



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FINAL DECISION

January 26, 2010 Government Records Council Meeting

Larry Kohn
Complainant

Complaint No. 2007-323

v.

Township of Livingston (Essex)
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 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. Because the Custodian forwarded the records No. 1, No. 2, No. 3, No. 5 and No. 6 to the Complainant pursuant to the Council’s Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s December 22, 2009 Interim Order.
2. The Custodian’s response to the Complainant’s November 21, 2007 and November 22, 2007 OPRA requests was in violation of N.J.S.A. 47:1A-5.g. because the Custodian failed to respond to each request item individually. Moreover, the Custodian failed to bear his burden of proving a lawful denial of access to records No. 1, No. 2, No. 3, No. 5 and No. 6 pursuant N.J.S.A. 47:1A-6. However, because the Custodian did not unlawfully deny access to the Complainant’s November 21, 2007 OPRA request Item No. 2 and November 22, 2007 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and complied with the Council’s Interim Orders dated September 30, 2009 and December 22, 2009, 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.



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 26th Day of January, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

**Larry Kohn¹
Complainant**

GRC Complaint No. 2007-323

v.

**Township of Livingston (Essex)²
Custodian of Records**

Records Relevant to Complaint:

November 21, 2007 OPRA Request:

1. Hillside Avenue construction project back-up for disbursements.
2. Copy of resolution approving contract with Business Improvement District (“BID”): letter dated October 29, 2007, signed and dated November 5, 2007.

November 22, 2007 OPRA Request:

1. Minutes of meeting at which the following was presented:
 - a. Analysis – the Complainant’s August 6, 2007 presentation of alternative approach to Town Hall/ Police facilities needs.
 - b. \$20 million estimated cost of stand alone Police building.

Request Made: November 21, 2007 and November 22, 2007³

Response Made: November 28, 2007⁴

Custodian: Glenn R. Turteltaub

GRC Complaint Filed: December 19, 2007⁵

Background

December 22, 2009

Government Records Council’s (“Council”) Interim Order. At its December 22, 2009 public meeting, the Council considered the December 16, 2009 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 timely complied with the Council’s September 30, 2009 Interim Order.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

³ The Complainant requested additional items that are not at issue in this complaint.

⁴ The Custodian responded in writing to both the November 21, 2007 and November 22, 2007 OPRA requests on November 28, 2007.

⁵ The GRC received the Denial of Access Complaint on said date.

2. The *In Camera* Examination set forth in the above table reveals the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-6.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
4. The Council defers its analysis regarding any knowing and willful violation of OPRA pending the Custodian's compliance with this Interim Order.

December 29, 2009

Council's Interim Order distributed to the parties.

December 31, 2009

Custodian's response to the Council's Interim Order attaching the following:

- Purchase Order No. 4-541.
- Purchase Order No. 05-0984.
- Purchase Order No. 07-01095.
- Memorandum dated December 12, 2006.
- Purchase Order for U.S. Bank National Association dated February 22, 2007.

The Custodian certifies that he is forwarding the Complainant records No. 1, No. 2, No. 3, No. 5 and No. 6, which were provided to the GRC for an *in camera* review, pursuant to the Council's December 22, 2009 Interim Order.⁶

Analysis

Whether the Custodian complied with the Council's December 22, 2009 Interim Order?

The Council's December 22, 2009 Interim Order specifically directed the Custodian to disclose records No. 1, No. 2, No. 3, No. 5 and No. 6 previously provided to the Council for an *in camera* review. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

On December 31, 2009, the Custodian responded in writing to the GRC certifying that he is forwarding the records at issue to the Complainant.

⁶ The Custodian provides additional information regarding why access to the records was initially denied; however, such information is irrelevant as access to the records was ordered to be provided as part of the Council's December 22, 2009 Interim Order.

Therefore, because the Custodian forwarded the records No. 1, No. 2, No. 3, No. 5 and No. 6 to the Complainant pursuant to the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's December 22, 2009 Interim Order.

