



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

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ROBIN BERG TABAKIN, Chair  
COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**July 30, 2008 Government Records Council Meeting**

Joseph A. Elcavage  
Complainant

Complaint No. 2006-55

v.

West Milford Township  
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 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 has complied with the provisions of the Council’s May 28, 2008 Interim Order by disclosing to the Complainant the records responsive to the Complainant’s request within the required time frame pursuant to Items #1 and #3 of the Interim Order.
2. Because the Complainant has failed to present sufficient proof to substantiate his assertion that more than one (1) e-mail responsive to his request exist in Councilman Warden’s personal account, as certified by the Custodian, the Custodian has not unlawfully denied the Complainant access to any additional records which may be contained within said account.
3. Because the Custodian relied upon advice from Counsel in making available only the summary information from the unopened e-mails, *see In re Zisa*, 385 N.J. Super. 188 (App. Div. 2006), and because the Custodian promptly released the contents of the records once she received a copy of the Council’s May 28, 2008 Interim Order, the Custodian’s delay in granting access to the requested records does 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 30<sup>th</sup> Day of July, 2008

Robin Berg Tabakin, 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: August 1, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
July 30, 2008 Council Meeting**

**Joseph A. Elcavage<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-55**

v.

**West Milford Township<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copies of e-mails from or to Councilman James Warden containing reference to Joseph A. Elcavage from the West Milford Township computer system.
2. Copies of e-mails from or to Councilman James Warden containing reference to Joseph A. Elcavage from Mr. Warden's personal e-mail accounts.<sup>3</sup>

**Request Made:** February 6, 2006

**Response Made:** February 7, 2006

**Custodian:** Antoniette Battaglia

**GRC Complaint Filed:** March 9, 2006

**Background**

**May 28, 2008**

At the May 28, 2008 public meeting, the Government Records Council ("Council") considered the May 21, 2008 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the contents of the two hundred sixty-one (261) unopened e-mails in Councilman Warden's township e-mail account, therefore the content of these e-mails shall be disclosed to the Complainant with any lawful redactions. Additionally, the Custodian shall disclose all e-mails with any lawful redactions in Councilman Warden's township account responsive to the Complainant's request for the period January 1, 2005 through January 30, 2005.

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

<sup>2</sup> Represented by Fred Semrau, Esq., of Dorsey & Semrau (Boonton, NJ).

<sup>3</sup> The scope of this request was subsequently narrowed to the time period encompassing January 1, 2005 to the date of the OPRA request.

2. Because the Custodian has certified that only one (1) e-mail responsive to the Complainant's request was in Councilman Warden's personal e-mail account and it was made available for disclosure to the Complainant, and because the Complainant has not offered any compelling evidence to the contrary, the Custodian did not unlawfully deny access to the records in the Councilman's personal e-mail account.
3. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
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.

**June 3, 2008**

Council's May 28, 2008 Interim Order ("Order") distributed to the parties.

**June 9, 2008**

Telephone call from the Custodian to the GRC. The Custodian states she can most effectively disclose the records in compliance with the Order by sending the records to the Complainant via e-mail. The Custodian seeks GRC approval to disclose the records in this manner. The GRC advised the Custodian that e-mail would be a satisfactory manner by which to disclose the records as long as the Complainant has not specified disclosure via a different means.

**June 9, 2008**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that she will begin the process of disclosing the records to the Complainant in compliance with the Order.

**June 9, 2008**

Custodian's response to the Order. The Custodian certifies that she received from the GRC a copy of the Order on June 3, 2008. The Custodian certifies that she has complied with Item #3 of the Order by e-mailing to the Complainant all of the records set forth in Item #1 of the Order. The Custodian further certifies she disclosed all records in unredacted form except for one (1) record which was made available to the Complainant with lawful redactions. The Custodian provided the GRC with a copy of the delivery notification for each record disclosed via e-mail.

