



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

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ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

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

Laurel Kornfeld  
Complainant

Complaint No. 2007-113

v.

Borough of Highland Park (Middlesex)  
Custodian of Record

At the January 30, 2008 public meeting, the Government Records Council (“Council”) considered the January 23, 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).
2. In this complaint, although the Custodian failed to respond in writing to the Complainant’s OPRA request granting access to the requested records until the forty-ninth (49<sup>th</sup>) business day following receipt of the Complainant’s request, the Complainant was granted access to the requested records free of charge on April 16, 2007. Based on the evidence of record, therefore, 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 actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box



006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of January, 2008

Robin Berg Tabakin, Vice 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: February 1, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Laurel Kornfeld<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-113**

v.

**Borough of Highland Park (Middlesex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copies of all correspondence between the Borough of Highland Park and the New Jersey Department of Transportation (“NJDOT”) in reference to any and all projects at Centennial Park.
2. Any and all grants applied for and gained or not received for such projects “between” the Borough’s acquisition of the property until February of 2007.

**Request Made:** February 1, 2007

**Response Made:** April 16, 2007

**Custodian:** Joan Hullings

**GRC Complaint Filed:** May 3, 2007

**Background**

**February 1, 2007**

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.

**April 16, 2007**

Custodian’s Response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the forty-ninth (49<sup>th</sup>) business day following receipt of such request. The Custodian provides all records responsive to this request to the Complainant.<sup>3</sup>

**May 3, 2007**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated February 1, 2007.

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

<sup>2</sup> Represented by Diane Dabulas, Esq. of Rogut, McCarthy and Troy (Cranford, NJ).

<sup>3</sup> Complainant signed an acknowledgement of receipt for the requested records on April 16, 2007.  
Laurel Kornfeld v. Borough of Highland Park (Middlesex), 2007-113 – Findings and Recommendations of the Executive Director

The Complainant states that she filed an OPRA request with the Custodian on February 1, 2007. The Complainant asserts that she had to continually ask the Custodian about the status of this OPRA request. The Complainant further asserts that the Custodian kept informing her that the Custodian had forwarded the request to the appropriate departments to be fulfilled because the records were in different places and that the Custodian did not know why there had been no response.

The Complainant asserts that in the beginning of April, the Borough's attorney contacted her and asserted that the Borough was having difficulty locating all of the files because they had to come from several different sources. The Complainant states that she received all records responsive on April 16, 2007. The Complainant finally asserts that she believes the Custodian is not at fault, but that the Custodian is non-tenured and that the Mayor was pressing the Custodian into delaying access to the records requested.

**May 21, 2007**

Offer of Mediation sent to both parties.

**May 21, 2007**

The Complainant declines mediation.<sup>4</sup>

**May 22, 2007**

Request for the Statement of Information sent to the Custodian.

**May 29, 2007**

E-mail from the Custodian to the GRC. The Custodian requests an extension of the deadline to submit the Statement of Information.

**May 30, 2007**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until June 4, 2007 to file the Statement of Information.

**June 4, 2007**

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

- Complainant's OPRA request dated February 1, 2007
- Complainant's Acknowledgement of Receipt of Records dated April 16, 2007 (with attachments)

The Custodian states that she received the Complainant's OPRA request on February 1, 2007. The Custodian further states that upon receipt of this request, copies of the request were disseminated to the Mayor and Borough Council's Office, Administration Office and the Financial Department. The Custodian asserts that the newly appointed Business Administrator and Chief Financial Officer were not familiar with the Centennial Park project. The Custodian finally asserts that the Complainant was verbally advised that the Complainant's OPRA request was being worked on and that an extension of time was needed.

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<sup>4</sup> The Custodian agreed to mediate this complaint on May 24, 2007.

## Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor 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 ...” N.J.S.A. 47:1A-5.g.

OPRA further 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 must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In this complaint, although the Custodian contacted the Complainant verbally on several occasions, she failed to respond in writing to the Complainant’s February 1, 2007 OPRA request granting access to records requested until forty-nine (49) business days after receipt of the request. OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).

**Whether the Custodian’s actions rise 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).

In this complaint, although the Custodian failed to respond in writing to the Complainant's OPRA request granting access to the requested records until the forty-ninth (49<sup>th</sup>) business day following receipt of the Complainant's request, the Complainant was granted access to the requested records free of charge on April 16, 2007. Based on the evidence of record, therefore, 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 actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the Complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).
2. In this complaint, although the Custodian failed to respond in writing to the Complainant's OPRA request granting access to the requested records until the forty-ninth (49<sup>th</sup>) business day following receipt of the Complainant's request, the Complainant was granted access to the requested records free of charge on April 16, 2007. Based on the evidence of record, therefore, 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 actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

January 23, 2008