Whether the Custodian's insufficient response and unlawful denial of access 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, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

In the instant complaint, the Custodian's response to the Complainant's November 21, 2007 and November 22, 2007 OPRA requests was in violation of N.J.S.A. 47:1A-5.g. because the Custodian failed to respond to each request item individually. Moreover, the Custodian failed to bear his burden of proving a lawful denial of access to records No. 1, No. 2, No. 3, No. 5 and No. 6 pursuant N.J.S.A. 47:1A-6. However, because the Custodian did not unlawfully deny access to the Complainant's November 21, 2007 OPRA request Item No. 2 and November 22, 2007 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July

2005) and complied with the Council's Interim Orders dated September 30, 2009 and December 22, 2009, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian forwarded the records No. 1, No. 2, No. 3, No. 5 and No. 6 to the Complainant pursuant to the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's December 22, 2009 Interim Order.
2. The Custodian's response to the Complainant's November 21, 2007 and November 22, 2007 OPRA requests was in violation of N.J.S.A. 47:1A-5.g. because the Custodian failed to respond to each request item individually. Moreover, the Custodian failed to bear his burden of proving a lawful denial of access to records No. 1, No. 2, No. 3, No. 5 and No. 6 pursuant N.J.S.A. 47:1A-6. However, because the Custodian did not unlawfully deny access to the Complainant's November 21, 2007 OPRA request Item No. 2 and November 22, 2007 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and complied with the Council's Interim Orders dated September 30, 2009 and December 22, 2009, 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.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010



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

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2007-323

v.

Township of Livingston (Essex)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 16, 2009 *In Camera* 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 timely complied with the Council's September 30, 2009 Interim Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-6.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
4. The Council defers its analysis regarding any knowing and willful violation of OPRA pending the Custodian's compliance with this Interim Order.



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹
Record # 1 Purchase Order #4-541 (1 page)	Purchase Order of Concrete Construction Corp., dated 6/22/2004	Record withheld from disclosure in its entirety.	This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Record #2 Purchase Order No. 05-0984 (1 page)	Purchase Order of Jarmel Kizel Architects/Engineers, Inc., dated 3/24/2005	Record withheld from disclosure in its entirety.	This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.
Record No. 3 Purchase Order No. 07-01095 (1 page)	Purchase Order of Peter M. Jacovino & Son, Inc., dated 3/28/2007	Record withheld from disclosure in its entirety.	This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.

<p>Record #5 Memorandum dated December 12, 2006 (2 pages)</p>	<p>Memorandum dated 12/12/2006 from R. Jones to S. Strande re: Allocate Funds</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a memorandum containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>
<p>Record #6 Purchase Order for U.S. Bank Nat'l Assoc. Feb WIT (1 page)</p>		<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>

Interim Order Rendered by the
Government Records Council
On The 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: December 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2007-323

v.

**Township of Livingston (Essex)²
Custodian of Records**

Records Relevant to Complaint:

November 21, 2007 OPRA Request:

1. Hillside Avenue construction project back-up for disbursements.
2. Copy of resolution approving contract with Business Improvement District (“BID”): letter dated October 29, 2007, signed and dated November 5, 2007.

November 22, 2007 OPRA Request:

1. Minutes of meeting at which the following was presented:
 - a. Analysis – the Complainant’s August 6, 2007 presentation of alternative approach to Town Hall/ Police facilities needs.
 - b. \$20 million estimated cost of stand alone Police building.

Request Made: November 21, 2007 and November 22, 2007³

Response Made: November 28, 2007⁴

Custodian: Glenn R. Turteltaub

GRC Complaint Filed: December 19, 2007⁵

Records Submitted for *In Camera* Examination: Purchase Order #4-541; Purchase Order No. 05-0984; Purchase Order No. 07-01095; Memorandum dated December 12, 2006; Purchase Order for U.S. Bank Nat’l Assoc. Feb WIT

Background

September 30, 2009

Government Records Council’s Interim Order. At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Executive Director’s Findings and Recommendations and all related documentation

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

³ The Complainant requested additional items that are not at issue in this complaint.

