



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Yolanda Dentley
Complainant

Complaint No. 2018-251

v.

Township of Irvington (Essex)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 30, 2020 Interim Order because he responded in the extended time frame providing Mr. Holley and Mr. Diaz’s certifications regarding their search and the existence of responsive records. Further, the Custodian also provided certified confirmation of compliance to the Executive Director within that extended time frame.
2. The Custodian’s failure to timely respond to the subject OPRA request resulted in a “deemed” denial of access. Notwithstanding, the Custodian timely complied with the Council’s June 30, 2020 Interim Order. Specifically, both Mr. Holley and Mr. Diaz provided sufficient certifications regarding their search for responsive records and that the only records came into existence after the Complainant’s OPRA request submission. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 25th Day of August 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Yolanda Dentley¹
Complainant**

GRC Complaint No. 2018-251

v.

**Township of Irvington (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “the history (repair, maintenance, *etc.*) of the sewage pipe outside of 1 University Place” for the last five (5) years.

Custodian of Record: Harold E. Wiener

Request Received by Custodian: September 10, 2018

Response Made by Custodian: September 13, 2018

GRC Complaint Received: October 24, 2018

Background

June 30, 2020 Council Meeting:

At its June 30, 2020 public meeting, the Council considered the June 23, 2020 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 his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Custodian must locate and disclose the relevant maintenance and repair records to the Complainant inclusive of certifications from Mr. Holley and the Department of Housing and

¹ No legal representation listed on record.

² Represented by Evelyn Akushie-Onyeani, Esq. (Irvington, NJ).

Building Construction staff. Should a sufficient search result in no responsive records, the Custodian, Mr. Holley, and a Department of Housing and Building Construction staff member are required to certify to this fact, inclusive of a search description.

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, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.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.

Procedural History:

On July 1, 2020, the Council distributed its Interim Order to all parties. On July 6, 2020, the Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking a two (2) week extension of time to respond to the Council's Order. On July 7, 2020, the GRC responded granting said extension through July 22, 2020.

On July 22, 2020, Custodian's Counsel responded to the Council's Interim Order. Counsel stated that attached were certifications from Mr. Holley and Superintendent Edwin Diaz, as well as several responsive records regarding a sewer repair in December 2018.⁶ Therein, each individual certified to their search, noting that no other maintenance records exist. See Holley Cert. and Diaz Cert. Each further certified that maintenance issues are typically addressed on street cleaning days, depending on the weather and season, in consultation with the Township Engineer where infrastructure issues were concerned, and in response to calls from customers.

On the same day, the GRC e-mailed Custodian's Counsel stating that the compliance package did not include the Custodian's certified confirmation of compliance. The GRC requested that Counsel cure the deficiency and extended the time frame through July 24, 2020. On July 24, 2020, Counsel submitted certified confirmation from Mr. Holley. On July 29, 2020, the GRC e-mailed Custodian's Counsel stating that Mr. Holley was not the identified "custodian of record" in the Statement of Information. The GRC thus stated that the certified confirmation of compliance should come directly from the Custodian, unless unavailable to submit same. The GRC again

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

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

⁶ This project post-dated the OPRA request by a little over three (3) months.

extended the time frame through July 31, 2020. On July 31, 2020, the Custodian submitted certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its June 30, 2020 meeting, the Council ordered the Custodian to locate and disclose responsive records or certify if none exist. The Council also ordered that the Custodian provide certifications from Mr. Holley and Department of Housing and Building Construction staff regarding their search and the existence, or lack thereof, of records. 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 July 1, 2020, 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 July 8, 2020.

On July 7, 2018, the fourth (4th) business day after receipt of the Council's Order, Custodian's Counsel sought and received an extension through July 22, 2020. On the final day of the extension, Mr. Holley and Mr. Diaz provided certifications describing how the Township of Irvington addressed sewer maintenance and repairs. Both certified that a sewer repair occurred at the location identified in the OPRA request and that responsive records were attached. The GRC notes that these records stemmed from a sewer that collapsed on December 13, 2018, three (3) months after the Complainant submitted the subject OPRA request. Because these records came into existence after submission of the OPRA request, the Custodian was under no obligation to disclose them. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Delbury v. Greystone Park Psychiatric Hospital (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).

