



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Allan Johnson
Complainant

Complaint No. 2007-107

v.

Borough of Oceanport
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 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 because Hugh Sharkey has failed to establish in his motion for reconsideration of the Council’s February 25, 2009 Administrative Disposition that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Custodian’s certification that all records responsive to the Complainant’s OPRA request were provided to him within the statutorily required response time, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Allan Johnson¹
Complainant**

GRC Complaint No. 2007-107

v.

**Borough of Oceanport²
Custodian of Records**

Records Relevant to Complaint: All internal and external correspondences, including e-mails, belonging to Councilman Hugh Sharkey concerning Borough business between October 1, 2006 and October 20, 2006, including e-mails to and from individuals from the town of Shrewsbury about a November 1, 2006 meeting.

Request Made: November 9, 2006

Response Made: November 20, 2006

Custodian: Kim Jungfer

GRC Complaint Filed: April 20, 2007

Background

February 25, 2009

Government Records Council's ("Council") Final Order. At its February 25, 2009 public meeting, the Council considered the December 15, 2008 Initial Decision of Administrative Law Judge Martone and all related documentation submitted by the parties. The Council, therefore, found that:

1. The December 15, 2008 Initial Decision of Administrative Law Judge Martone which finds that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access to the Complainant's November 9, 2006 OPRA request under the totality of the circumstances, and that the conduct of Councilman Hugh Sharkey was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent, and which orders Councilman Hugh Sharkey to "pay a civil penalty in the amount of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11.a." is **ADOPTED**;
2. The Initial Decision is **MODIFIED** to require that, pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be

¹ No legal representation listed on record.

² Represented by DAG Brady Connaughton, on behalf of the NJ Attorney General.

made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

3. Councilman Hugh Sharkey shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order.

March 9, 2009

Check in the amount of \$1,000, payable to the Treasurer, State of New Jersey, from Councilman Hugh Sharkey to the Government Records Council.

March 12, 2009

Motion for Reconsideration from Councilman Hugh Sharkey. Councilman Sharkey requests that the GRC reconsider the February 25, 2009 Supplemental Findings and Recommendations of the Executive Director pursuant to *N.J.A.C. 5:105.2.10*. Councilman Sharkey asserts that mistake and new evidence require that the GRC reconsider this matter.

Councilman Sharkey attaches to his Motion for Reconsideration the following:

- a five (5) page summary of reasons for reconsideration;
- CD-ROM containing the following:
 - Transient Documents:
 - Letter from Thomas X. Seaman to Kimberly Jungfer, dated November 29, 2006, attaching Feasibility Study, Police Dispatching Services, dated November 2006;
 - E-mail from GRC to Kimberly Jungfer, dated May 16, 2007;
 - Memorandum from Kimberly Jungfer to Borough of Oceanport Mayor and Council, dated October 15, 2007;
 - Agenda for Seminar, Managing Government E-Mail Risks: OPRA, E-discovery and Retention, and Developing Solutions, dated February 24 and February 26, 2009;
 - E-mail from Hugh Sharkey to Albin Wagner, dated February 28, 2009;
 - E-mail from Albin Wagner to Hugh Sharkey, dated March 2, 2009;
 - State of New Jersey Circular Letter 03-10-ST from Regina L. Thomas, undated;
 - Material Error in SOI:
 - E-mail from Scott Arnett, Esq., to Hugh Sharkey, dated August 8, 2007;
 - E-mail from Scott Arnett, Esq., to Hugh Sharkey, dated August 9, 2007;
 - E-mail from Hugh Sharkey to Scott Arnett, Esq., dated August 11, 2007;
 - E-mail from Hugh Sharkey to Scott Arnett, Esq., dated August 11, 2007;
 - E-mail from Hugh Sharkey to Scott Arnett, Esq., dated August 11, 2007;
 - Index of responsive e-mails delivered to the GRC;

- Prosecutor Investigation:
 - Minutes of Workshop, dated October 17, 2005;
 - Executive Session Agenda, dated March 2, 2006;
 - OPRA request from Complainant, Allan Johnson, to Borough of Oceanport, dated August 1, 2006;
 - E-mail from Kimberly Jungfer to Hugh Sharkey, dated August 22, 2006;
 - OPRA request from Complainant to Borough of Oceanport, dated September, 2006;
 - OPRA request from Complainant to Borough of Oceanport, dated October 10, 2006;
 - OPRA request from Complainant to Borough of Oceanport, dated October 10, 2006;
 - OPRA request from Complainant to Borough of Oceanport, dated October 20, 2006;
 - OPRA request from Complainant to Borough of Oceanport, undated;
 - OPRA request from Complainant to Borough of Oceanport, undated;
 - OPRA request from Complainant to Borough of Oceanport, dated February 20, 2007;
 - OPRA request from Complainant to Borough of Oceanport, dated February 20, 2007;
 - E-mail from Hugh Sharkey to redbankra@yahoo.com, dated February 27, 2007;
 - OPRA request from Complainant to Borough of Oceanport, dated March 25, 2007;
 - Notes of telephone conversations from Hugh Sharkey, dated October 10, 2007;
 - Receipt from Office of Attorney General, Department of Law & Public Safety, Division of State Police, dated January 21, 2009;
- Known E-mail Problems:
 - E-mail from Scott Arnett to Council, Borough of Oceanport, dated January 11, 2006;
 - E-mail from Ellyn Kahle to Hugh Sharkey, dated May 2, 2006;
 - E-mail from Ellyn Kahle to L. Johnson, dated August 3, 2006;
 - E-mail from Hugh Sharkey to Pat Welsh, dated September 26, 2006;
 - E-mail from Lucille Chaump to Ellyn Kahle, dated October 13, 2006;
 - E-mail from Lucille Chaump to Hugh Sharkey, dated October 13, 2006;
 - E-mail from Lucille Chaump to Ellyn Kahle, dated October 18, 2006;
 - E-mail from Lucille Chaump to Ellyn Kahle, dated October 18, 2006;
 - E-mail from Ellyn Kahle to Lucille Chaump, dated October 18, 2006;

- E-mail from Ellyn Kahle to Lucille Chaump, dated October 18, 2006;
- E-mail from Pat Hickey to Kimberly Jungfer, dated October 19, 2006;
- E-mail from Michael Mahon to Hugh Sharkey, dated October 19, 2006;
- E-mail from Pat Hickey to Ellyn Kahle, dated October 20, 2006;
- E-mail from Hugh Sharkey to Kimberly Jungfer, dated October 23, 2006;
- E-mail from Pat Hickey to Ellyn Kahle, dated October 25, 2006;
- E-mail from Hugh Sharkey to Kimberly Jungfer, dated October 25, 2006;
- E-mail from Pat Hickey to Pat Hickey, dated November 30, 2006;
- E-mail from Hugh Sharkey to Ellyn Kahle, dated December 2, 2006;
- E-mail from Hugh Sharkey to Ellyn Kahle, dated January 30, 2007;
- New Jersey Law Journal, *Complex Litigation and E-discovery: E-mails Are Not Always Admissible*, dated February 19, 2007;
- Letter from Alan S. Pralgever, Esquire, dated April 5, 2007
- E-mail from Kimberly Jungfer to Hugh Sharkey, dated April 18, 2007;
- E-mail from Scott Arnett, Esq., to Kimberly Jungfer, dated April 30, 2007;
- E-mail from Hugh Sharkey to Scott Arnett, dated April 30, 2007;
- E-mail from Comcast to Hugh Sharkey, dated August 10, 2007;
- E-mail from Hugh Sharkey to GRC, dated August 10, 2007;
- The Link News, *Kahle: Public Records Requests “Political,”* dated August 29, 2007;
- Associated Press, *Oceanport to seek plans for computer upgrades*, undated;
- Newspaper article, *GOP: Politics at Play in e-mail disclosures*, undated;
- Memorandum from Hugh Sharkey to GRC, dated January 28, 2009;
- Letter from Hugh Sharkey to GRC, dated March 12, 2009.

