

FINAL DECISION

November 15, 2006 Government Records Council Meeting

Richard Kasper
Complainant

Complaint No. 2006-57

v.

Washington Township Board of Education
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 2006 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has complied with the Council’s September 21, 2006 Interim Order.

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

Final Decision Rendered by the
Government Records Council
On The 15th Day of November, 2006

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

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

Government Records Council

Decision Distribution Date: November 21, 2006



**Supplemental Findings and Recommendations of the Executive Director
November 15, 2006 Council Meeting**

Richard Kasper¹
Complainant

GRC Complaint No. 2006-57

v.

Washington Township Board of Education²
Custodian of Records

Records Relevant to Complaint:

1. Copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school.
2. Copy of the RFP or contract used to secure telephone equipment in the high school and the middle school.

Request Made: January 2, 2006

Response Made: None

Custodian: Paul Todd

GRC Complaint Filed: March 9, 2006

Background

September 21, 2006

Government Records Council's ("Council") Interim Order. At its September 21, 2006 public meeting, the Council considered the September 7, 2006 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. A record (the contract requested) should have been provided to the Complainant *immediately* pursuant to N.J.S.A. 47:1A-5.e., unless such record was not immediately available because it was in storage or archived. The Custodian never asserted that the requested contract was in storage or archived. Therefore, the Custodian unlawfully denied immediate access to the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone pursuant to N.J.S.A. 47:1A-5.e.
2. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian's

¹ No legal representation on record.

² Custodian represented by Steven Kleinman of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g.

3. While the Custodian provided facts that support the legal basis for the denial of access to the construction reports (that the information, which, if disclosed, would give an advantage to competitors or bidders), the Council should conduct an *in camera* review of the requested 39 page document prepared by Bovis Lend Lease, Inc. to determine if said report, or portions therein are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006).
4. While the Custodian's actions were negligent, heedless or unintentional, the Custodian has not knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard established for same established by New Jersey Courts.
5. The Custodian must deliver to the Council in a sealed envelope six copies of the requested unredacted document (see #3 above), a document or redaction index detailing the document and/or each redaction you assert and the Custodian's legal certification under penalty of perjury that the document provided is the document requested by the Council for the *in camera* no later than *five (5) business days from the distribution date of the Council's Interim Order.*

October 3, 2006

Council's Interim Order distributed to the parties.

October 9, 2006

Custodian's response to the Council's Interim Order. The Custodian asserts that the GRC's findings and recommendations are inaccurate regarding the finding that the Custodian violated OPRA by not providing immediate access to the contract for telephone equipment. In fact, the Custodian asserts there was no contract because such purchase was made through a contract entered into by the State of New Jersey and that the Custodian provided the state contract number to the Complainant (after researching such information) within the statutorily required seven (7) business days. Additionally, the Custodian asserts that the Complainant has acknowledged to the GRC that the state contract was responsive to the request and does not dispute that this portion of the request was fulfilled in a letter to the GRC dated August 23, 2006.

Further, the Custodian certifies that the requested 39 page document prepared by Bovis Lend Lease, Inc. (for which the GRC requested for an *in camera* inspection) had previously been disclosed to the Complainant without any redactions on August 5, 2005. The Custodian further asserts the disclosure of the requested report resolves the GRC's concerns in this matter.

Analysis

Whether the Custodian complied with the Council's September 21, 2006 Interim Order?

The Custodian asserts that the GRC's findings and recommendations are inaccurate regarding the finding that the Custodian violated OPRA by not providing immediate access to the contract for telephone equipment. In fact, the Custodian asserts there was no contract because such purchase was made through a contract entered into by the State of New Jersey and that the Custodian provided the state contract number to the Complainant (after researching such information) within the statutorily required seven (7) business days. Additionally, the Custodian asserts that the Complainant has acknowledged to the GRC that the state contract was responsive to the request and does not dispute that this portion of the request was fulfilled in a letter to the GRC dated August 23, 2006.

