



**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**

**December 19, 2017 Government Records Council Meeting**

Katalin Gordon  
Complainant

Complaint No. 2016-127

v.

City of Orange Township (Essex)  
Custodian of Record

At the December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s November 14, 2017 Interim Order because she responded in the extended time frame by providing responsive invoices to the Complainant (via the GRC) and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian violated OPRA by failing to respond to the Complainant’s OPRA request seeking invoices immediately. N.J.S.A. 47:1A-5(e). Further, the Custodian unlawfully denied access to responsive invoices. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s November 14, 2017 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 were intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 19<sup>th</sup> Day of December, 2017

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 21, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 19, 2017 Council Meeting**

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-127**

v.

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

**Records Relevant to Complaint:** Electronic copies of the last invoice for compact discs (“CD”) that the City of Orange (“City”) ordered in bulk (which were the CDs used by the Clerk’s Office in response to OPRA requests).

**Custodian of Record:** Joyce Lanier  
**Request Received by Custodian:** March 17, 2016  
**Response Made by Custodian:** May 2, 2016  
**GRC Complaint Received:** April 21, 2016

**Background**

**November 14, 2017 Council Meeting:**

At its November 14, 2017 public meeting, the Council considered the November 8, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

---

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

<sup>2</sup> Represented by Eric Pennington, Esq. (Orange, NJ). Previously represented by Jeanette Calderon-Arnold, Esq. (Orange, NJ).

2. The Custodian may have unlawfully denied access to the responsive invoice. N.J.S.A. 47:1A-6. The Custodian must therefore search for and disclose a responsive invoice showing payments made for CDs prior to March 17, 2016. Should the Custodian determine that no record exists, she must certify to this fact.
3. **The Custodian shall comply with conclusion 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>3</sup> to the Executive Director.<sup>4</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.

#### Procedural History:

On November 16, 2017, the Council distributed its Interim Order to all parties. On November 21, 2017, the Custodian e-mailed the Government Records Council ("GRC") seeking an extension of time to respond to the Council's Order. On the same day, the GRC granted an extension until December 4, 2017.<sup>5</sup>

On November 29, 2017, the Custodian sent to the GRC two (2) invoices that the Finance Department deemed to be responsive to the Complainant's OPRA request.<sup>6</sup> The Custodian further stated that she believed her e-mail satisfied the Council's Order. On December 4, 2017, the GRC e-mailed all parties (attaching the two (2) invoices), stating that the Custodian's response did not satisfy the Council's Order. The GRC stated that the Order required the Custodian to disclose records directly to the Complainant and to provide simultaneous certified confirmation of compliance to the Executive Director. The GRC noted that the Custodian had yet to submit certified confirmation of compliance. The GRC provided the Custodian until December 5, 2017, to cure said deficiency.

On December 5, 2017, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that upon receipt of the Order, the Law Department, Business Administrator, and Finance Department worked extensively to comply with it. The Custodian

---

<sup>3</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>4</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.

<sup>5</sup> On November 22, 2017, the Complainant e-mailed the GRC requesting prevailing party attorney's fees. While OPRA allows for a prevailing party fee award, a complainant must be represented by an attorney in order to obtain fees. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (May 2013). Here, there is no evidence in the record indicating that the Complainant was represented by legal counsel. Thus, the GRC will not address the Complainant's request because she has no legal entitlement to a fee award.

<sup>6</sup> The Complainant was not copied on this e-mail.

certified that on November 28, 2017, Joy Lascari sent to her two (2) invoices she believed were most responsive to the Complainant's OPRA request. The Custodian noted that she forwarded the invoices to the GRC on November 29, 2017.

## Analysis

### Compliance

At its November 14, 2017 meeting, the Council ordered the Custodian to disclose a responsive invoice showing payments made for CDs prior to March 17, 2016 or to certify that no records existed, if applicable. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 16, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 27, 2017.

On November 21, 2017, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, the Custodian sought an extension of time, which the GRC granted through December 4, 2017. On November 29, 2017, the Custodian provided two (2) responsive invoices to the GRC. Subsequently, the GRC responded to all parties on December 4, 2017 (including the invoices as attachments) providing the Custodian one (1) additional business day to submit certified confirmation of compliance, which she submitted on December 5, 2017.