In support of his Motion for Reconsideration, Councilman Sharkey argues several points. First, Councilman Sharkey argues that various “transient” documents were erroneously treated as deliberative documents. Councilman Sharkey asserts that the basis for the Complainant’s Denial of Access Complaint was a single e-mail from Gene Farrell to FNear@shrewsburyboro.com and TSpencer@shrewsburyboro.com dated October 5, 2006, relating to shared services. Councilman Sharkey asserts that this e-mail and nine (9) other related e-mails were transient documents that were disposable after serving their administrative useful purpose. Councilman Sharkey contends that in an e-mail exchange with Albin Wagner, Deputy Director for Records Management of the NJ Division of Archives and Records Management, Mr. Wagner rendered an opinion that, as a string of requests for information, the e-mails would be considered “transient;” such e-mails could be deleted when the action is completed and do not require authorization for destruction.

Councilman Sharkey argues that the opinion of Mr. Wagner constitutes new evidence requiring the Council to reconsider its February 25, 2009 decision.

Councilman Sharkey also observes that an e-mail from the GRC to Kimberly Jungfer, dated May 16, 2007, granted a three (3) day extension for the Borough Attorney to review the Denial of Access Complaint. Further, Councilman Sharkey asserts that the GRC should request the invoice for the Borough Attorney's work in this regard.

Councilman Sharkey also asserts that the November 30, 2006 receipt of Shrewsbury's Feasibility Study made ten e-mail requests for the study disposable.³

Councilman Sharkey refers to a memorandum dated October 15, 2007 with instructions to Oceanport Council members regarding e-mail retention responsibilities, and asserts that these instructions are significantly different from the Circular Letter 03-10-ST which was disseminated at a seminar for government officials on February 24, 2009.

Councilman Sharkey also asserts that the Oceanport Custodian and the Oceanport Borough Attorney did not recognize the transient nature of the e-mails which were included with the Complainant's Denial of Access Complaint.

Councilman Sharkey also contends that the Custodian's Statement of Information contained a material error which "resulted in an extremely misleading impression of Councilman Sharkey's compliance with his OPRA responsibilities."

Councilman Sharkey asserts that two e-mails responsive to the Complainant's OPRA request, dated October 2, 2006 and October 13, 2006, were forwarded to the Borough Attorney and should have been found on the borough's e-mail server. Moreover, Councilman Sharkey asserts that an additional forty-six (46) e-mails should have been found on the borough's server and provided to the Complainant.⁴ Councilman Sharkey contends that these e-mails "clearly document Councilman Sharkey's compliance with his OPRA responsibilities, i.e., sending borough related communications to Custodian for retention of 'non-transient' communications that would be responsive to OPRA requests."

Councilman Sharkey asserts that a grievance filed against him on November 30, 2006 was the reason that he responded to the Borough Attorney rather than the Custodian. Councilman Sharkey further asserts that the "tone" of the Custodian's August 10, 2006 rejection of Councilman Sharkey's initial response caused concern to him. Councilman Sharkey requests that the GRC conduct an in-camera review of the grievance file to understand his concern with responding directly to the Custodian.

³ Councilman Sharkey failed to identify the ten (10) e-mails which he believes were rendered disposable by the disclosure of the Feasibility Study.

⁴ Councilman Sharkey asserts that these forty-six (46) e-mails are contained on the CD-ROM which he delivered to the GRC.

Councilman Sharkey contends that he made a good faith effort to determine the substance of the Denial of Access Complaint after learning of the Council's July 25, 2007 Interim Order.

Councilman Sharkey contends that his responses to the Custodian in this matter complied with law enforcement requests and Borough Attorney advice not to discuss information related to an active law enforcement investigation. In support of this contention, Councilman Sharkey asserts that various evidence establishes such a law enforcement investigation, including a U.S. postage receipt to U.S. Attorney Christopher Christie, Council meeting minutes dated October 17, 2005 showing the efforts of Councilwoman Linda Johnson (Complainant's wife) to obtain documents provided to law enforcement by Councilman Sharkey, ten (10) OPRA requests filed by the Complainant for "every email [sic] sent or received by Councilman Sharkey since joining council[.]" an e-mail dated April 27, 2007 from Councilman Sharkey to FBI Special Agent Robert Cook, telephone records and notes from Councilman Sharkey documenting a telephone call to law enforcement personnel, including Assistant Monmouth County Prosecutor John Loughrey, and a receipt dated January 21, 2009 from the NJ State Police. Councilman Sharkey requests that the GRC consider the totality of the evidence as well as the possibility that the "[Complainant's] OPRA requests are nothing more than a continuation of his wife's attempts to find out what information was provided to law enforcement."

Finally, Councilman Sharkey asserts that the GRC is "well aware" of common e-mail related problems experienced by government officials. Councilman Sharkey refers to the numerous copies of e-mail submitted on CD-ROM to support this contention. Councilman Sharkey requests that the GRC consider the "likelihood that e-mails were inadvertently or intentionally deleted or lost."

March 15, 2009

E-mail from the Complainant to the GRC. The Complainant asserts that Councilman Sharkey has been given numerous opportunities to resolve this matter with the custodian, the Borough Attorney, the GRC and the Office of Administrative Law. The Complainant contends that there were no mistakes nor any new evidence to support the Councilman's attempt to justify his claim that he did not need to comply with the Complainant's OPRA request. The Complainant asks that Councilman Sharkey's request for reconsideration be denied.

March 26, 2009

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey asserts that he has pointed out many times that e-mails responsive to the Complainant's OPRA request exist on the Borough of Oceanport server and should be provided to the Complainant. Councilman Sharkey asserts that all of his e-mails and reports indicate his clear intent to be open about his council activities and his intent to comply with OPRA and to rely on the Custodian to retain appropriate e-mails. Councilman Sharkey states that he requests that the GRC begin a formal law enforcement investigation into the Borough of Oceanport's failure to provide e-mails responsive to the Complainant's OPRA request from the Borough server.