Thereafter, the GRC contacted Custodian's Counsel to obtain certified confirmation of compliance from the Custodian. Following two (2) extensions, the Custodian submitted certified confirmation of compliance as required by the Council's Order.

Therefore, the Custodian complied with the Council's June 30, 2020 Interim Order because he responded in the extended time frame providing Mr. Holley and Mr. Diaz's certifications regarding their search and the existence of responsive records. Further, the Custodian also provided certified confirmation of compliance to the Executive Director within that extended time frame.

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 before the Council, the Custodian's failure to timely respond to the subject OPRA request resulted in a "deemed" denial of access. Notwithstanding, the Custodian timely complied with the Council's June 30, 2020 Interim Order. Specifically, both Mr. Holley and Mr. Diaz provided sufficient certifications regarding their search for responsive records and that the only records came into existence after the Complainant's OPRA request submission. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 30, 2020 Interim Order because he responded in the extended time frame providing Mr. Holley and Mr. Diaz's certifications regarding their search and the existence of responsive records. Further, the Custodian also provided certified confirmation of compliance to the Executive Director within that extended time frame.
2. The Custodian's failure to timely respond to the subject OPRA request resulted in a "deemed" denial of access. Notwithstanding, the Custodian timely complied with the Council's June 30, 2020 Interim Order. Specifically, both Mr. Holley and Mr. Diaz provided sufficient certifications regarding their search for responsive records and that the only records came into existence after the Complainant's OPRA request submission. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 30, 2020 Government Records Council Meeting

Yolanda Dentley
Complainant

Complaint No. 2018-251

v.

Township of Irvington (Essex)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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 his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Custodian must locate and disclose the relevant maintenance and repair records to the Complainant inclusive of certifications from Mr. Holley and the Department of Housing and Building Construction staff. Should a sufficient search result in no responsive records, the Custodian, Mr. Holley, and a Department of Housing and Building Construction staff member are required to certify to this fact, inclusive of a search description.
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, if applicable. Further, the Custodian shall simultaneously deliver¹**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

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 30th Day of June 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 1, 2020

² "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."

³ 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
June 30, 2020 Council Meeting**

**Yolanda Dentley¹
Complainant**

GRC Complaint No. 2018-251

v.

**Township of Irvington (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “the history (repair, maintenance, *etc.*) of the sewage pipe outside of 1 University Place” for the last five (5) years.

Custodian of Record: Harold E. Wiener

Request Received by Custodian: September 10, 2018

Response Made by Custodian: September 13, 2018

GRC Complaint Received: October 24, 2018

Background³

Request and Response:

On September 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, Township employee Shonta D. Watson forwarded the OPRA request and a memo from the Custodian to the Custodian to Department of Public Works (“DPW”) Director Jamel C. Holley and Township of Irvington (“Township”) Engineer John Wiggins.

On September 13, 2018, Mr. Wiggins composed a written response on behalf of the Custodian stating that a review of his records indicated that his office did not engage in any capital construction at that location over the last five (5) years. Mr. Wiggins noted that capital projects cover those that the Township designs and bids out but does not include routine maintenance or emergency work. Mr. Wiggins further noted that the DPW covered emergency repairs and the Department of Housing and Building Construction (“HBC”) covered routine maintenance. Mr. Wiggins stated that the Complainant should contact those agencies for further information.

¹ No legal representation listed on record.

² Represented by Evelyn Akushie-Onyeani, Esq. (Irvington, NJ).

³ 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.

On September 19, 2018, Ms. Watson again forwarded the Custodian's memorandum and the OPRA request to Mr. Holley and Mr. Wiggins and copying the Complainant. On September 26, 2018, Mr. Wiggins resent his letter to the Complainant via e-mail. On October 1, 2018, Mr. Holley responded to the Complainant noting that "[a]ll items submitted by [Mr. Wiggins] completes the request." On the same day, the Complainant e-mailed Mr. Holley disputing the response. The Complainant contended that Mr. Wiggins only addressed capital projects; her request sought maintenance and repair records. The Complainant thus reiterated that she was seeking "the history of the sewer's maintenance and repairs" as soon as possible, noting that the statutory time frame "has long since expired."