Further, the Custodian certifies having previously provided the Complainant the requested 39 page document prepared by Bovis Lend Lease, Inc. (which the GRC requested for an *in camera* inspection) without any redactions on August 5, 2005. Thus, resolving the GRC's concerns in this matter.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has complied with the Council's September 21, 2006 Interim Order.

Prepared By:

Catherine Starghill, Esq.
Executive Director

November 8, 2006

INTERIM ORDER

September 21, 2006 Government Records Council Meeting

Richard Kasper
Complainant

Complaint No. 2006-57

v.

Washington Township Board of Education
Custodian of Record

At the September 21, 2006 public meeting, the Government Records Council (“Council”) considered the September 7, 2006 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:

6. A record (the contract requested) should have been provided to the Complainant *immediately* pursuant to N.J.S.A. 47:1A-5.e., unless such record was not immediately available because it was in storage or archived. The Custodian never asserted that the requested contract was in storage or archived. Therefore, the Custodian unlawfully denied immediate access to the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone pursuant to N.J.S.A. 47:1A-5.e.
7. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian’s failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g.
8. While the Custodian provided facts that support the legal basis for the denial of access to the construction reports (that the information, which, if disclosed, would give an advantage to competitors or bidders), the Council should conduct an *in camera* review of the requested 39 page document prepared by Bovis Lend Lease, Inc. to determine if said report, or portions therein are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006).
9. While the Custodian’s actions were negligent, heedless or unintentional, the Custodian has not knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard established for same established by New Jersey Courts.
10. The Custodian must deliver to the Council in a sealed envelop six copies of the requested unredacted document (see #3 above), a document or redaction index detailing the document and/or each redaction you assert and the Custodian’s legal certification under penalty of perjury that the document provided is the document requested by the Council for the *in camera* no later

than *five (5) business days from the distribution date of the Council's Interim Order.*

Interim Order Rendered by the
Government Records Council
On The 21st Day of September, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: October 3, 2006

**Findings and Recommendations of the Executive Director
September 21, 2006 Council Meeting**

Richard Kasper³

GRC Complaint No. 2006-57

Complainant

v.

**Washington Township Board of Education⁴
Custodian of Records**

Records Relevant to Complaint:

3. Copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school.
4. Copy of the RFP or contract used to secure telephone equipment in the high school and the middle school.

Request Made: January 2, 2006

Response Made: None

Custodian: Paul Todd

GRC Complaint Filed: March 9, 2006

Background

January 2, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant seeks a copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school, as well as a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school.

March 9, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant states that on January 9, 2006⁵, he requested the following: either the request for proposal or state contract number used to purchase new telephone equipment within the district, and a final construction report from Bovis Lend Lease, Inc. involving the Robbinsville High School.

³ No legal representation on record.

⁴ Represented by Matthew Giacobbe, Esq. and Steven Kleinman, Esq. from the law offices of Scarinci & Hollenbeck, LLC in Lyndhurst, NJ.

⁵ Actual date on the Complainant's OPRA request is January 2, 2006.

The Complainant claims that on January 13, 2006, the Custodian contacted him by phone and indicated that his request for contracts would be provided following some research, and that his request for a construction report would not be provided as the Board Attorney advised against it, citing potential litigation as the reason for not disclosing the documents. The Complainant asserts that he has not received any written response from the Custodian or the Board Attorney.

Further, the Complainant contends that potential litigation is not a valid reason to withhold the requested records as he claims the original bids were opened publicly, and that all change orders were approved in public session. He claims that the only explanation is that the Board of Education has exceeded its publicly approved budget and is trying to hide it from members of the public.

March 15, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this case.

March 24, 2006

Letter from GRC staff to Complainant. Staff requests that the Complainant provide a copy of the OPRA request subject of this complaint.

March 24, 2006

Request for Statement of Information sent to the Custodian.

March 30, 2006

Letter from Complainant to GRC Staff. The Complainant asserts that he is unable to locate his original OPRA request involving this complaint. He contends that his original request and his complaint filed with the GRC involve the same issues.