April 15, 2009

E-mail from the Complainant to the GRC. In response to Councilman Sharkey's request for reconsideration, the Complainant asserts that Councilman Sharkey did not forward the Shrewsbury correspondence to the Oceanport Custodian in 2006. The complainant also asserts that the release of the Shrewsbury Feasibility Study did not relate to his OPRA request. The Complainant questions whether Councilman Sharkey informed Albin Wagner of NJDARM that the Oceanport Custodian was never in possession of the Shrewsbury correspondence or that Councilman Sharkey was party to a hearing before the Office of Administrative Law. The Complainant requests that the GRC deny Councilman Sharkey's request for reconsideration.

April 19, 2009⁵

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey asserts that additional new evidence became available on April 13, 2009 and he submits such evidence for review. Councilman Sharkey asserts that the Borough Attorney will inspect the Borough's server in the near future; Councilman Sharkey requests that the Borough apprise all parties to this matter of this appointment so that they may witness same. Councilman Sharkey requests that the GRC send a representative to observe the inspection.

Councilman Sharkey attaches the following:

- OPRA response from the Custodian to Hugh Sharkey dated April 13, 2009;
- List of OPRA responses to Hugh Sharkey OPRA request dated April 1, 2009, including:
 - E-mail from Ellyn Kahle to Kim Jungfer dated October 11, 2006;
 - E-mail from Pat Hickey to Ellyn Kahle dated October 20, 2006;
 - E-mails between Hugh Sharkey and Councilman Gallo, dated October 1, 2006 to October 20, 2006;
 - E-mails between Hugh Sharkey and Councilman Briscione, dated October 1, 2006 to October 20, 2006;
 - E-mails between Hugh Sharkey and Councilman Ibex, dated October 1, 2006 to October 20, 2006;
 - E-mails between Hugh Sharkey and Councilwoman Johnson, dated October 1, 2006 to October 20, 2006;
 - E-mails between Councilman Sharkey and Councilwoman Kahle, dated October 1, 2006 to October 20, 2006.

Councilman Sharkey requests that the GRC consider an additional thirteen (13) e-mails which he believes document the following:

- 1) the SOI submitted by the Custodian was materially incorrect and misleading;
- 2) Councilman Sharkey complied with his OPRA responsibilities;
- 3) Councilman Sharkey's belief that five (5) 2006 Oceanport elected officials destroyed copies of responsive e-mails.

⁵ Additional correspondence was submitted by both parties in this matter. However, such correspondence either restates assertions previously made or contains no new allegations of fact or assertions of law.
Allan Johnson v. Borough of Oceanport, 2007-107 – Supplemental Findings and Recommendations of the Executive Director

Councilman Sharkey asserts that thirteen (13) e-mails he received from the Custodian only served to raise additional concerns in his mind.

Councilman Sharkey submits a list of twenty-six (26) additional e-mails which he believes are responsive to the Complainant's OPRA request for the period October 1, 2006 to October 20, 2006, which he believes establish conclusively:

1) how unreliable and misleading the Custodian's certification was compared to the thirty-nine (39) e-mails documenting the Councilman's track record of compliance with his OPRA duties, which Councilman Sharkey asserts is a much more accurate reflection of facts than depicted by "a materially incorrect and misleading certification and 'transient e-mail(s)' to Shrewsbury Township;"

2) that Councilman Sharkey's "unofficial" retention of responsive e-mails is substantially better than both the Custodian's retention of thirteen (13) e-mails and the one unofficial retention by all other elected officials combined;

3) these twenty-six (26) e-mails further highlight the serious problem with e-mail retention and document destruction controls in Oceanport and that important "responsive documents" are being destroyed.

Councilman Sharkey requests that the GRC accept his original response to the Custodian, as timely and adequate in light of the evidence of record and the Borough Attorney's legal advice regarding revealing anything related to the Monmouth County Prosecutor's three year investigation.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's February 25, 2009 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or

unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' Ibid." In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, Councilman Sharkey submitted copious evidence, including e-mails, news articles, seminar agendas and a circulatory letter issued by the State of New Jersey. Moreover, Councilman Sharkey submitted numerous e-mails sent and received after the Council's adoption of the ALJ's Initial Decision in this matter, which Councilman Sharkey contends establish that his actions were lawful.

However, as the moving party, Councilman Sharkey was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, supra. Councilman Sharkey has failed to meet this burden. None of the materials submitted by Councilman Sharkey in support of his Motion for Reconsideration constitutes probative, competent evidence sufficient to establish that the Administrative Law Judge erred in the Initial Decision. Moreover, Councilman Sharkey has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in adopting the Administrative Law Judge's Initial Decision. See D'Atria, supra.

Here, Councilman Sharkey had a full and fair opportunity to present all evidence which he believed was relevant to his case at the hearing before the Office of Administrative Law. ALJ Martone issued an Initial Decision in the matter, determining that Councilman Sharkey's exculpatory evidence was not credible. The ALJ's credibility determination is entitled to the Council's deference. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), certif. denied 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of

Health v. Tegnazian, 194 N.J. Super. 435 , 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor. *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the testimony and evidence on both sides, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. Each of the ALJ’s conclusions is clearly aligned and consistent with those credibility determinations. As such, the Council was able to ascertain which testimony the ALJ accepted as fact and determined that these facts provided a reasonable basis for the ALJ’s conclusions. Based on the substantial credible evidence in the record, including the testimony of Councilman Sharkey, the Council found that the ALJ’s determination that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access to the Complainant’s November 9, 2006 OPRA request under the totality of the circumstances, and that the conduct of Councilman Hugh Sharkey was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent, was correct and reasonable and supported by the substantial credible evidence of record.

Moreover, it should be noted that a Custodian’s compliance with records retention schedules is outside the GRC’s jurisdiction. N.J.S.A. 47:1A-7. See also Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008); Van Pelt v. Twp of Edison BOE, GRC # 2007-179 (January 2008)(GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain).

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council’s February 25, 2009 Final Decision that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Custodian’s certification that all records responsive to the Complainant’s OPRA request were provided to him within the statutorily required response time, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because Hugh Sharkey has failed to establish in his motion for reconsideration of the Council's February 25, 2009 Administrative Disposition that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Custodian's certification that all records responsive to the Complainant's OPRA request were provided to him within the statutorily required response time, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

Allan Johnson
Complainant

Complaint No.2007-107

v.

Borough of Oceanport (Monmouth)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 2009 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 December 15, 2008 Initial Decision of Administrative Law Judge Martone which finds that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access to the Complainant’s November 9, 2006 OPRA request under the totality of the circumstances, and that the conduct of Councilman Hugh Sharkey was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent, and which orders Councilman Hugh Sharkey to “pay a civil penalty in the amount of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11.a.” is **ADOPTED**;
2. The Initial Decision is **MODIFIED** to require that, pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999” and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.
3. **Councilman Hugh Sharkey shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order.**



Interim Order Rendered by the
Government Records Council
On The 25th Day of February, 2009

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: March 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Allan Johnson¹
Complainant**

GRC Complaint No. 2007-107

v.