**June 16, 2008**

E-mail from the Complainant to the GRC. The Complainant states that the Council found there was insufficient evidence to overcome the Custodian's certification that only one (1) e-mail responsive to the Complainant's request was in Councilman

Warden's personal e-mail account; however, subsequent to the Council's decision, the Complainant states that he has obtained copies of four (4) additional e-mails from Councilman Warden's personal account that are responsive to his OPRA request. In support of his contention the Complainant provides to the GRC the following copies of five (5) e-mails:

- E-mail regarding Greenwood Lake weed harvesting from Joe Elcavage to Robert Nolan and CC: [JamesWarden2nd@aol.com](mailto:JamesWarden2nd@aol.com) dated March 28, 2005
- E-mail regarding Greenwood Lake weed harvesting from Robert Nolan to Joe Elcavage and CC: [JamesWarden2nd@aol.com](mailto:JamesWarden2nd@aol.com) dated March 28, 2005
- E-mail regarding Greenwood Lake weed harvesting from PRC Water to [JamesWarden2nd@aol.com](mailto:JamesWarden2nd@aol.com), et al., dated March 31, 2005
- E-mail regarding Greenwood Lake weed harvesting from Joseph Ponzio to [JamesWarden2nd@aol.com](mailto:JamesWarden2nd@aol.com), et al., dated March 31, 2005
- E-mail regarding Greenwood Lake weed harvesting from Joseph Ponzio to [JamesWarden2nd@aol.com](mailto:JamesWarden2nd@aol.com), et al., dated April 1, 2005

The Complainant states that he believes he has now provided sufficient evidence to demonstrate Councilman Warden used his personal account for e-mail activity responsive to the Complainant's request and that additional e-mails responsive to his request exist in that account. The Complainant requests that he be granted access to all e-mails responsive to his request that remain in Councilman Warden's personal e-mail account. Further, the Complainant contends Councilman Warden and the Custodian willfully falsified the certification wherein it was averred that only one (1) e-mail responsive to the Complainant's request was in Councilman Warden's personal e-mail account.

### **Analysis**

#### **Whether the Custodian complied with the Council's May 28, 2008 Interim Order?**

The Custodian certifies that she received a copy of the Order on June 3, 2008. The Custodian further certifies that she has complied with Item No. 3 of the Order by e-mailing to the Complainant all of the records set forth in Item #1 of the Order on June 9, 2008, which is four (4) business days after the Custodian's receipt of the Order.

Accordingly, the Custodian has complied with the provisions of the Order by disclosing to the Complainant the records responsive to the Complainant's request within the required time frame pursuant to Items #1 and #3 of the Order.

#### **Whether the Custodian failed to disclose to the Complainant all of the e-mails in Councilman Warden's personal account responsive to the Complainant's request?**

The copies of e-mails that the Complainant relies upon in support of his contention that e-mails responsive to his OPRA request exist in Councilman Warden's personal account, other than the one (1) already disclosed by the Custodian, are not

convincing as proof because they are not records responsive to his request. Of the five (5) e-mails submitted by the Complainant, two (2) are not “from or to” Councilman Warden. Rather, Councilman Warden is copied on the correspondence. Further, not one of the e-mails contains reference to Joseph A. Elcavage, other than as a sender or recipient. The e-mails are all in reference to Greenwood Lake weed harvesting and the benefits and detriments of proceeding with the project.

Because the Complainant has failed to present sufficient proof to substantiate his assertion that more than one (1) e-mail responsive to his request exists in Councilman Warden’s personal account, as certified by the Custodian, the Custodian has not unlawfully denied the Complainant access to any additional records which may be contained within said account.

**Whether the Custodian’s delay in granting access to the requested records 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.

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, 107 (App. Div. 1996)).