In determining whether the Custodian complied, the GRC first notes that both of her responses fell within the extended deadline to comply with the Council's Order. Thus, the Custodian met the timeliness requirement for compliance. Further, although the Custodian forwarded the invoices only to the GRC, the Complainant received them by being copied on the GRC's December 4, 2017 e-mail. Thus, although the Custodian should have included the Complainant on the November 29, 2017 e-mail (or sent the invoices to her directly in another e-mail), the Complainant still received said records on December 4, 2017. The GRC therefore finds that the Custodian complied with the Council's Order.

Therefore, the Custodian complied with the Council's November 14, 2017 Interim Order because she responded in the extended time frame by providing responsive invoices to the Complainant (via the GRC) and simultaneously providing certified confirmation of compliance to the Executive Director.

### 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)).

In the matter currently before the Council, the Custodian violated OPRA by failing to respond to the Complainant’s OPRA request seeking invoices immediately. N.J.S.A. 47:1A-5(e). Further, the Custodian unlawfully denied access to responsive invoices. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s November 14, 2017 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 were intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s November 14, 2017 Interim Order because she responded in the extended time frame by providing responsive invoices to the Complainant (via the GRC) and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian violated OPRA by failing to respond to the Complainant’s OPRA request seeking invoices immediately. N.J.S.A. 47:1A-5(e). Further, the Custodian unlawfully denied access to responsive invoices. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s November 14, 2017 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 were intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

December 12, 2017



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

INTERIM ORDER

November 14, 2017 Government Records Council Meeting

Katalin Gordon  
Complainant

Complaint No. 2016-127

v.

City of Orange Township (Essex)  
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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 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 immediately, results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian may have unlawfully denied access to the responsive invoice. N.J.S.A. 47:1A-6. The Custodian must therefore search for and disclose a responsive invoice showing payments made for CDs prior to March 17, 2016. Should the Custodian determine that no record exists, she must certify to this fact.
3. **The Custodian shall comply with conclusion 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>1</sup> to the Executive Director.<sup>2</sup>**

<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 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.



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 14<sup>th</sup> Day of November, 2017

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 16, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 14, 2017 Council Meeting**

**Katalin Gordon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-127**

v.

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

**Records Relevant to Complaint:** Electronic copies of the last invoice for compact discs (“CD”) that the City of Orange (“City”) ordered in bulk (which were the CDs used by the Clerk’s Office in response to OPRA requests).

**Custodian of Record:** Joyce Lanier  
**Request Received by Custodian:** March 17, 2016  
**Response Made by Custodian:** May 2, 2016  
**GRC Complaint Received:** April 21, 2016

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

**Request and Response:**

On March 17, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 18, 2016, the Custodian forwarded the OPRA request to Purchasing Office employee Jacqueline Harkeem and asked for a response within seven (7) business days. On March 23, 2016, the Custodian’s Counsel sent an e-mail to Ms. Harkeem, asking that she provide the name of the vendor and invoice information for CDs to Quinn Fields in the Clerk’s Office. On April 27, 2016, the Custodian’s Counsel e-mailed Chief Financial Officer Joy Lascari, again seeking access to the responsive invoice. Counsel noted that Ms. Harkeem advised that Purchasing could track purchases by vendor and identified those the City purchased CDs from in 2015 and 2016.

**Denial of Access Complaint:**

On April 21, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the City failed to

---

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

<sup>2</sup> Represented by Jeanette Calderon-Arnold, Esq. (Orange, 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.

provide her immediate access to the responsive invoice. The Complainant argued that instead, the City ignored three (3) e-mails, sent between April 15, and April 19, 2016, seeking the status of the request. Further, the Complainant contended that Ms. Quinn finally verbally advised on April 19, 2016, that the Clerk's Office was waiting for the Finance Department to respond and that she would update the Complainant via e-mail that afternoon. The Complainant stated that Ms. Quinn never e-mailed her.

#### Supplemental Response:

On May 2, 2016, the thirty-first (31<sup>st</sup>) business day after receipt of the OPRA request, Ms. Fields responded in writing on behalf of the Custodian, disclosing purchase orders dated June 12, 2015, and April 13, 2016, inclusive of CD charges in bulk.

#### Statement of Information:

On May 23, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on March 17, 2016. The Custodian certified that her search included forwarding the OPRA request to the Purchasing Office, following up with them, and ultimately obtaining assistance from the Finance Department. The Custodian certified that, on her behalf, Ms. Quinn disclosed the responsive records to the Complainant via e-mail on May 2, 2016.<sup>4</sup>

#### Additional Submissions:

On August 26, 2016, the Complainant e-mailed the GRC to rebut the Custodian's SOI.<sup>5</sup> Therein, the Complainant argued that the Custodian failed to provide any evidence to support her certification that she repeatedly the contacted Purchasing Office and the Finance Department between March 23, and April 27, 2016. Further, the Complainant noted that the June 12, 2015 invoice only identified CD sleeves and not actual CDs. The Complainant also noted that the April 13, 2016 invoice does include a charge for CDs but that the invoice date is well beyond the request date.

