each of the two OPRA requests. The GRC treated the two complaints as a single complaint encompassing two OPRA requests.

<sup>5</sup> The records were identified on the copies of the OPRA requests that the Complainant attached to the complaint; however, the copies were very poor and partially illegible.

<sup>6</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.

complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant provided two (2) OPRA requests to the Custodian on June 18, 2014, and the Custodian failed to respond to the requests.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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.

Here the Custodian failed to bear her burden of proof that she timely responded to the Complainant's OPRA requests, which resulted in a "deemed" denial of the requests. Moreover, the Custodian failed to cite a lawful reason for denying access to the requested records. On August 21, 2014, the Custodian was provided with another opportunity to cite a lawful reason for denying access by completing and returning to the GRC the SOI; however, the Custodian failed to do so.

Therefore, because the Custodian failed to cite a lawful reason for denying access to the requested records, she shall disclose to the Complainant (1) all bids and estimates pertaining to the cap of the convenience center, (2) the cost estimate for rubbish clean-up at the convenience center, (3) all New Jersey Department of Environmental Protection documents pertaining to the convenience center and the capping of same, and (4) all estimates and cost documents for the drainage project completed at the convenience center.

### **Knowing & Willful**

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



## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian failed to cite a lawful reason for denying access to the requested records, she shall disclose to the Complainant (1) all bids and estimates pertaining to the cap of the convenience center, (2) the cost estimate for rubbish clean-up at the convenience center, (3) all New Jersey Department of Environmental Protection documents pertaining to the convenience center and the capping of same, and (4) all estimates and cost documents for the drainage project completed at the convenience center.
3. **The Custodian shall comply with paragraph #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>7</sup> to the Executive Director, or within five (5) business days from receipt of the Council's Interim Order the Custodian shall provide a certification to the Executive Director setting forth the lawful reason for denying access to the requested records, or any parts thereof.<sup>8</sup>**
4. 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: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

October 21, 2013

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<sup>7</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>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.