In documents attached to her SOI, the Custodian states that she sought legal advice regarding how she should proceed with respect to the disclosure of unopened e-mails. Counsel subsequently advised the Custodian in a written opinion that the content of unopened e-mails has not been “received” pursuant to OPRA; therefore, the content is not a government record subject to disclosure. Accordingly, in compliance with Counsel’s advice, the Custodian made available to the Complainant only the summary information from the unopened e-mails that she identified as being responsive to the Complainant’s request.<sup>4</sup>

Although the Custodian failed to carry her burden of proving a lawful denial of access to the contents of the unopened e-mails in Councilman Warden’s township e-mail account pursuant to N.J.S.A. 47:1A-6, she relied upon the advice of Counsel in denying access to said contents. Reliance upon the advice of counsel as a defense to a charge that a municipal official acted in violation of his legal duty was considered in In re Zisa, 385 N.J. Super. 188 (App. Div. 2006). In that case, the official relied upon the advice of the city attorney that he did not have a conflict of interest regarding award of a contract. The administrative law judge affirmed the decision of the Local Finance Board in concluding that the official violated the Local Government Ethics Law; however, the Appellate Division reversed, holding that the official was entitled to rely upon the legal advice he had received and therefore did not violate the Ethics Law. Similarly here, the Custodian sought and followed Counsel’s advice with respect to disclosing only the summary information from the unopened e-mails.

Accordingly, because the Custodian relied upon advice from Counsel in making available only the summary information from the unopened e-mails, *see In re Zisa, supra*, and because the Custodian promptly released the contents of the records once she received a copy of the Council’s May 28, 2008 Interim Order, the Custodian’s delay in granting access to the requested records does 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 has complied with the provisions of the Council’s May 28, 2008 Interim Order by disclosing to the Complainant the records responsive to the Complainant’s request within the required time frame pursuant to Items #1 and #3 of the Interim Order.
2. Because the Complainant has failed to present sufficient proof to substantiate his assertion that more than one (1) e-mail responsive to his request exist in Councilman Warden’s personal account, as certified by the Custodian, the Custodian has not unlawfully denied the Complainant access to any additional records which may be contained within said account.

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<sup>4</sup>The summary information contained only the “From,” “Subject,” “Received” and “Time” data for each e-mail.

3. Because the Custodian relied upon advice from Counsel in making available only the summary information from the unopened e-mails, *see In re Zisa*, 385 N.J. Super. 188 (App. Div. 2006), and because the Custodian promptly released the contents of the records once she received a copy of the Council's May 28, 2008 Interim Order, the Custodian's delay in granting access to the requested records does 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: John E. Stewart  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 23, 2008





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

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ROBIN BERG TABAKIN, Chair  
COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**INTERIM ORDER**

**May 28, 2008 Government Records Council Meeting**

Joseph A. Elcavage  
Complainant

Complaint No. 2006-55

v.

West Milford Township  
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the contents of the two hundred sixty-one (261) unopened e-mails in Councilman Warden’s township e-mail account, therefore the content of these e-mails shall be disclosed to the Complainant with any lawful redactions. Additionally, the Custodian shall disclose all e-mails with any lawful redactions in Councilman Warden’s township account responsive to the Complainant’s request for the period January 1, 2005 through January 30, 2005.
2. Because the Custodian has certified that only one (1) e-mail responsive to the Complainant’s request was in Councilman Warden’s personal e-mail account and it was made available for disclosure to the Complainant, and because the Complainant has not offered any compelling evidence to the contrary, the Custodian did not unlawfully deny access to the records in the Councilman’s personal e-mail account.
3. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**



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

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of May, 2008

Robin Berg Tabakin, 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: June 3, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 28, 2008 Council Meeting**

**Joseph A. Elcavage<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-55**

v.

**West Milford Township<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copies of e-mails from or to Councilman James Warden containing reference to Joseph A. Elcavage from the West Milford Township computer system.
2. Copies of e-mails from or to Councilman James Warden containing reference to Joseph A. Elcavage from Mr. Warden's personal e-mail accounts.<sup>3</sup>

**Request Made:** February 6, 2006

**Response Made:** February 7, 2006

**Custodian:** Antoniette Battaglia

**GRC Complaint Filed:** March 9, 2006

**Background**

**February 6, 2006<sup>4</sup>**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in e-mail letter format.<sup>5</sup>

**February 7, 2006**

E-mail from the Custodian to Custodian's Counsel. The Custodian requests Counsel review the Complainant's OPRA request.

**February 7, 2006**

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian advises the Complainant that the request is too broad and requires clarification so that she can better understand the nature and scope of the request.

