



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER CHALRES RICHMAN  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
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**FINAL DECISION**

**September 26, 2007 Government Records Council Meeting**

Joanna Perilli, Esq.

Complainant

v.

Borough of South Bound Brook

Custodian of Record

Complaint No. 2006-180

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 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 complaint be dismissed because the Complainant withdrew the matter from the Office of Administrative Law.

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 26<sup>th</sup> Day of September, 2007

Vincent P. Maltese, Chairman  
Government Records Council



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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: October 3, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 26, 2007 Council Meeting**

**Joanna Perilli, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-180**

v.

**Borough of South Bound Brook<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any Borough resolutions and/or authorizations made pursuant to or in connection with the Workable Relocation Assistance Plan.

**Request Made:** July 17, 2006

**Response Made:** August 3, 2006

**Custodian:** Donald Kazar

**GRC Complaint Filed:** October 10, 2006

**Background**

**February 28, 2007**

Government Records Council's ("Council") Interim Order. At its February 28, 2007 public meeting, the Council considered the February 21, 2007 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 violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to her OPRA request indicating that all records responsive to the request had been provided within the statutorily mandated seven (7) business days, therefore creating a "deemed" denial.
- 2) Pursuant to the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian's failure to obtain an extension to fulfill the Complainant's OPRA request, and the Custodian's failure to adhere to his own time frame when providing the records responsive and ultimately fulfilling the Complainant's OPRA request fifty-three

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

<sup>2</sup> Represented by Richard Millet, Esq. (Bridgewater, NJ).

(53) business days after it was submitted, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

**March 6, 2007**

Council's Interim Order distributed to the parties.

**June 6, 2007**

GRC forwards complaint to the Office of Administrative Law for a determination of a knowing and willful violation of OPRA under the totality of the circumstances.

**July 30, 2007**

The Complainant withdrew the complaint from the Office of Administrative Law.

**Analysis**

The Complainant withdrew the complaint from the Office of Administrative Law on July 30, 2007.<sup>3</sup> Therefore, the complaint should be dismissed because the Complainant withdrew the matter from the Office of Administrative Law.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the complaint be dismissed because the Complainant withdrew the matter from the Office of Administrative Law.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

September 19, 2007

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<sup>3</sup> The Complainant copied the GRC on her withdrawal letter.



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**  
101 SOUTH BROAD STREET  
PO BOX 819  
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**INTERIM ORDER**

**February 28, 2007 Government Records Council Meeting**

Joann M. Perilli  
Complainant

Complaint No. 2006-180

v.

Borough of South Bound Brook  
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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:

- 1) The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to her OPRA request indicating that all records responsive to the request had been provided within the statutorily mandated seven (7) business days, therefore creating a “deemed” denial.
- 2) Pursuant to the Council’s decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian’s failure to obtain an extension to fulfill the Complainant’s OPRA request, and the Custodian’s failure to adhere to his own time frame when providing the records responsive and ultimately fulfilling the Complainant’s OPRA request fifty-three (53) business days after it was submitted, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of February 2007



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: March 2, 2007**

**Findings and Recommendations of the Executive Director  
February 28, 2007 Council Meeting**

Joann M. Perilli, Esq.<sup>1</sup>

GRC Complaint No. 2006-180

**Complainant**

v.

**Borough of South Bound Brook<sup>2</sup>**  
*Custodian of Records*

**Records Relevant to Complaint:** Any Borough resolutions and/or authorizations made pursuant to or in connection with the Workable Relocation Assistance Plan.

*Request Made: July 17, 2006*

*Response Made: August 3, 2006*

*Custodian: Donald Kazar*

**GRC Complaint Filed:** October 10, 2006

## **Background**

July 17, 2006

Complainant's Open Public Records Act ("OPRA") request submitted via fax and regular mail to the Custodian.