**Borough of Oceanport (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: All internal and external correspondences, including e-mails, belonging to Councilman Hugh Sharkey concerning Borough business between October 1, 2006 and October 20, 2006, including e-mails to and from individuals from the town of Shrewsbury about a November 1, 2006 meeting.

Request Made: November 9, 2006

Response Made: November 20, 2006

Custodian: Kim Jungfer

GRC Complaint Filed: April 20, 2007

Background

November 28, 2007

Government Records Council's ("Council") Interim Order. At its November 28, 2007 public meeting, the Council considered the November 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 Councilman Hugh Sharkey is in contempt of the Council's July 25, 2007 Interim Order and the complaint should be referred to the Office of Administrative Law for determination of whether Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because Councilman Hugh Sharkey failed to comply with the provisions of the Council's July 25, 2007 Interim Order by failing to respond to the Custodian's requests attempting to obtain the records responsive to the Complainant's November 9, 2006 request and because Councilman Hugh Sharkey failed to respond to the Custodian's initial attempt to obtain the records responsive to the Complainant's November 9, 2006 OPRA request.

November 29, 2007

Council's Interim Order distributed to the parties.

¹ No legal representation listed on record.

² The Custodian is represented by Scott Arnette, Esq., (Shrewsbury, NJ). Councilman Hugh Sharkey is represented by Michael D. Fitzgerald, Esq., of Law Office of Michael D. Fitzgerald (Brielle, NJ).
Allan Johnson v. Borough of Oceanport (Monmouth), 2007-107 – Supplemental Findings and Recommendations of the Executive Director

February 5, 2008

Complaint transmitted to the Office of Administrative Law (“OAL”).

February 15, 2008

Letter from the Custodian’s Counsel to the GRC. The Custodian’s Counsel states that he has received the GRC’s letter transmitting this complaint to OAL and that the supplemental information should be corrected. The Custodian’s Counsel requests that the GRC amend the Appendix to Item No. 1 to reflect that this matter was transmitted to OAL for a hearing to seek a determination on the issues of whether Councilman Hugh Sharkey (“Councilman Sharkey”) failed to comply with the provisions of the Council’s July 25, 2007 Interim Order instead of whether the Custodian’s action were intentional or deliberate with knowledge of their wrongfulness.³

February 20, 2008

Amended complaint transmitted to OAL.

December 15, 2008

Administrative Law Judge’s (“ALJ”) Initial Decision. The ALJ **FINDS** that the clear evidence of record showed repeated attempts for Councilman Sharkey to provide the records responsive to the Custodian so that she may comply with the Complainant’s OPRA request. Specifically, the ALJ states that:

“repeated requests were made of Councilman Hugh Sharkey to provide copies of materials to the [Custodian] in order that the custodian could comply with an OPRA request. The first request consists of a memorandum to Councilman Sharkey from [the Custodian], dated November 9, 2006 (C-5C). This memorandum enclosed a copy of the complainant’s OPRA request and requested that Councilman Sharkey advise [the Custodian] if he had any of the requested information. It went on to state, “If you have no materials other than the ones previously given would you kindly advise me of that also.” When [the Custodian] received no response from Councilman Sharkey, she provided to the complainant a copy of the memorandum upon which she wrote, “No response” and included her initials and the date, November 20, 2006.

After the complainant filed a GRC complaint on April 20, 2007, this matter was investigated by the GRC and the GRC issued a July 25, 2007, Interim Order (C-3). The [Custodian] was provided a copy of the interim order, together with the correspondence, and directed to comply with the interim order by providing the requested documents. On August 8, 2007, the custodian sent an e-mail to Councilman Sharkey (C-7D) requesting the records responsive to this request. The custodian sent another e-mail to Councilman Sharkey to inform him that he must provide all e-mails responsive to the complainant’s November 9, 2006, OPRA request (C-7F). The custodian also sent another memo to Councilman

³ The Custodian had been exonerated of a knowing and willful violation of OPRA in the Council’s July 25, 2007 Interim Order.

Sharkey and advised him that she had five days to comply with the Council's interim order of July 25, 2007 (C-7G). She also advised Councilman Sharkey by e-mail of his noncompliance and explained the GRC's decision and the requirements necessary for the custodian to comply (C-7H).

In addition to the above, on August 8, 2007, e-mails were sent from the custodian's counsel to Councilman Sharkey (C-7K and C-7L) advising Councilman Sharkey that the custodian had re-requested from him the records responsive to the complaint because they were not provided by him at the time of the original request. It does not appear in the record that Councilman Sharkey disputed this assertion. These e-mails further informed Councilman Sharkey that the custodian was making a good faith effort to comply with the interim order and advised Councilman Sharkey to provide to the custodian any records responsive to the complainant's November 9, 2006, OPRA request for compliance. On August 8, 2007, the GRC received an e-mail from Councilman Sharkey requesting copies of all documents regarding this complaint so that he may comply with the interim order and provide a thorough response. On August 9, 2007, custodian's counsel sent another e-mail to Councilman Sharkey advising him to provide any records to the custodian that are responsive to the complainant's November 9, 2006, OPRA request (C-7M). Councilman Sharkey's only response to this was an e-mail sent to the custodian and the custodian's counsel advising that he believed he complied with all of his OPRA obligations in November 2006 (C-7N). In response to this, the custodian responded by e-mail to Councilman Sharkey that since Councilman Sharkey failed to respond in November 2006, he has not complied with the complainant's OPRA request. The custodian reiterated that any e-mails responsive to the complainant's request should be supplied to the custodian immediately (C-7N). On the same date, Councilman Sharkey sent an e-mail to the custodian's counsel and the GRC attaching an e-mail dated November 8, 2006 (C-7AA). He asserted that this e-mail dated November 8, 2006, is proof of his intention to be open on the subject of the complainant's OPRA request (C-7N)."

In a case such as this, the complainant faces a heavy burden in order to prove that the violations by the public official were "knowingly and willful." Based on the foregoing, I **FIND** that there were nine requests for documents made of Councilman Sharkey, one on November 9, 2007, six on August 8, 2007 and two on August 9, 2007. It was not until August 11, 2007, that Councilman Sharkey provided eleven more e-mails responsive to the complainant's OPRA request (C-7Q – C-7Z and C-7AA). However, I **FIND** that Councilman Sharkey did not provide a copy of any of these responsive documents to the [Custodian] as required by OPRA. In fact, I **FIND** that there is no evidence in the record that Councilman Sharkey ever provided these responsive documents or any others to the custodian, as required by OPRA, in response to the complainant's OPRA request.

On August 13, 2007, the GRC sent a letter to Councilman Sharkey ordering him to comply with the council's interim order by September 5, 2007. On September 5, 2007, Councilman Sharkey sent an e-mail to the GRC asserting that because he had not heard from the GRC, he will assume his August 10, 2007, e-mail to the custodian stating that he has complied with OPRA has satisfied the requirements of the interim order. It is noted that what he sent to the custodian eleven (11) or twelve e-mails to the custodian that he provided to the custodian's counsel and to the GRC.