**February 8, 2006**

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

<sup>2</sup> Represented by Fred Semrau, Esq., of Dorsey & Semrau (Boonton, NJ).

<sup>3</sup> The scope of this request was subsequently narrowed to the time period encompassing January 1, 2005 to the date of the OPRA request.

<sup>4</sup> Although the Complainant's e-mailed OPRA request was dated February 6, 2006, it was sent after regular business hours and therefore not received by the Custodian until February 7, 2006.

<sup>5</sup> For the sake of clarification, the request was an e-mail message, not a website form.

E-mail from the Complainant to the Custodian. The Complainant modifies his OPRA request by limiting the time frame from January 1, 2005 to the date of request.

**February 9, 2006**

Memorandum from the Custodian to West Milford Township Councilman James Warden. The Custodian requests the Councilman provide her with the information pertinent to the Complainant's OPRA request.

**February 14, 2006**

Letter from the Custodian's Counsel to the Custodian. Counsel advises the Custodian that nearly all of Councilman Warden's e-mail correspondence is unopened. Counsel advises the Custodian that unopened e-mails have not been received pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. Counsel further informs the Custodian that the unopened e-mails may be disclosed as a government record to the extent that they show the "From, Subject, Received and Time" entries on the e-mail inbox screen, but that the content of the e-mails should not be considered a government record.

**February 15, 2006**

E-mail from the Custodian to the Complainant. The Custodian forwards a copy of Counsel's February 14, 2006 legal opinion to the Complainant. The Custodian informs the Complainant that Councilman Warden has advised the Custodian that he has never opened any e-mails in his township account nor has he sent any e-mails from the account. The Custodian advises the Complainant that the Councilman has granted her access to his e-mail account to verify the Councilman's assertions. The Custodian also advises the Complainant that she will print the screens from the Outlook® program used by the township for electronic mail, and that the printouts will display the unopened mail icons. The Custodian further advises the Complainant that the printouts will be made available for purchase, and that once available, she will let the Complainant know the total number of screen pages and the copy purchase price. The Custodian also advises the Complainant that she has been informed by the Councilman that he does not use his personal e-mail account for township business; however, he did locate one (1) e-mail that pertains to a township matter and has printed a copy for the Custodian so she can make it available to the Complainant.

**February 15, 2006**

E-mail from the Complainant to the Custodian. The Complainant contends that he has been made aware that Councilman Warden uses the township e-mail account as well as his personal e-mail account for township business. The Complainant asserts that Councilman Warden's personal e-mail account is jumbojim@aol.com. The Complainant states that he reviewed the opinion prepared by the Custodian's Counsel and comments that it is silent with respect to Councilman Warden's personal e-mail account.

**February 15, 2006**

E-mail from the Complainant to the Custodian. The Complainant requests the date the Custodian received his OPRA request and when a response should have been provided to him.

**February 15, 2006**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that his OPRA request, e-mailed after regular business hours, was not seen by her until February 7, 2006. The Custodian further states that she requested the Complainant narrow the scope of his request and that he did so by reply e-mail on February 8, 2006. The Custodian advises the Complainant that she has seven (7) business days from February 8, 2006 to respond to the Complainant's request.

**February 15, 2006**

E-mail from the Custodian's Council to the Custodian. Counsel states that he did not opine regarding Councilman Warden's personal e-mail account because he was not requested to do so. Counsel states that messages regarding township business sent through the Councilman's personal account are public records.

**February 15, 2006**

E-mail from the Custodian to the Complainant. The Custodian clarifies for the Complainant the opinion she received from Counsel.

**February 16, 2006**

Letter from Councilman Warden to the Custodian. The Councilman states that the e-mail he delivered to the Custodian was the only one that was stored in his personal AOL account. The Councilman also advises the Custodian to tell the Complainant that the Complainant may review any of the e-mails stored in the Councilman's township account pursuant to OPRA.