**August 2, 2006**

E-mail from Complainant to Custodian. In an e-mail to the Custodian the Complainant inquires about the status of the OPRA request that was submitted to the Borough twelve (12) business days before.

August 3, 2006

Custodian's Response to the Complainant's OPRA request. The Custodian informs the Complainant, twelve (12) business days after receiving the Complainant's OPRA request, that the Workable Relocation Assistance Plan ("WRAP") has not yet been approved by the Department of Community Affairs ("DCA"), therefore a copy of same is not available at this time. The Custodian also informs the Complainant that the remainder of the records responsive will be available on August 7, 2006.

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

<sup>2</sup> Represented by William Cooper, III (Somerville, NJ).

August 3, 2006

E-mail from Complainant to Custodian. In an e-mail to the Custodian, the Complainant requests the draft copy of the WRAP.

**August 16, 2006**

Letter from Complainant<sup>3</sup> to Custodian. The Complainant inquires as to the status of her July 17, 2006 OPRA request. The Complainant asks the Custodian to immediately fulfill her OPRA request and inform the Complainant of any fees associated with doing so.

**September 14, 2006**

Letter from Custodian to Complainant. The Custodian provides the Complainant with a copy of a letter approving the Borough's WRAP. The Custodian also provides the Complainant with a copy of the WRAP, even though this document was only requested in a subsequent letter, not on the Complainant's OPRA request form.

**September 20, 2006**

Letter from Complainant<sup>4</sup> to Relocation Officer. The Complainant writes to express dismay with how the OPRA request has been handled by the Borough of South Bound Brook. The Complainant did not receive a response from the Custodian in the statutorily mandated seven (7) business days nor did the Complainant receive the records responsive to the OPRA request. The Complainant gives the Borough ten (10) additional days to fulfill the July 17, 2006 OPRA request and explains that after ten (10) days legal action will be pursued regarding this matter if the records responsive are not received.

**September 25, 2006**

Letter from Custodian to Complainant. The Custodian provides the Complainant with a copy of the following:

- 1) Resolution appointing Princeton Brownfields Redevelopment, Inc.. as Borough's Redeveloper dated October 10, 2006,
- 2) Redevelopment Agreement between the Borough of South Bound Brook and RPB SBB, LLC dated September 21, 2001,
- 3) Resolution declaring RPB SBB, LLC in breach of Redevelopment Agreement,
- 4) Resolution Approving Rider to Redevelopment Agreement dated July 8, 2003,
- 5) Resolution Approving Assignment Agreement Between RPB, Inc. and M&M Investments, L.P. dated July 8, 2003, and
- 6) Second Rider to the Redevelopment Agreement dated October 16, 2003.

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<sup>3</sup> This letter was written by Vincent Mangini, Esq. on behalf of the Complainant. However, Mr. Mangini is not representing the Complainant in this matter.

<sup>4</sup> This letter was written by Vincent Mangini, Esq. on behalf of the Complainant.



The Custodian also informs the Complainant that he does not have an executed copy of the Third Rider to the Redevelopment Agreement. The Custodian declares that when a copy of same is obtained it will be forwarded to the Complainant.

### **September 28, 2006**

Letter from Complainant<sup>5</sup> to Custodian. The Complainant confirms the receipt of the above mentioned documents and informs the Custodian that some records responsive to the OPRA request have not been supplied to the Complainant. The Complainant is waiting to receive the Borough's resolution authorizing the creation of a WRAP and the submission of same to the DCA for approval. The Complainant declares that these items were specifically included on the OPRA request, which is attached to this letter for the Custodian's convenience. The Complainant explains to the Custodian that if the remainder of the OPRA request is not fulfilled by Monday, October 2, 2006, legal action will be pursued.