However, in this case, Councilman Sharkey was requested to provide responsive documents to the [Custodian] on November 9, 2006 (C-5C), and on August 8, 2007 (C-7D, C-7F, C-7G, and C-7H). In addition on August 8, 2007, custodian's counsel advised Councilman Sharkey to provide records responsive to complainant's November 9, 2006, OPRA request to the custodian (C-7K and C-7L). He was again put on notice by an e-mail from the custodian that Councilman Sharkey has not complied with the OPRA request (C-7N).

On August 13, 2007, the GRC ordered Councilman Sharkey to comply with the council's interim order by September 5, 2007.

After considering the totality of the circumstances, and after considering the number of occasions upon which Councilman Hugh Sharkey was notified of his obligation and responsibility to provide documents to the [Custodian], and after considering the number of times he had an opportunity to provide such documents and failed to do so, and after considering that when he eventually provided copies, they were not provided to the custodian of records as required by the statute, but were provided to others..."

Therefore, based on the evidence of record, the ALJ **FINDS** "that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and that the conduct and actions of Councilman Hugh Sharkey were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent." Additionally, the ALJ **ORDERS** that Councilman Hugh Sharkey "shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a)."

EXCEPTIONS AND REPLIES TO EXCEPTIONS

Exceptions

Councilman Sharkey's Counsel filed two (2) Exceptions to the Initial Decision of the ALJ.

Initially, Counsel alleges that the GRC did not participate nor take a position with regard to the hearing conducted by ALJ Martone based on Counsel's belief that the GRC

was aware of ongoing investigations by the Monmouth County Prosecutor's Office, Federal Bureau of Investigation ("FBI") and the New Jersey State Police. Counsel argues that the Complainant pressed this matter in an attempt to determine the nature and extent of the criminal investigation. Counsel argues that Councilman Sharkey followed the advice of the Borough's Counsel and the direction given to him by representatives from the FBI and the Monmouth County Prosecutor's Office by providing any and all records with reference to the investigation directly to the investigating agencies.

Exception I

Counsel excepts to the ALJ's finding that Councilman Sharkey knowingly and willfully failed to respond to the Complainant's November 9, 2006 OPRA request. Counsel contends that Councilman Sharkey was only acting on the direction given to him by law enforcement officials.

Exception II

Counsel states that, should the GRC adopt the ALJ's decision, Councilman Sharkey would have no choice but to provide any and all investigative material for disclosure, thus jeopardizing the investigation.

Counsel requests that the GRC consider rejecting the ALJ's decision or modify the decision to find a "technical" violation of OPRA without knowing and willful intent, and also to waive the assessed fine. Additionally, Counsel asserts that Councilman Sharkey has retained Counsel at his own personal expense and that Councilman Sharkey's adherence to the directives of law enforcement officials has caused him both financial hardship and emotional strain.

Counsel requests that the GRC reject the ALJ's decision of December 15, 2008.

Reply Exceptions

The Complainant's Reply Exceptions note that Councilman Sharkey failed to copy the parties and the ALJ with his Exceptions. The Complainant also notes that the Councilman's Exceptions appear to have been received after the thirteen (13) day period specified by the ALJ in the Order.

The Complainant asserts that he is at a loss regarding the statements made by Councilman Sharkey's Counsel. The Complainant contends that Councilman Sharkey averred in sworn testimony before ALJ Martone that he believed he had complied with the Complainant's November 9, 2006 OPRA request, but now more than two (2) years later Councilman Sharkey claims that he was instructed by law enforcement not to comply with the Complainant's OPRA request. The Complainant requests that the Council reject Councilman Sharkey's Exceptions in their entirety.

Analysis

The GRC initially referred this complaint to OAL based on Councilman Sharkey's failure to respond properly to the Complainant's November 9, 2006 OPRA request and failure to provide the Custodian with any records responsive, even after many attempts by the Custodian to obtain the records responsive. In the Initial Decision, ALJ Martone found that:

“...considering the totality of the circumstances, and after considering the number of occasions upon which Councilman Hugh Sharkey was notified of his obligation and responsibility to provide documents to the [Custodian], and after considering the number of times he had an opportunity to provide such documents and failed to do so, and after considering that when he eventually provided copies, they were not provided to the custodian of records as required by the statute, but were provided to others...”

In the Exceptions submitted by Councilman Sharkey's Counsel to the Executive Director of the GRC, Councilman Sharkey's Counsel asserts that the GRC had knowledge of an outside investigation being conducted by the Monmouth County Prosecutor's Office, FBI and the New Jersey State Police and that Councilman Sharkey was instructed to withhold any records regarding this investigation. The Complainant's Reply Exceptions note that this contention directly contradicts Councilman Sharkey's sworn testimony.

The GRC rejects Councilman Sharkey's contention that the GRC was aware of any alleged investigations conducted by the Monmouth County Prosecutor's Office, the FBI or the New Jersey State Police. Contrary to Counsel's unfounded assertion that the GRC had knowledge of any such investigation, the Council's decision to refer this matter to OAL was based on the specific facts of this complaint. Moreover, assuming such an investigation actually exists, not only did Councilman Sharkey fail to notify the Custodian of the alleged advice he received from law enforcement agencies, but Councilman Sharkey also failed to inform the GRC or ALJ Martone at any point during the adjudication of this complaint or the hearing before the OAL.

The GRC similarly rejects Councilman Sharkey's first Exception that the ALJ should not have found Councilman Sharkey to have knowingly and willfully failed to respond to the Complainant's November 9, 2006 OPRA request because Councilman Sharkey was following the orders of law enforcement personnel in so doing. As discussed above, at no time during the pendency of this matter did Councilman Sharkey submit probative evidence of the existence of such an investigation nor did Councilman Sharkey provide any evidence that he complied with OPRA in responding to the Complainant's OPRA request despite numerous requests from the Custodian of the Borough of Oceanport.

The GRC also rejects Councilman Sharkey's second Exception that the Councilman will be required to disclose investigative material should the GRC adopt the ALJ's Initial Decision. Again, the GRC notes that Councilman Sharkey utterly failed to

provide any evidence of the existence of such an investigation at any time during the adjudicatory process. The GRC also notes that the ALJ's Initial Decision does not require the disclosure of any records responsive to the Complainant's November 9, 2006 OPRA request, but instead finds that Councilman Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and that the conduct of Councilman Sharkey was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent. The Initial Decision therefore finds Councilman Sharkey to be subject to a \$1,000 civil penalty pursuant to N.J.S.A. 47:1A-11.a.