**February 16, 2006**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that she was granted access to Councilman Warden's township e-mail account. The Custodian states that there are two hundred seventy (270) e-mails in that account, but only fifteen (15) have been opened. The Custodian further advises the Complainant that she has printed out eight (8) pages of in-box screens showing the opened and unopened e-mails, and that the in-box screen printouts are available for review and/or purchase. The Custodian states that the opened e-mails may also be reviewed or printed for purchase. The Custodian informs the Complainant that there are no items in Councilman Warden's sent e-mail box. The Custodian advises the Complainant that the Councilman has informed her that there is one item in the Councilman's personal e-mail account pertaining to township business and that a copy of that item is available for review and/or purchase. The Custodian attaches a copy of an e-mail from Custodian's Counsel to Councilman Warden dated January 13, 2006.

**February 17, 2006**

E-mail from the Complainant to the Custodian. The Complainant states that, unless Councilman Warden provides those e-mails in his personal account responsive to the Complainant's request, the Complainant will file a Denial of Access Complaint.

**February 21, 2006**

E-mail from the Complainant to the Custodian. The Complainant states that Councilman Warden was not forthcoming with the records responsive to his request, and

that the Councilman has until the close of the business day to provide the requested records, otherwise the Complainant will file a Denial of Access Complaint.

**March 9, 2006**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:<sup>6</sup>

- E-mail from the Complainant to the Custodian dated February 8, 2006
- E-mail from the Custodian to the Complainant dated February 15, 2006
- E-mail from the Complainant to the Custodian dated February 15, 2006
- E-mail from the Complainant to the Custodian dated February 15, 2006
- E-mail from the Custodian to the Complainant dated February 15, 2006
- E-mail from the Complainant to the Custodian dated February 15, 2006
- E-mail from the Custodian to the Complainant dated February 16, 2006
- E-mail from the Complainant to the Custodian dated February 17, 2006

The Complainant states that he submitted his OPRA request on February 7, 2006 for the records relevant to this complaint. The Complainant also states that he received a response from the Custodian which he attached to his complaint.<sup>7</sup> The Complainant further states that he received correspondence from the Custodian dated February 15, 2006, wherein he was informed that since March of 2005, Councilman Warden had not read the majority of his e-mails and that he had only one (1) e-mail relating to township business in his personal e-mail account. The Complainant asserts that he was denied access to the records responsive to the request because he does not believe Councilman Warden has only one (1) e-mail responsive to the OPRA request in his personal e-mail account. Moreover, the Complainant does not accept the Custodian’s reason for denial of access to Councilman’s Warden’s township e-mail account as sufficient reason to deny the Complainant access to the content of those e-mails, viz., that the Councilman has not opened the majority of his e-mails.

The Complainant states that it is the practice of the township to automatically forward township e-mails to an employee’s personal e-mail address upon request. The Complainant contends that Councilman Warden had requested such a service. The Complainant states that the one (1) e-mail offered from Councilman Warden’s personal e-mail box was one that the Councilman knew the Complainant had also previously received.

Further, the Complainant implies that Councilman Warden has more than one (1) personal e-mail account to which he may receive e-mail correspondence pertaining to township business because the Complainant provides the Councilman’s known e-mail address as jumbojim@aol.com and states that this address is *one of* the Councilman’s accounts.

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<sup>6</sup> This complaint has “Amended Complaint 3-9-06” printed across the top; however, the GRC was unable to locate an original complaint filed under this same complaint number.

<sup>7</sup> The Denial of Access Complaint did not have an attached response from the Custodian to the Complainant in reference to the Complainant’s OPRA request.

**March 10, 2006**

Offer of Mediation sent to both parties. The Complainant agrees to mediate this complaint.

**March 13, 2006**

The Custodian agrees to mediate this complaint.

**March 17, 2006**

The complaint is forwarded to the Office of Dispute Resolution for mediation.

**February 15, 2008**

The Office of Dispute Resolution refers the complaint back to the GRC for adjudication.

**February 19, 2008**

Request for the Statement of Information sent to the Custodian.