April 4, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Letter of Representation from Custodian's Counsel dated April 4, 2006
- Custodian's certification dated April 4, 2006
- Complainant's OPRA request dated January 2, 2006

The Custodian certifies receiving the Complainant's OPRA request on or about January 2, 2006. He certifies that on several occasions within the seven (7) business days following the date of the Complainant's request, he attempted to contact the Complainant by phone and did not reach him until on or about January 11, 2006. The Custodian certifies that on said date, he verbally provided the Complainant with the information responsive to his request for the state contract numbers used for the telephone equipment. He also certifies that this information was not made, maintained, received, or kept on file by the Board, but that "it had to be researched and compiled...and accordingly should not

be considered a ‘public record’ under OPRA.”⁶ The Custodian also asserts that he has no objection to providing this information to the Complainant, as he has already done so verbally, and he is willing to provide the Complainant with a written compilation of the requested information.

Additionally, the Custodian certifies that the Complainant requested a thirty-nine (39) page document prepared by Bovis Lend Lease, Inc., a contractor working on constructing the new Robbinsville High School, for the Boards’ internal use. The Custodian certifies that during his January 2006 phone conversation with the Complainant, he indicated that he would not be providing the Complainant with the requested Bovis document as the Board was, and still remains, in negotiations to approve final close out change orders on the high school project. He asserts that the requested document contains sensitive financial information and if disclosed, would provide an advantage to contractors in negotiations with the Board and should be exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian does, however, state that he is aware that upon completion of the negotiations, the document would then become a “government record” subject to disclosure under OPRA.

Further, the Custodian states that the Complainant’s request was his first OPRA request as Custodian. He also asserts that it is now his policy to respond to such requests in writing.

August 5, 2006

Letter from Custodian’s Counsel to Complainant. The Custodian’s Counsel asserts that the exemption from disclosure previously asserted by the Custodian no longer applies since the matters have been settled. The Custodian’s Counsel further states that the requested records (the Bovis Construction reports) are enclosed and therefore the issues of this denial of access complaint are moot and the complaint should be dismissed.

August 23, 2006

Letter from Complainant to Custodian’s Counsel. The Complainant takes exception with the completeness of the reports enclosed with the Custodian Counsel’s August 5, 2006 letter. Additionally, the Complainant disagrees that the issues are moot requiring the complaint to be dismissed.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*”
(Emphasis added.) N.J.S.A. 47:1A-1.

⁶ As stated in the Custodian’s certification dated April 4, 2006.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that a government record shall not include the following information which is deemed to be confidential:

“...information which, if disclosed, would give *an advantage to competitors or bidders...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA mandates that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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.

Complainant’s Request for a Copy of the RFP or Contract Used to Secure Telephone Equipment in the High School and the Middle School

The Complainant claims to have submitted his OPRA request for a copy of the RFP or contract used to secure telephone equipment in the high school and the middle

school on January 9, 2006. The Complainant states that the Custodian contacted him by phone on January 13, 2006 and indicated that he would have to research the Complainant's request in order to provide the requested information.

The Custodian certifies receiving the Complainant's OPRA request on or about January 2, 2006. He also certifies that he attempted to contact the Complainant by phone several times during the seven (7) business day time period following the date of the Complainant's request. The Custodian certifies that he eventually reached the Complainant by phone on or about January 11, 2006 and verbally provided the Complainant with the information responsive to his request. Additionally, the Custodian certifies that the requested information should not be considered a government record as it is not made, maintained, received, or kept on file as a separate document, as the requested information had to be researched and compiled. Further, the Custodian asserts that he would have no objection to providing the Complainant with a written compilation of the requested information as he has already provided said information verbally.

OPRA provides that immediate access shall be granted to budgets, bills, vouchers, and *contracts* pursuant to N.J.S.A. 47:1A-5.e. Additionally, OPRA provides that if the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis for such denial on the request form and promptly return it to the requestor pursuant to N.J.S.A. 47:1A-5.g.