Based on the foregoing, the GRC therefore **ADOPTS** the December 15, 2008 Initial Decision of ALJ Martone which finds that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access to the Complainant's November 9, 2006 OPRA request under the totality of the circumstances, and that the conduct of Councilman Hugh Sharkey was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent, and which orders Councilman Hugh Sharkey to "pay a civil penalty in the amount of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11.a." However, the GRC hereby **MODIFIES** the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11.a, this penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

Additionally, the GRC notes that Councilman Sharkey's Counsel failed to copy all parties with the Councilman's Exceptions, in spite of the ALJ's Order which required that all parties be provided copies of Exceptions. The failure to copy opposing counsel with submissions to the adjudicatory agency is a violation not only of the Administrative Procedures Act, N.J.S.A. 52:14B-10.c. ("...an opportunity shall be afforded each party of record to file exceptions, objections, and replies thereto ... in writing[.]"), but also of the Rules of Professional Conduct 3.2 ("[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.") and 3.4 ("[a] lawyer shall not: ... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act.").

Conclusions and Recommendations

The Executive Director respectfully recommends that:

1. The December 15, 2008 Initial Decision of Administrative Law Judge Martone which finds that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access to the Complainant's November 9, 2006 OPRA request under the totality of the circumstances, and that the conduct of Councilman Hugh Sharkey was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent, and which orders

Councilman Hugh Sharkey to “pay a civil penalty in the amount of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11.a.” is **ADOPTED**;

2. The Initial Decision is **MODIFIED** to require that, pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999” and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

3. Councilman Hugh Sharkey shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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INTERIM ORDER

November 28, 2007 Government Records Council Meeting

Allan Johnson
Complainant

Complaint No. 2007-107

v.

Borough of Oceanport (Monmouth)
Custodian of Record

At the November 28, 2007 public meeting, the Government Records Council (“Council”) considered the November 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 as amended. The Council, therefore, finds that the Councilman Hugh Sharkey is in contempt of the Council’s July 25, 2007 Interim Order and the complaint should be referred to the Office of Administrative Law for determination of whether Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because Councilman Hugh Sharkey failed to comply with the provisions of the Council’s July 25, 2007 Interim Order by failing to respond to the Custodian’s requests attempting to obtain the records responsive to the Complainant’s November 9, 2006 request and because Councilman Hugh Sharkey failed to respond to the Custodian’s initial attempt to obtain the records responsive to the Complainant’s November 9, 2006 OPRA request.

Interim Order Rendered by the
Government Records Council
On The 28th Day of November, 2007

Vincent P. Maltese, Chairman
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 29, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Allan Johnson¹
Complainant**

GRC Complaint No. 2007-107

v.

**Borough of Oceanport (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: All internal and external correspondences, including e-mails, belonging to Councilman Hugh Sharkey concerning Borough business between October 1, 2006 and October 20, 2006, including e-mails to and from individuals from the town of Shrewsbury about a November 1, 2006 meeting.

Request Made: November 9, 2006

Response Made: November 20, 2006

Custodian: Kim Jungfer

GRC Complaint Filed: April 20, 2007

Background

July 25, 2007

Government Records Council's ("Council") Interim Order. At its July 25, 2007 public meeting, the Council considered the July 18, 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. because although the Custodian responded in writing within the statutorily mandated seven (7) business days, she failed to provide a sufficient response to the Complainant.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Councilman Sharkey's e-mails.
3. The Custodian shall obtain the records requested from Councilman Sharkey and provide those records responsive to the Complainant's November 9, 2006 OPRA request with proper redaction, if necessary, to the Complainant.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

¹ No representation listed on record.

² Represented by Scott Arnette, Esq. (Shrewsbury, NJ).

5. Because the Custodian made an effort to obtain the records responsive to the Complainant's November 9, 2006 OPRA request after not finding any records responsive to this request in the municipal files and responded in writing within the statutorily mandated seven (7) business days to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
6. Because Councilman Sharkey failed to respond to the Custodian's effort to obtain the records responsive to the Complainant's OPRA request, it is possible that Councilman Sharkey's actions were intentional and deliberate, with knowledge of his wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Councilman Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

July 31, 2007

Council's Interim Order distributed to the parties.

August 2, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension until August 10, 2007 to comply with the Council's Interim Order.

August 3, 2007

Letter from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension until August 10, 2007 to comply with the Council's Interim Order.

August 8, 2007

Letter from the Custodian to the GRC attaching an e-mail to Councilman Hugh Sharkey requesting the records responsive to this request. The Custodian requests an additional extension to comply with the Council's July 25, 2007 Interim Order. The Custodian states that she is doing everything she can to obtain the requested records but that the Custodian's attempts to procure the records have not been successful to date.

The Custodian states that she e-mailed Councilman Sharkey to inform him that Councilman Sharkey must provide all e-mails responsive to the Complainant's November 9, 2006 OPRA request. The Custodian further asserts that she sent a memo to Councilman Sharkey and advised that the Custodian has five (5) days to comply with the Council's Interim Order of July 25, 2007. The Custodian also states that she advised Councilman Sharkey of his non-compliance and explained the GRC's decision and the requirements necessary for the Custodian to comply.

August 8, 2007

E-mail from Councilman Sharkey to the Custodian's Counsel. Councilman Sharkey requests that the Custodian's Counsel forward all correspondences regarding this complaint.

August 8, 2007

E-mail from the Custodian's Counsel to the Custodian and Councilman Sharkey. Custodian's Counsel advises Councilman Sharkey that the Custodian has all of the decisional documents on this complaint. The Custodian's Counsel further states that the Custodian has re-requested the records responsive to this complaint because they were not provided at the time of the original request. The Custodian's Counsel informs Councilman Sharkey that the Custodian is making a good faith effort to comply with the GRC's Interim Order and advises Councilman Sharkey to provide any records responsive to the Complainant's November 9, 2006 OPRA request, should they exist, to the Custodian for compliance.

August 8, 2007

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey requests that the GRC send him all documents received regarding this complaint so that he may comply with the GRC's Interim Order and provide a thorough response. Councilman Sharkey also requests an additional two weeks to review this information and prepare the appropriate response.

August 9, 2007

E-mail from Councilman Sharkey to the Custodian and Custodian's Counsel. Councilman Sharkey thanks the Custodian for faxing the following:

- Fax cover page from the Custodian to Councilman Sharkey dated August 8, 2007.
- Memo from the Custodian to Councilman Sharkey dated August 8, 2007.
- GRC Interim Order dated August 25, 2007.
- Undated OPRA request form submitted by Complainant.
- Memo from the Custodian to Councilman Sharkey regarding Complainant's OPRA request dated November 9, 2006.

Councilman Sharkey also asks to review additional decisional documents regarding this complaint.

August 9, 2007

E-mail from Councilman Sharkey to the Custodian's Counsel. Councilman Sharkey advises the Custodian's Counsel that he viewed the "Findings and Recommendations of the Executive Director" for this complaint and notices that communication not received by the Councilman had taken place. Councilman Sharkey requests to receive all communications between the GRC and Borough of Oceanport regarding this complaint.

August 9, 2007

E-mail from the Custodian's Counsel to the Custodian and Councilman Sharkey. The Custodian's Council requests that the Custodian provide the requested documents to Councilman Sharkey.