**February 26, 2008**

Custodian's Statement of Information ("SOI") with the following attachments:<sup>8</sup>

- E-mail from the Complainant to the Custodian dated February 6 2006
- E-mail from the Custodian to the Complainant dated February 6, 2006
- Complainant's e-mail letter format OPRA request dated February 6, 2006
- E-mail from the Custodian to Custodian's Counsel dated February 7, 2006
- Custodian's response to the Complainant's OPRA request dated February 7, 2006
- E-mail from the Complainant to the Custodian dated February 8, 2006
- Memorandum from the Custodian to Councilman Warden dated February 9, 2006
- Letter from the Custodian's Counsel to the Custodian dated February 14, 2006
- E-mail from the Custodian to the Complainant dated February 15, 2006
- E-mail from the Complainant to the Custodian dated February 15, 2006
- E-mail from the Complainant to the Custodian dated February 15, 2006
- E-mail from the Custodian to the Complainant dated February 15, 2006
- E-mail from the Custodian's Counsel to the Custodian dated February 15, 2006
- E-mail from the Custodian to the Complainant dated February 15, 2006
- Letter from Councilman Warden to the Custodian dated February 16, 2006
- E-mail from the Custodian to the Complainant dated February 16, 2006<sup>9</sup>
- E-mail from the Complainant to the Custodian dated February 17, 2006
- E-mail from the Complainant to the Custodian dated February 21, 2006

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<sup>8</sup> Other correspondence was attached to the SOI which was not relevant to this complaint.

<sup>9</sup> The Custodian attached to her Statement of Information eight (8) pages of Outlook® electronic mail in-box screen printouts addressed "Warden @WestMilford.org." Each page of the printout contains forty (40) items for a total of 320 items. Of the 320 items, 36 are duplicate entries and eight (8) are beyond the scope of the Complainant's request. This leaves 276 items responsive to the Complainant's request in Councilman Warden's township account (261 unopened and 15 opened). However, the e-mail items start on January 31, 2005 and they should start on January 1, 2005 pursuant to the Complainant's request. Accordingly, thirty (30) days of e-mails are missing from the Custodian's response. The Custodian also attached a single sent items page from the same account which displays the message "there are no items to show in this view."

The Custodian certifies that her search for the requested records involved submitting a request to Councilman Warden for access to the requested records, reviewing the Outlook® e-mail screens in the Councilman's township e-mail account and receiving a statement from the Councilman that only one (1) e-mail in his personal e-mail account was responsive to the Complainant's OPRA request.

The Custodian also certifies that no records responsive to the Complainant's request have been destroyed and therefore the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management has not been triggered in this matter.

The Custodian certifies that all records responsive to the Complainant's request were made available to the Complainant for personal inspection on the computer screen or as hard copies available for purchase. The Custodian certifies that the Complainant did not view any of the records made available to him. The Custodian further certifies that all records responsive to the request were made available to the Complainant in their entirety and without any redactions.

#### **April 21, 2008**

Facsimile transmission from the GRC to the Custodian. The GRC confirms a telephone message left this date with the Custodian's office wherein the GRC requests a certification from Councilman Warden providing addresses for his personal e-mail accounts to which he may receive e-mail correspondence pertaining to township business and affirming that within those accounts only one (1) e-mail was responsive to the Complainant's request.

#### **April 22, 2008<sup>10</sup>**

Telephone call from the Custodian to the GRC. The Custodian advises the GRC that Mr. Warden is no longer a member of City Council; however, she will obtain the certification from him as requested by the GRC. The Custodian states that as soon as the certification is secured she will forward it to the GRC.

#### **April 28, 2008**

Facsimile transmission from the Custodian to the GRC. The Custodian forwards to the GRC a certification from former Councilman Warden confirming e-mail accounts to which he may have received e-mail pertaining to township business and affirming that only one (1) e-mail in his personal account was responsive to the Complainant's request.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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<sup>10</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.



“...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 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. 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 Complainant asserts that the Custodian provided insufficient reason for denial of access to the majority of the e-mails in Councilman Warden’s township e-mail account, viz., that Councilman Warden claimed he did not read them therefore they are not disclosable. The Custodian certifies that all records the Complainant requested were made available to him.