### **October 10, 2006**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- OPRA Request dated July 17, 2006,
- Rider A – Timeline summarizing the events from July 17, 2006 to present between the Complainant and the Custodian,
- Exhibit A – Cover letter to Custodian with OPRA request attached dated July 17, 2006,
- Exhibit B – Three (3) e-mails written between the Complainant and Custodian,
- Exhibit C – Letter from Complainant to Custodian dated August 16, 2006,
- Exhibit D – Letter from Custodian to Complainant dated September 14, 2006,
- Exhibit E – Letter from Complainant to Relocation Officer dated September 20, 2006,
- Exhibit F – Letter from Custodian to Complainant dated September 25, 2006, and
- Exhibit G – Letter from Complainant to Custodian dated September 28, 2006.

The Complainant asserts that an OPRA request was submitted to the Custodian via facsimile on July 17, 2006. The Complainant asserts that seven (7) business days later, July 26, 2006, she had not received any response from the Custodian. The Complainant alleges that between July 26, 2006 and August 2, 2006, various attempts were made by the Complainant and her colleagues to contact the Custodian in order to discuss the July 27, 2006 OPRA request. The Complainant asserts that several phone messages went unanswered by the Custodian during this time.

On August 2, 2006, the Complainant's paralegal sent the Custodian an e-mail inquiring about the OPRA request. The Complainant contends that the Custodian

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<sup>5</sup> This letter was written by Vincent Mangini, Esq. on behalf of the Complainant.

responded to this e-mail on August 3, 2006, twelve (12) business days after the OPRA request was received, stating that the records responsive would be provided to the Complainant. The Complainant alleges that at this time the Custodian denied her access to the WRAP, explaining that it had not yet been approved. The Complainant further asserts that she then requested a draft copy of the WRAP.

The Complainant asserts that as of August 16, 2006, the records responsive were not received from the Custodian and a letter of even date was sent to the Custodian regarding the unfulfilled OPRA request. The Complainant declares that on September 14, 2006, the Custodian provided her with a copy of the WRAP and two additional records responsive to the OPRA request. The Complainant further declares that the remaining records responsive were not provided to her at this time. The Complainant asserts that in an effort to reconcile the matter, a letter was sent to the Relocation Officer stating that the July 17, 2006 OPRA request was not completely fulfilled by the Custodian. The Complainant contends that on September 25, 2006, the Custodian provided her with some, but not all, of the remaining records responsive to the Complainant's OPRA request. The Complainant alleges that on September 28, 2006, an itemized list of the missing documents was sent to the Custodian and no response was received, thus forcing the Complainant to file a Denial of Access Complaint with the GRC.

October 25, 2006

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

**October 26, 2006**

Request for Statement of Information sent to the Custodian.

**October 26, 2006**

Letter from Custodian to Complainant. The Custodian asserts that there is no resolution specifically dealing with the WRAP.

**November 1, 2006**

Letter from GRC to Custodian. Following a telephone conversation with the Custodian, the GRC granted the Custodian a five (5) day extension to complete the Statement of Information.

**November 8, 2006**

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

- OPRA Request dated July 17, 2006,
- Letter from Custodian to Complainant dated September 14, 2006, and
- Letter from Custodian to Complainant dated September 25, 2006.

The Custodian asserts that he recognizes that the documents sought by the Complainant are available to her pursuant to OPRA. The Custodian further declares that under the totality of the circumstances of this complaint, he respectfully states that he has not knowingly or purposefully denied the Complainant access to the records responsive. The Custodian asserts that the Complainant was provided with a copy of the WRAP, as well as the Borough's Redevelopment Agreement, and that these documents were provided free of cost.

**November 13, 2006**

Letter from Complainant to GRC and Custodian. The Complainant states that she spoke with the Custodian who agreed to do the following:

- 1) Look for and report on the availability of a resolution from the Borough Council authorizing the Relocation Officer to prepare the WRAP, and
- 2) Look for and report the availability of a resolution from the Borough Council approving the WRAP and authorizing its submission to the DCA.

The Complainant is further asking that if no records responsive exist that the Custodian certify that no such resolutions or other approvals exist.