In this complaint, the Custodian certifies receiving the Complainant's request on January 2, 2006 and verbally providing the Complainant with the requested information on January 11, 2006, the seventh (7th) business day following the date of the request. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian's failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g. Also, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that "[while] both the Custodian and Complainant confirm verbal contact regarding the OPRA request later in the month in which the request was made... the Custodian has violated N.J.S.A. 47:1A-5.g in not providing the Complainant a written response to the request..."

Additionally, it is uncertain how the Custodian could have provided the Complainant "a *copy* of the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone" (as was the request of the Complainant). A record (the contract requested) should have been provided to the Complainant *immediately* pursuant to N.J.S.A. 47:1A-5.e, unless such record was not immediately available because it was in storage or archived. The Custodian never asserted that the requested contract was in storage or archived. Therefore, the Custodian unlawfully denied immediate access to the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone pursuant to N.J.S.A. 47:1A-5.e.

Further, the Custodian's assertion that the Complainant's request for the contract requires research which is prohibited under OPRA is misplaced. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful*

information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1." (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534 (March 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549. As such, OPRA does not obligate a Custodian to create a document in response to a records request.

Mag Entertainment, LLC does not apply to this complaint since the request for "a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone" clearly names an "identifiable" government record as defined in Mag Entertainment, LLC. Thus, no research on behalf of the Custodian is required to determine the record being requested. Again, in this complaint, the requested record (a copy of a contract) is clearly identifiable.

Complainant's Request for a Copy of the Most Current Construction Report from Bovis Lend Lease, Inc. Regarding the High School and the Middle School

The Complainant asserts submitting his OPRA request on January 9, 2006. He claims that on January 13, 2006, the Custodian contacted him by phone and advised that the requested record would not be provided as the Board Attorney advised against it, citing potential litigation as the basis for the denial of access. The Complainant contends that potential litigation should not cause his request to be denied as all the original bids were approved in public and all the change orders were also approved publicly.

The Custodian certifies receiving the Complainant's OPRA request on or about January 2, 2006. He certifies that several times during the seven (7) business day time frame following the date of the Complainant's request, he attempted to contact the Complainant by phone but states that he did not reach the Complainant until on or about January 11, 2006. The Custodian also certifies that during said telephone conversation, he advised the Complainant that the requested thirty-nine (39) page document, prepared by Bovis Lend Lease, Inc. for the Board's internal use, would not be provided at that time as the Board was, and remains, in negotiations to approve final close out change orders on the new high school project.

Additionally, the Custodian asserts that the requested document contains sensitive financial information, which if disclosed, would provide an advantage to contractors in negotiations with the Board. He contends that the requested document is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian also states that he is aware that the document would become a government record upon successful completion of said negotiations. He further certifies that he would have no objections to providing the requested document once the negotiations have been completed. The Custodian also states that as the Complainant's request was the first OPRA request he received as Custodian, it has now become his policy to respond to all requests in writing.

In a prior GRC case, the Council rendered a decision regarding documents that a custodian claimed to be exempt under OPRA's exemption for information, which if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. In Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the Council

held that “[w]hile the custodian has provided facts in support of the legal conclusions asserted, the Council must determine whether the legal conclusions asserted by the Custodian (that the information which, if disclosed, would give an advantage to competitors or bidders) are properly applied to the redactions. Therefore, the Council must conduct an *in camera* inspection of the redacted Morris Land Conservancy reports...”

The same conclusion should be applied in this complaint. While the Custodian has provided facts that support the legal basis for the denial of access (that the information, which, if disclosed, would give an advantage to competitors or bidders), the Council should conduct an *in camera* review of the thirty-nine (39) page document prepared by Bovis Lend Lease, Inc. to determine if said document, or portions therein are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Further, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that “[while] both the Custodian and Complainant confirm verbal contact regarding the OPRA request later in the month in which the request was made... the Custodian has violated N.J.S.A. 47:1A-5.g. in not providing the Complainant a written response to the request...”