The Custodian's Counsel informs Councilman Sharkey that the Custodian possesses all documents regarding this matter and further advises Councilman Sharkey to provide any records to the Custodian that are responsive to the Complainant's November 9, 2006 OPRA request.

August 10, 2007

E-mail from Councilman Sharkey to the Custodian and the Custodian's Counsel. Councilman Sharkey advises that he believes he complied with all of his OPRA obligations in November 2006.

August 10, 2007

E-mail from the Custodian to Councilman Sharkey. The Custodian asserts that since Councilman Sharkey failed to respond in November 2006, he has not complied with the Complainant's OPRA request. The Custodian reiterates that any e-mails responsive to the Complainant's request should be provided to the Custodian immediately.

August 10, 2007

E-mail from Councilman Sharkey to the Custodian's Counsel and the GRC attaching an e-mail dated November 8, 2006. Councilman Sharkey asks the Custodian's Counsel if the GRC considered the attached e-mail when preparing the "Findings and Recommendations of the Executive Director." Councilman Sharkey asserts that the provided e-mail dated November 8, 2006 is proof of the Councilman's intention to be open on the "Shrewsbury Dispatch" issue that is the e-mail subject of the Complainant's OPRA request.

Councilman Sharkey provides eleven (11) more e-mails to the Custodian's Counsel and the GRC over the next four (4) days. Two (2) of the e-mails provided by Councilman Sharkey regard government business and occur between October 1, 2006 and October 20, 2006, making them responsive to the Complainant's OPRA request.

August 13, 2007

Letter from the Custodian to the GRC. The Custodian states that she has e-mailed and placed memos requesting responsive records in Councilman Sharkey's mailbox. The Custodian further states that she has not received anything that could be considered responsive to the Complainant's November 9, 2006 OPRA request as of this date. The Custodian further states that she has asked the Custodian's Counsel to help with this complaint. The Custodian finally asserts that she does not know what else to do in order to comply with the Council's July 25, 2007 Interim Order and feels that she has complied to the best of her ability.

August 21, 2007

Letter from the GRC to Councilman Sharkey. The GRC encloses a copy of the complete file maintained by the GRC relating to this complaint. The GRC also grants a two (2) week extension and orders Councilman Sharkey to comply with the Council's Interim Order by September 5, 2007.

September 5, 2007

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey asserts that because he has not heard from the GRC, he will assume that his August 10, 2007 e-mail to the Custodian stating that he has complied with OPRA has satisfied the requirement of the Interim Order. Councilman Sharkey also asserts that he anticipates the GRC amending their Interim Order to reflect that Councilman Sharkey has responded twice to the Complainant's November 9, 2006 OPRA request.

September 6, 2007

E-mail from the GRC to Councilman Sharkey. The GRC advises Councilman Sharkey that he has not complied with the GRC's July 25, 2007 Interim Order requiring Councilman Sharkey to provide requested e-mails to the Custodian so that she may fulfill the Complainant's OPRA request. The GRC further states that Councilman Sharkey was granted a two (2) week extension yet failed to comply with the Interim Order. The GRC finally states that the GRC will proceed accordingly.

September 6, 2007

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey asks why the GRC did not recognize his August 10, 2007 e-mail which asserted that Councilman Sharkey complied with OPRA in November 2006.

September 14, 2007

E-mail from the GRC to Councilman Sharkey. The GRC states that Councilman Sharkey's August 10, 2007 e-mail is not responsive to the GRC's Interim Order specifically requiring that Councilman Sharkey provide any records responsive to the Custodian in order for her to fulfill the Complainant's OPRA request. The GRC further states that even though Councilman Sharkey provided the GRC with several e-mails between August 11, 2007 and August 14, 2007 entitled "For Your Consideration," those e-mails should have been directed to the Custodian and were not. The GRC further states that these e-mails do not constitute compliance with the GRC's Interim Order. Therefore, the GRC will proceed accordingly.

October 10, 2007

E-mail from the GRC to Councilman Sharkey. The GRC requests that Councilman Sharkey provide a legal certification in support of his contention that he complied with the Council's July 25, 2007 Interim Order requiring that all e-mails responsive to the Complainant's November 9, 2006 OPRA request be provided to the Custodian. The GRC also requests that Councilman Sharkey certify as to his practice of e-mail retention. The GRC finally requests that Councilman Sharkey provide this certification to the GRC prior to close of business on Friday, October 12, 2007.

October 18, 2007

E-mail from the GRC to Councilman Sharkey. The GRC advises Councilman Sharkey that a legal certification was due prior to close of business on October 12, 2007 and has yet to be provided to the GRC.

October 19, 2007

E-mail from Councilman Sharkey to the GRC. Councilman Sharkey informs the GRC that the Borough of Oceanport Council approved a resolution to allow Councilman Sharkey to hire an attorney to amend his previous response to the GRC in a specific legal format required by the GRC. Councilman Sharkey requests a reasonable amount of time to find and retain appropriate legal representation to address this matter.

October 23, 2007

E-mail from the GRC to Councilman Sharkey. The GRC grants an additional five (5) day extension for Councilman Sharkey to submit the requested certification to the GRC. Councilman Sharkey's new deadline is by close of business on Monday October 29, 2007.

Analysis

Whether the Custodian complied with the Council's July 25, 2007 Interim Order?

The Custodian attempted to obtain the records from Councilman Sharkey at the time that the Complainant submitted his November 9, 2006 OPRA request and after the Council's Interim Order on July 25, 2007. Councilman Sharkey failed to provide the Custodian with records responsive to the Complainant's November 9, 2006 OPRA request within the statutorily mandated time frame so that the Custodian could provide the requested records legally pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and again failed to provide the requested records as required by the Council's July 25, 2007 Interim Order.

Pursuant to Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006), the Custodian has a duty to obtain the requested records from Councilman Sharkey. However, in the matter before the Council, the Custodian received inadequate responses from Councilman Sharkey after numerous attempts, even after the Council's Interim Order. While the Custodian's duty is to obtain the records, it is reasonable to believe that the continuous delay in access to the requested records is not attributable to the actions of the Custodian. Further, Councilman Sharkey failed to submit requested information to the GRC on two (2) occasions within the timeframe set forth by the GRC.

Therefore, because Councilman Sharkey's failure to respond on two (2) occasions to the Custodian's requests for the records responsive to the Complainant's November 9, 2006 OPRA request caused the Custodian's non-compliance with the Council's July 25, 2007 Interim Order and because Councilman Sharkey has failed to meet several deadlines for submissions to the GRC, this complaint should be referred to the Office of Administrative Law for determination of whether Councilman Hugh Sharkey knowingly

and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that Councilman Hugh Sharkey is in contempt of the Council's July 25, 2007 Interim Order and the complaint should be referred to the Office of Administrative Law for determination of whether Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because Councilman Hugh Sharkey failed to comply with the provisions of the Council's July 25, 2007 Interim Order by failing to respond to the Custodian's requests attempting to obtain the records responsive to the Complainant's November 9, 2006 request and because Councilman Hugh Sharkey failed to respond to the Custodian's initial attempt to obtain the records responsive to the Complainant's November 9, 2006 OPRA request.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 21, 2007



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

July 25, 2007 Government Records Council Meeting

Allan M. Johnson
Complainant

Complaint No. 2007-107

v.