⁴ The Custodian responded in writing to both the November 21, 2007 and November 22, 2007 OPRA requests on November 28, 2007.

⁵ The GRC received the Denial of Access Complaint on said date.

submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Although the Custodian responded in writing to the Complainant's November 21, 2007 and November 22, 2007 OPRA requests within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no records which were responsive to the Complainant's November 21, 2007 request Item No. 1 and November 22, 2007 OPRA request relevant to this complaint existed at the time of the Complainant's two (2) requests, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records No. 1, No. 2, No. 3, No. 5 and No. 6 responsive to the Complainant's November 21, 2007 request to determine the validity of the Custodian's assertion that the records pertain to pending litigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

October 5, 2009

Council's Interim Order ("Order") distributed to the parties.

⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

October 12, 2009

Certification of the Custodian in response to the Council's Interim Order attaching the required document index and copies of the unredacted requested records. The Custodian certifies that he is the Township Clerk of the Township of Livingston and has been so since 2001. The Custodian further certifies that he is also the Custodian of Records for the Township.

The Custodian certifies that the requested records contain references to pending litigation and were therefore not disclosed. The Custodian certifies that such records were not disclosed pursuant to the advice of the Township Counsel. The Custodian asserts that because the litigation was discussed in closed session under the exception set forth at N.J.S.A. 10:4-12, the requested records were properly withheld and to have disclosed the requested records would have contravened the very purpose of addressing the matter in closed session.

Analysis

Whether the Custodian complied with the Council's September 30, 2009 Interim Order?

At its September 30, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied as containing references to pending litigation which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9 and N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order, or no later than October 12, 2009.

The Custodian provided the GRC with the requested records, the document index and the Custodian's certification in compliance with the Council's September 30, 2009 Interim Order on October 12, 2009, in a timely manner. Therefore, the Custodian did comply with the Council's September 30, 2009 Interim Order in a timely manner.

Whether the Custodian unlawfully denied the Complainant access to the records requested?

The Custodian asserts in the Statement of Information that he lawfully denied the Complainant access to the requested records because the records contain references to

pending litigation which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9 and N.J.S.A. 10:4-12. Conversely, the Complainant asserts that he was unlawfully denied access to the requested records.

The Open Public Meetings Act provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:

“Any pending or anticipated litigation ...in which the public body is, or may become a party...

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.” N.J.S.A. 10:4-12 (7), (8).

OPRA provides that:

“A government record *shall not include* the following information which is deemed to be confidential for the purposes of [OPRA] as amended and supplemented: ... any record within the attorney-client privilege. This paragraph *shall not be construed as exempting from access attorney or consultant bills or invoices* except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

In its Interim Order dated September 30, 2009, the Council noted that the Custodian asserted that responsive records No. 1, No. 2, No. 3, No. 5 and No. 6 to the Complainant’s November 21, 2007 request were exempt from disclosure due to pending litigation pursuant to N.J.S.A. 47:1A-1.1. The Custodian submitted these records for an *in camera* examination on October 12, 2009.

An *in camera* examination was performed on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁹

⁹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set Larry A. Kohn v. Township of Livingston (Essex), 2007-323 – *In Camera* Findings and Recommendations of the Executive Director 4

<p>Record # 1 Purchase Order #4-541 (1 page)</p>	<p>Purchase Order of Concrete Construction Corp., dated 6/22/2004</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>
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off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

<p>Record #2 Purchase Order No. 05-0984 (1 page)</p>	<p>Purchase Order of Jarmel Kizel Architects/Engineers, Inc., dated 3/24/2005</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>
<p>Record No. 3 Purchase Order No. 07-01095 (1 page)</p>	<p>Purchase Order of Peter M. Jacovino & Son, Inc., dated 3/28/2007</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>