**November 14, 2006**

Letter from GRC to Custodian. The GRC asks that the Custodian complete the document index in table form, requested at the time the Statement of Information was requested, and return to the GRC no later than Thursday, November 16, 2006.

**November 16, 2006**

Custodian's Statement of Information received with the following attachments:

- Complainant's July 17, 2006 OPRA request,
- Letter from Custodian to Complainant dated September 14, 2006, and
- Letter from Custodian to Complainant dated September 25, 2006.

The Custodian asserts that he is aware that the records responsive are required to be disclosed under OPRA. However, the Custodian asserts that he did not knowingly or purposely deny the Complainant access to the requested materials. The Custodian declares that this project was first commenced in or around 1996. The Custodian states that the WRAP was a document created in or around July/August 2006. The Custodian contends that upon completion, the WRAP was forwarded by the Borough's Redevelopment Coordinator to the DCA for approval. The Custodian asserts that the WRAP was not approved and returned to the Borough until after the July 17, 2006 OPRA request. The Custodian certifies that the WRAP was provided to the Complainant on or about September 17, 2006. The Custodian asserts that the remaining documents concerning the Borough's Redevelopment Agreement were retrieved and forwarded to the Complainant on or about September 25, 2006. The Custodian also declares that the Complainant was not charged any fee for the reproduction of these documents.

**November 17, 2006**

Complainant's response to Custodian's Statement of Information. The Complainant states that the Custodian has failed to contact her regarding the following items he agreed to do regarding the OPRA request:

- 1) The Custodian agreed to look for and report on the availability of a resolution from the Borough Council authorizing the Relocation Officer to prepare the WRAP, and
- 2) The Custodian also agreed to look for and report the availability of a resolution from the Borough Council approving the WRAP and authorizing its submission to the DCA.

The Complainant further asks that if no records responsive exist that the Custodian certify as such.

**November 30, 2006**

Letter from Custodian to Complainant. The Custodian asserts that Ordinance 05-06 entitled "Ordinance Authorizing the Acquisition of Certain Real Property Located in the Borough of South Bound Brook" is the ordinance that provided the necessary authorization for the Borough to prepare the WRAP, which the Complainant has in her possession. The Custodian explains that this ordinance identified the property that was taken through eminent domain, the statutory authority to take the property, and also gave authorization to the appropriate officials to take any and all necessary action in connection with the acquisition of said property. The Custodian declares that by necessity, this ordinance includes the preparation and filing of a WRAP.

**December 5, 2006**

Letter from Complainant to Custodian. The Complaint disagrees with the Custodian, who alleges that Ordinance 05-06 contained the authorization to prepare South Bound Brook's WRAP. The Complainant alleges that a resolution or other approval for the WRAP should exist, as it is required by New Jersey state law. The Complainant is requesting that if the Borough never complied with the statute, they submit a certified statement stating so.

**December 12, 2006**

Letter from Custodian to Complainant. The Custodian supplies the Complainant with a certification stating that all records responsive to the Complainant's OPRA request have been provided to her. The Custodian further certifies that he will continue to locate any other document(s) that may fit this request.

**December 26, 2006**

Letter from Complainant to GRC. The Complainant alleges that the Custodian's December 12, 2006 certification is unsatisfactory. The Complainant believes that the document she is requesting does not exist and would like to be provided with a certification stating same.

## 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.

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 provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is *currently available... [i]f the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request...[t]he requestor shall be advised by the custodian when the record can be made available...[i]f the record is not made available by that time, access shall be deemed denied...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

The Complainant asserts that an OPRA request was submitted to the Custodian via facsimile on July 17, 2006. The Complainant asserts that seven (7) business days later, July 26, 2006, she had not received any response from the Custodian. The Complainant alleges that between July 26, 2006 and August 2, 2006, various attempts were made by the Complainant and her colleagues to contact the Custodian in order to

discuss the July 27, 2006 OPRA request. Several phone messages went unanswered by the Custodian during this time.