In this complaint, the same ruling should apply. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian’s failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g. Further, the Custodian certifies that he has now made it his policy to respond to all future requests in writing.

Whether the Custodian’s failure to provide a written response to the Complainant’s OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Complainant states that he submitted his OPRA request on January 9, 2006. He claims that he did not receive a written response from the Custodian but states that the Custodian contacted him by phone on January 13, 2006. The Complainant states that on

said date, the Custodian explained that his request for a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school would have to be researched and would be provided. Additionally, the Complainant states that the Custodian informed him that his request for a copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school was being denied as per the Board Attorney's advice regarding potential litigation and that disclosure of this financial information would provide an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies receiving the Complainant's OPRA request on or about January 2, 2006 and claims to have attempted to contact the Complainant by phone several times in the seven (7) business days following the date of the Complainant's request. The Custodian certifies reaching the Complainant by phone on or about January 11, 2006 and verbally provided the Complainant with information responsive to his request for state contract numbers used for telephone equipment. He also certifies that this information had to be researched and compiled and does not exist as a separate record made, maintained, received, or kept on file pursuant to N.J.S.A. 47:1A-1. Additionally, the Custodian certifies informing the Complainant that the requested Bovis document would not be provided pursuant to N.J.S.A. 47:1A-1.1 as it would provide an advantage to competitors or bidders, if disclosed. The Custodian certifies that at the time of the request, the Board was, and remains in negotiations with contractors regarding the new high school project. He also states that he is aware that once negotiations have been completed, the requested document would become a government record. Further, the Custodian asserts that that as the Complainant's request was the first OPRA request he received as Custodian, it has now become his policy to respond to all requests in writing.

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 at 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 (App. Div. 1996) at 107).

In Fallstick v. Haddon Township and Haddon Township Business Partners, Inc., GRC Case No. 2004-73 (October, 2004), the Council held that "[t]he Township violated N.J.S.A. 47:1A-5.g. by not providing written responses to the February 13, 2004 and May 5, 2004 OPRA requests. However, the violations do not rise to the level of a knowing and willful violation in the totality of the circumstances as the Complainant received verbal notices and has acknowledged same."

The situation in this complaint is similar. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing the Complainant with a written response to his request, both parties agree that verbal communication took place during the statutorily

mandated seven (7) business days following the date of the Complainant's request. Additionally, the Custodian certifies that as the Complainant's request was the first OPRA request he received as Custodian, it has now become his policy to respond to all requests in writing. Further, the Custodian certifies providing the Complainant with information responsive to his request, even though OPRA does not require custodians to conduct research in response to requests.

While the Custodian's actions were negligent, heedless or unintentional, the Custodian has not knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard established for same established by New Jersey Courts.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

11. A record (the contract requested) should have been provided to the Complainant *immediately* pursuant to N.J.S.A. 47:1A-5.e., unless such record was not immediately available because it was in storage or archived. The Custodian never asserted that the requested contract was in storage or archived. Therefore, the Custodian unlawfully denied immediate access to the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone pursuant to N.J.S.A. 47:1A-5.e.
12. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian's failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g.
13. While the Custodian provided facts that support the legal basis for the denial of access to the construction reports (that the information, which, if disclosed, would give an advantage to competitors or bidders), the Council should conduct an *in camera* review of the requested 39 page document prepared by Bovis Lend Lease, Inc. to determine if said report, or portions therein are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006).
14. While the Custodian's actions were negligent, heedless or unintentional, the Custodian has not knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard established for same established by New Jersey Courts.
15. The Custodian must deliver to the Council in a sealed envelop six copies of the requested unredacted document (see #3 above), a document or redaction index detailing the document and/or each redaction you assert and the Custodian's legal certification under penalty of perjury that the document provided is the document requested by the Council for the *in camera* no later

than five (5) business days from the distribution date of the Council's Interim Order.

Prepared By:

Dara Lownie
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

September 7, 2006