The Complainant thus argued that the GRC must review the following contested facts: 1) who delayed the response time; 2) was the delay deliberate to allow time for the City to cover up an inability to locate the responsive invoice by ordering a new supply and providing that invoice instead; and 3) did Ms. Harkeem and/or Ms. Lascari knowingly provide unresponsive records to the Clerk's Office for disclosure. The Complainant requested that the GRC seek additional information to answer those three questions. The Complainant also requested that, should the response remain ambiguous, the GRC initiate a hearing to resolve the facts.

---

<sup>4</sup> The Custodian included additional information regarding a prior OPRA request for similar records. The GRC does not address that request because the Complainant did not initially identify it as a disputed matter in the instant Denial of Access Complaint.

<sup>5</sup> The Complainant asserted a need to amend her complaint due to the Custodian's inclusion of a prior OPRA request. The GRC notes that its regulations generally allow complainants to amend complaints within thirty (30) business days of submission. N.J.A.C. 5:105-2.3(h)(1); N.J.A.C. 5:105-2.3(h)(2). Here, not only is the amendment well beyond the thirty (30) business day time frame but also three (3) months beyond submission of the SOI. Additionally, due to its irrelevance to the instant complaint, the GRC has not considered the prior OPRA request.

## Analysis

### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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 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).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>7</sup> See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007)(holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the Complainant requested the most recent invoice for a bulk purchase of CDs that are used by the Clerk's Office to fulfill OPRA requests. Such records are "subject to immediate access." N.J.S.A. 47:1A-5(e). The Custodian had an obligation to respond to the request for the records immediately, granting or denying access, requesting additional time to respond, or requesting clarification. However, the evidence of record reveals that neither the Custodian nor anyone on her behalf responded to the Complainant's request until May 2, 2016, or thirty-one (31) business day following receipt of the request. Thus, it is clear that the Custodian violated the immediate access provision of OPRA. See also Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and

---

<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.

<sup>7</sup> OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98 and Harris, GRC 2011-65. See also Herron, GRC 2006-178.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Council has previously determined that a custodian is not required to provide records that came into existence after the submission of an OPRA request. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013). Further, OPRA does not contemplate on-going requests for records. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012)(citing Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005)).

Following the filing of this complaint, on behalf of the Custodian, Ms. Fields provided the Complainant two (2) invoices. One of the invoices was dated June 12, 2015 and showed a charge for CD sleeves, not the actual CDs themselves. The second invoice was dated April 13, 2016, and did contain payments made for both DVDs and CDs. Subsequent to the SOI, the Complainant contended that neither record was responsive to the subject OPRA request.

The GRC has reviewed the invoices, which were attached to the SOI, and finds that neither invoice was responsive to the Complainant’s OPRA request. Specifically, the first invoice did not contain a charge for the actual CDs. Further, the second invoice was clearly created nearly a month after submission of the OPRA request. Thus, it certainly was not the “last invoice for [CDs]” prior to March 17, 2016 (the date of the OPRA request). In applying the Council’s decision in Paff, GRC 2012-262, the Custodian, through Ms. Fields, was not obligated to provide a record that came into existence after the request. Her obligation was either to provide the most recent invoice that existed prior to the date of the OPRA request or certify that no records existed. Thus, on their face, neither invoice provided on May 2, 2016 was responsive to the Complainant’s OPRA request.

Accordingly, the Custodian may have unlawfully denied access to the responsive invoice. N.J.S.A. 47:1A-6. The Custodian must therefore search for and disclose a responsive invoice showing payments made for CDs prior to March 17, 2016. Should the Custodian determine that no record exists, she must certify to this fact.

### **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 immediately, results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian may have unlawfully denied access to the responsive invoice. N.J.S.A. 47:1A-6. The Custodian must therefore search for and disclose a responsive invoice showing payments made for CDs prior to March 17, 2016. Should the Custodian determine that no record exists, she must certify to this fact.
3. **The Custodian shall comply with conclusion 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>8</sup> to the Executive Director.<sup>9</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: Frank F. Caruso  
Communications Specialist/Resource Manager

November 8, 2017

---

<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 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.