On August 2, 2006, the Complainant's paralegal sent the Custodian an e-mail inquiring about the OPRA request. The Complainant contends that the Custodian responded to this e-mail on August 3, 2006, twelve (12) business days after the OPRA request was received, stating that the records responsive would be provided to the Complainant on August 7, 2006. The Complainant alleges that at this time the Custodian denied her access to the WRAP, explaining that it had not yet been approved. The Complainant further asserts that she then requested a draft copy of the WRAP.

The Complainant asserts that as of August 16, 2006, the records responsive were not received from the Custodian and a letter of even date was sent to the Custodian regarding the unfulfilled OPRA request. The Complainant declares that on September 14, 2006, the Custodian provided her with a copy of the WRAP and two additional records responsive to the OPRA request. The Complainant further declares that the remaining records responsive were not provided to her at this time. The Complainant asserts that in an effort to reconcile the matter a letter was sent to the Relocation Officer stating that the July 17, 2006 OPRA request was not completely fulfilled by the Custodian. The Complainant contends that on September 25, 2006, the Custodian provided her with some, but not all, of the remaining records responsive to the Complainant's OPRA request. The Complainant alleges that on September 28, 2006, an itemized list of the missing documents was sent to the Custodian and no response was received, thus forcing the Complainant to file a Denial of Access Complaint with the GRC.

The Complainant disagrees with the Custodian, who alleges that Ordinance 05-06 contained the authorization to prepare South Bound Brook's WRAP. The Complainant alleges that a resolution or other approval for the WRAP should exist, as it is required by New Jersey state law. The Complainant is requesting that if the Borough never complied with the statute, they submit a certified statement stating so. The Complainant alleges that the Custodian's December 12, 2006 certification, stating that all records responsive to the Complainant's OPRA request have been provided to the Complainant, is unsatisfactory. The Complainant believes that the document she is requesting does not exist and would like to be provided with a certification stating same.

The Custodian asserts that he is aware that the records responsive are required to be disclosed under OPRA, however he did not knowingly or purposely deny the Complainant access to the requested materials. The Custodian further asserts that the items requested by the Complainant relate to the Borough's Redevelopment project. The Custodian declares that this project was first commenced in or around 1996. The Custodian states that the WRAP was a document created in or around July/August 2006. The Custodian contends that upon completion, the WRAP was forwarded by the Borough's Redevelopment Coordinator to the DCA for approval. The Custodian asserts that the WRAP was not approved and returned to the Borough until after the July 17, 2006 OPRA request. The Custodian certifies that the WRAP was provided to the Complainant on or about September 17, 2006. The Custodian asserts that the remaining

documents concerning the Borough's Redevelopment Agreement were retrieved and forwarded to the Complainant on or about September 25, 2006. The Custodian also declares that the Complainant was not charged any fee for the reproduction of these documents.

The Custodian asserts that Ordinance 05-06 entitled "Ordinance Authorizing the Acquisition of Certain Real Property Located in the Borough of South Bound Brook" is the ordinance that provided the necessary authorization for the Borough to prepare the WRAP, which the Complainant has in her possession. The Custodian explains that this ordinance identified the property that was taken through eminent domain, the statutory authority to take the property, and also gave authorization to the appropriate officials to take any and all necessary action in connection with the acquisition of said property. The Custodian declares that by necessity, this ordinance includes the preparation and filing of a WRAP.

The Custodian certifies that all records responsive to the Complainant's OPRA request have been provided to her. The Custodian further certifies that he will continue to locate any other document(s) that may fit this request.

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. As also prescribed under 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. Additionally, if the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's request, the Custodian should have obtained a written agreement from the Complainant in order to do so.

In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a "deemed" denial of the request. In this complaint, the Custodian responded to the OPRA request twelve (12) business days after the request was submitted and did not supply the first set of records responsive until September 14, 2006, almost a full month after the OPRA request was received by the Custodian.