Denial of Access Complaint:

On October 24, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that she hand-delivered an OPRA request to the Township on September 10, 2018 and received an e-mail forwarding same to Mr. Holley and Mr. Wiggins. The Complainant stated that on September 19, 2018, after not receiving a response, she contacted the Township. The Complainant stated that she received confirmation of the "second request" on the same day. The Complainant noted that on September 24, 2018, she received Mr. Holley's September 13, 2018 letter referring her to other departments. The Complainant averred that she subsequently received an e-mail advising that her OPRA request was completed, which she disputed on October 1, 2018.

The Complainant asserted that after the multiple attempts set forth above to obtain the records sought, she received "no answer to [her] request." The Complainant argued that she received no additional responses from the Township.

Statement of Information:

On December 3, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 10, 2018. The Custodian certified that no search could be conducted because no records existed. The Custodian certified that Mr. Wiggins responded in writing on his behalf on September 13, 2018 advising that no capital projects records existed. The Custodian contended that he lawfully denied access to the subject OPRA request because no records existed.

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).⁴ 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).

In the matter before the Council, the Complainant submitted her OPRA request on September 10, 2018. The Custodian subsequently responded with a letter dated September 13, 2018. In the Denial of Access Complaint, the Complainant argued that the Custodian failed to respond to her OPRA request in a timely manner. Further, the Complainant noted that she received Mr. Wiggins' September 13, 2018 letter via U.S. mail on September 24, 2018 as a result of a status update she requested on September 19, 2018. In the SOI, the Custodian certified that the Township received the request on September 10, 2018 and responded on September 13, 2018.

Notwithstanding the Custodian's certification, the evidence of record supports that a "deemed" denial of access occurred. Specifically, the letter and envelope attachment included in the Denial of Access Complaint supports that September 24, 2018 was the time the Complainant received Mr. Wiggins' response. Moreover, the envelope is more compelling because it proves that the letter was postmarked on September 20, 2018. Thus, even if the Custodian meant to send Mr. Wiggins' response to the Complainant on September 13, 2018, the evidence supports that this did not occur until September 20, 2018, and after the expiration of the statutory time frame.

Therefore, the Custodian did not bear his burden of proof that he 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, 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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

⁴ 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.

In the matter before the Council, the Complainant contended that the Custodian failed to properly respond to her OPRA request. Specifically, the Complainant argued that Mr. Wiggins' response only addressed "capital projects" and that DPW and HBC failed to identify whether a responsive record existed. In the SOI, the Custodian certified that no records existed.

While such a response typically results in a finding similar to Pusterhofer, GRC 2005-49, conflicting facts here require a different outcome. Specifically, Mr. Wiggins' letter is clear that his office only managed capital projects and DPW and HBC handled emergency repairs and maintenance respectively. Notwithstanding this, the only response on record from either department was from Mr. Holley, who stated that "[a]ll items submitted by [Mr.] Wiggins . . . completes the request." Even when taken together, these responses do not paint a clear picture of the existence of potentially responsive records. Such a position is further reinforced by the lack of a response from HBC as to the scope of maintenance records for that property.

Therefore, the Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter, GRC 2011-76. The Custodian must locate and disclose the relevant maintenance and repair records to the Complainant inclusive of certifications from Mr. Holley and HBC staff. Should a sufficient search result in no responsive records, the Custodian, Mr. Holley, and an HBC staff member are required to certify to this fact, inclusive of a search description.

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 his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Custodian must locate and disclose the relevant maintenance and repair records to the Complainant inclusive of certifications from Mr. Holley and the Department of Housing and Building Construction staff. Should a sufficient search result in no responsive records, the Custodian, Mr. Holley, and a Department of Housing and Building Construction staff member are required to certify to this fact, inclusive of a search description.

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, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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
Executive Director

June 23, 2020

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⁶ "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."

⁷ 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.