Borough of Oceanport (Monmouth)
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council ("Council") considered the July 18, 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:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because although the Custodian responded in writing within the statutorily mandated seven (7) business days, she failed to provide a sufficient response to the Complainant.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Councilman Sharkey's e-mails.
3. The Custodian shall obtain the records requested from Councilman Sharkey and provide those records responsive to the Complainant's November 9, 2006 OPRA request with proper redaction, if necessary, to the Complainant.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian made an effort to obtain the records responsive to the Complainant's November 9, 2006 OPRA request after not finding any records responsive to this request in the municipal files and responded in writing within the statutorily mandated seven (7) business days to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the



totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

6. Because Councilman Sharkey failed to respond to the Custodian's effort to obtain the records responsive to the Complainant's OPRA request, it is possible that Councilman Sharkey's actions were intentional and deliberate, with knowledge of his wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Councilman Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 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: July 31, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2007 Council Meeting**

Allan M. Johnson¹
Complainant

GRC Complaint No. 2007-107

v.

Borough of Oceanport (Monmouth)²
Custodian of Records

Records Relevant to Complaint: All internal and external correspondences, including e-mails, belonging to Councilman Hugh Sharkey concerning Borough business between October 1, 2006 and October 20, 2006, including e-mails to and from individuals from the town of Shrewsbury about a November 1, 2006 meeting.

Request Made: November 9, 2006

Response Made: November 20, 2006

Custodian: Kim Jungfer

GRC Complaint Filed: April 20, 2007

Background

November 9, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 9, 2006

Memo from the Custodian to the Councilman. The Custodian requests Councilman Sharkey to advise whether or not any records responsive to this request exist by Friday, November 17, 2006.

November 20, 2006

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that she received no response to her inquiry from Councilman Sharkey.

April 30, 2007

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

¹No representation listed on record.

² Represented by Scott Arnette, Esq. (Shrewsbury, NJ).

- Complainant’s OPRA request dated November 9, 2006.
- Memo from the Custodian to the Councilman dated November 20, 2006.

The Complainant states that he submitted an OPRA request to the Custodian on November 9, 2006. The Complainant states that the records requested pertain to a Council Meeting in which Councilman Sharkey spoke of correspondence with other local towns including Shrewsbury about shared services, as well as a police dispatch study. The Complainant asserts that Councilman Sharkey made mention of one e-mail in particular from a Shrewsbury official named Mr. Ferrell.

The Complainant states that his request was ignored by Councilman Sharkey. The Complainant also states that he was provided with e-mails from Councilman Sharkey in a separate OPRA request with Shrewsbury, but that the Complainant did not receive e-mails involving a Mr. Ferrell.³

May 8, 2007

Offer of Mediation sent to both parties.

May 9, 2007

The Complainant declines mediation.

May 9, 2007

Request for the Statement of Information sent to the Custodian.

May 16, 2007

E-mail from the Custodian to the GRC. The Custodian requests an extension of three (3) days to submit the Statement of Information.

May 16, 2007

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until May 21, 2007 to file the Statement of Information.

May 22, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated November 9, 2006.
- Memo from the Custodian to Councilman Sharkey dated November 9, 2006 (with note from Custodian dated November 20, 2006).

The Custodian states that she received the Complainant’s OPRA request on November 9, 2006. The Custodian states that upon finding no records responsive among the Borough records, she prepared a memo requesting that Councilman Sharkey provide any records responsive to this request by November 17, 2006. The Custodian states that she received no response from Councilman Sharkey. The Custodian asserts that she

³ The Complainant also attached a copy of an OPRA request made to Shrewsbury with the records he obtained.

responded to the Complainant both verbally and in writing within the statutorily mandated seven (7) business day time frame.

Analysis

Whether the Custodian unlawfully denied access to the requested e-mails of Councilman Hugh Sharkey to the Complainant?

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 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 thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, 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 ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (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.

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.

A custodian has the responsibility of responding to an OPRA request in writing granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receipt of a request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. A custodian also has an obligation to obtain records responsive, even if they are held in a different location, and provide them to a requestor.

Further, in Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006), the Complainant requested to inspect all e-mails pertaining to official Borough business on the Mayor's personal e-mail account. The Council ruled that the location of the records in the Mayor's personal e-mail account does not inhibit the Custodian from obtaining and providing such records; therefore, the Custodian had not borne her burden of proving that the e-mails were not government records. The Council further ordered the Custodian to obtain the requested records and release these records to the requestor.

In this complaint, the Custodian sent a memo to Councilman Sharkey requesting the records responsive to the Complainant's OPRA request. After receiving no response from Councilman Sharkey, the Custodian responded in writing to the Complainant within the statutorily mandated seven (7) business day time frame, yet her response to the Complainant that Councilman Sharkey had not responded to the Custodian's memo dated November 9, 2006 was insufficient. Since the Custodian failed to lawfully grant access, deny access, seek clarification or request an extension of the statutorily mandated time frame in her written response to the Complainant, the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 1A-5.i. The Custodian has failed to bear the burden of proving that her denial of access was lawful pursuant to N.J.S.A. 47:1A-6.

Whether the Custodian's delay in access to the requested e-mails 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 (App. Div. 1996) at 107).

The Custodian in this complaint certified that she found no records responsive among the Borough records and thus forwarded a memo to Councilman Sharkey who maintained the records requested in order to obtain the records responsive. Further, even although the Custodian's response was insufficient, the Custodian did respond to the Complainant in writing within the statutorily mandated seven (7) business days.

Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Further, Councilman Sharkey's failure to respond resulted in the Custodian's violation of OPRA. Because Councilman Sharkey failed to respond to the Custodian's effort to obtain the records responsive to the Complainant's OPRA request, it is possible that Councilman Sharkey's actions were intentional and deliberate, with knowledge of his wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Councilman knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because although the Custodian responded in writing within the statutorily mandated seven (7) business days, she failed to provide a sufficient response to the Complainant.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Councilman Sharkey's e-mails.

3. The Custodian shall obtain the records requested from Councilman Sharkey and provide those records responsive to the Complainant's November 9, 2006 OPRA request with proper redaction, if necessary, to the Complainant.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian made an effort to obtain the records responsive to the Complainant's November 9, 2006 OPRA request after not finding any records responsive to this request in the municipal files and responded in writing within the statutorily mandated seven (7) business days to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
6. Because Councilman Sharkey failed to respond to the Custodian's effort to obtain the records responsive to the Complainant's OPRA request, it is possible that Councilman Sharkey's actions were intentional and deliberate, with knowledge of his wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Councilman Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

July, 18 2007