Considering the somewhat broad nature of the Complainant's request for "any Borough resolutions and/or authorizations made pursuant to or in connection with the WRAP," the delay in releasing the records responsive could have been within reason

because the Complainant failed to specifically identify the resolutions and authorizations by name. In a recent Appellate Division decision, NJ Builders Association v. NJ Council on Affordable Housing, (App.Div. January 2007), the Court held that because the builders association's request did not specifically identify the documents it sought, as required by N.J.S.A. 47:1A-5.f., OPRA did not require the custodian to produce the records within the seven (7) business days as required in N.J.S.A. 47:1A-5.i.

However, the Custodian in the complaint now before the GRC stated in his August 3, 2006 e-mail to the Complainant that the records responsive would be available for Complainant on August 7, 2006. Therefore, the Custodian has unlawfully violated OPRA because he stated that all of the records responsive would be available on August 7, 2006, fifteen (15) business days after the Complainant's OPRA request was submitted, and did not fulfill the Complainant's OPRA request in its entirety until September 25, 2006, fifty-three (53) business days after the Complainant's OPRA request was submitted, which resulted in a "deemed" denial pursuant to N.J.S.A. 47: 1A-5.i.

Thus, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to her OPRA request indicating that all records responsive to the request had been provided within the statutorily mandated seven (7) business days, therefore creating a "deemed" denial. Also, pursuant to the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive. Additionally, the Custodian has unlawfully violated OPRA because he stated that the records responsive would be available to the Complainant on August 7, 2006, fifteen (15) business days after the Complainant's OPRA request was submitted, and did not release them until September 25, 2006, fifty-three (53) business days after the Complainant's OPRA request was submitted, which resulted in a "deemed" denial pursuant to N.J.S.A. 47: 1A-5.i.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonably 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:

“...[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.

The Complainant asserts that the Custodian failed to grant or deny her access to the records responsive within the statutorily mandated seven (7) business days. The Complainant further asserts that the records responsive to her OPRA request were not provided to her on August 7, 2006, fifteen (15) business days after the Complainant's OPRA request was submitted, even though the custodian had agreed in writing to do so. The Complainant alleges that the Custodian's lack of cooperation and communication regarding this OPRA request has forced her to file a Denial of Access Complaint with the Government Records Council.

The Custodian asserts that although he realizes that the records responsive to this request are available under OPRA, he did not knowingly and willfully deny the Complainant access to the records responsive. The Custodian eventually released the records responsive, fifty-three (53) business days after the Complainant's OPRA request was submitted, and provided a certification stating that all records responsive to the Complainant's OPRA request have been provided.

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).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to her OPRA request within the statutorily mandated seven (7) business days, therefore creating a “deemed” denial. Also, pursuant to the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive. Additionally, the Custodian has unlawfully violated OPRA because he stated

that the records responsive would be available to the Complainant on August 7, 2006, fifteen (15) business days after the Complainant's OPRA request was submitted, and did not release them until September 25, 2006, fifty-three (53) business days after the Complainant's OPRA request was submitted, which resulted in a "deemed" denial pursuant to N.J.S.A. 47: 1A-5.i.

Based on the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian's failure to obtain an extension to fulfill the Complainant's OPRA request, and the Custodian's failure to adhere to his own time frame when providing the records responsive and ultimately fulfilling the Complainant's OPRA request fifty-three (53) business days after it was submitted, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find:

- 3) The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to her OPRA request indicating that all records responsive to the request had been provided within the statutorily mandated seven (7) business days, therefore creating a "deemed" denial.
- 4) Pursuant to the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian's failure to obtain an extension to fulfill the Complainant's OPRA request, and the Custodian's failure to adhere to his own time frame when providing the records responsive and ultimately fulfilling the Complainant's OPRA request fifty-three (53) business days after it was submitted, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

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Date:

February 21, 2007