The Custodian did not make all records requested by the Complainant available to him. The record reflects that of two hundred seventy-six (276) e-mails in the Councilman’s township e-mail account responsive to the Complainant’s request, the content of two hundred sixty-one (261) was not disclosed. The Custodian, relying on Counsel’s opinion that the unopened e-mails were not received under OPRA because they remained unopened after electronic delivery and therefore are not government records, made only the “From, Subject, Received and Time” entries available to the Complainant.

N.J.S.A. 47:1A-1.1 defines a government record as any [records] made, maintained or kept on file ... or ... received in the course of [a government agency’s] official business ...” The term “received” is not defined in OPRA; however because the legislature did not propose any exceptions to the term, no distinction should be made between opened and unopened e-mail.

Regular postal mail is deemed to be received and noted by the recipient once the sender proves the item was properly posted, irrespective of whether the recipient takes notice of the contents. The weight of the law has come down on the side of proof of the mailing rather than proof of the receipt (much less proof that the envelope was opened and the contents actually read). Where provision is made for service by mail, service is complete on mailing. R. 1:5-4(b).

Further, in Outlook®, a popular e-mail program used by West Milford Township as well as many other government agencies, there is a feature called the Reading Pane. The Microsoft Corporation provides the following instructions concerning the use of the Reading Pane:

You can preview items in your Inbox *without opening them* by using the Reading Pane—just click the message to display the text of the item. In the Reading Pane, you can also open attachments, follow a hyperlink, use voting buttons, view the follow-up information in the InfoBar, and respond to meeting requests. You can view messages safely in the Reading Pane. Potentially malicious scripts or attachments are not activated or opened automatically in the Reading Pane.<sup>11</sup> (Emphasis added.)

By using Reading Pane, the contents of an e-mail can be read without opening the e-mail. A government agency taking advantage of this feature, therefore, need never open an e-mail. Accordingly, if unopened e-mails were deemed not to be government records, the purpose of OPRA would effectively be undermined.

A distinction between whether an e-mail is opened or unopened is not relevant to a determination of whether a record is a government record or not under OPRA. Further, under OPRA as long as the record is “made, maintained ... kept on file or... received” in the course of government business, it is a government record. N.J.S.A. 47:1A-1.1. It is of no consequence, therefore, whether the e-mail is linked to a personal or government account. In Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006), the Council determined that electronic correspondence stored in a government official’s personal e-mail account was a government record subject to disclosure when used for Borough business. The Council found that “the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA.”

Accordingly, e-mails and other forms of electronically transmitted messages received in the course of government business are government records whether received by a personal or government–provided receiving device.

Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the contents of the two hundred sixty-one (261) unopened e-mails in Councilman Warden’s township e-mail account, therefore the content of these e-mails shall be disclosed to the Complainant with any lawful redactions. Additionally, the Custodian shall disclose all e-mails with any lawful redactions in Councilman Warden’s

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<sup>11</sup> <http://office.microsoft.com/assistance/hfws>.

township account responsive to the Complainant's request for the period January 1, 2005 through January 30, 2005.

The Complainant also contends that he was denied access to the records responsive to the request because he believes Councilman Warden has more than one (1) e-mail in his personal e-mail account responsive to his OPRA request. However, because the Complainant has not offered any compelling evidence to the contrary and the Custodian has certified that only one (1) e-mail responsive to the Complainant's request was in Councilman Warden's personal e-mail account and it was made available for disclosure to the Complainant, the Custodian did not unlawfully deny access to the records in the Councilman's personal e-mail account.

**Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the contents of the two hundred sixty-one (261) unopened e-mails in Councilman Warden's township e-mail account, therefore the content of these e-mails shall be disclosed to the Complainant with any lawful redactions. Additionally, the Custodian shall disclose all e-mails with any lawful redactions in Councilman Warden's township account responsive to the Complainant's request for the period January 1, 2005 through January 30, 2005.
2. Because the Custodian has certified that only one (1) e-mail responsive to the Complainant's request was in Councilman Warden's personal e-mail account and it was made available for disclosure to the Complainant, and because the Complainant has not offered any compelling evidence to the contrary, the Custodian did not unlawfully deny access to the records in the Councilman's personal e-mail account.
3. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
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:

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Approved By:

Catherine Starghill  
Executive Director

May 21, 2008