<p>Record #5 Memorandum dated December 12, 2006 (2 pages)</p>	<p>Memorandum dated 12/12/2006 from R. Jones to S. Strande re: Allocate Funds</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a memorandum containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>
<p>Record #6 Purchase Order for U.S. Bank Nat'l Assoc. Feb WIT (1 page)</p>		<p>Record withheld from disclosure in its entirety.</p>	<p>This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>The record contains neither attorney work product nor materials produced in anticipation of litigation. The record is a purchase order containing factual information. As such, this record is not exempt from disclosure under OPRA.</p>

Thus, the Custodian unlawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-6. Therefore, Custodian must disclose the unredacted records to the Complainant within five (5) business days of this Interim Order.

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

The Council defers its analysis regarding any knowing and willful violation of OPRA pending the Custodian’s compliance with this Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council’s September 30, 2009 Interim Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-6.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
4. The Council defers its analysis regarding any knowing and willful violation of OPRA pending the Custodian’s compliance with this Interim Order.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

December 16, 2009



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

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2007-323

v.

Township of Livingston (Essex)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded in writing to the Complainant’s November 21, 2007 and November 22, 2007 OPRA requests within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no records which were responsive to the Complainant’s November 21, 2007 request Item No. 1 and November 22, 2007 OPRA request relevant to this complaint existed at the time of the Complainant’s two (2) requests, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records No. 1, No. 2, No. 3, No. 5 and No. 6 responsive to the Complainant’s November 21, 2007 request to determine the validity of the



Custodian's assertion that the records pertain to pending litigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 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, Secretary
Government Records Council

Decision Distribution Date: October 5, 2009

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2007-323

v.

**Township of Livingston (Essex)²
Custodian of Records**

Records Relevant to Complaint:

November 21, 2007 OPRA Request:

1. Hillside Avenue construction project back-up for disbursements.
2. Copy of resolution approving contract with Business Improvement District (“**BID**”): letter dated October 29, 2007, signed and dated November 5, 2007.

November 22, 2007 OPRA Request:

1. Minutes of meeting at which the following was presented:
 - a. Analysis – the Complainant’s August 6, 2007 presentation of alternative approach to Town Hall/ Police facilities needs.
 - b. \$20 million estimated cost of stand alone Police building.

Request Made: November 21, 2007 and November 22, 2007³

Response Made: November 28, 2007⁴

Custodian: Glenn R. Turtletaub

GRC Complaint Filed: December 19, 2007⁵

Background

November 21, 2007

Complainant’s first (1st) Open Public Records Act (“**OPRA**”) request. The Complainant requests the records relevant to the Complainant’s November 21, 2007 OPRA request listed above on an official OPRA request form.

November 22, 2007

Complainant’s second (2nd) Open Public Records Act (“**OPRA**”) request. The Complainant requests the records relevant to the Complainant’s November 22, 2007 OPRA request listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

³ The Complainant requested additional items that are not at issue in this complaint.

⁴ The Custodian responded in writing to both the November 21, 2007 and November 22, 2007 OPRA requests on November 28, 2007.

⁵ The GRC received the Denial of Access Complaint on said date.

November 28, 2007

Custodian's responses to the Complainant's November 21, 2007 and November 22, 2007, OPRA requests.⁶

November 21, 2007 OPRA Request

The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that no records responsive to request Item No. 2 exist because the Township has not entered into a contract with BID and no resolution to specifically approve the agreement was passed because authorization to provide funding was previously granted.⁷

November 22, 2007 OPRA Request

The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that records responsive to the Complainant's request are available for review and duplication. The Custodian further states that the Town Council meeting minutes from August 6, 2007 consist of eight (8) pages and will cost \$6.00 to duplicate.

November 28, 2007

Letter from the Complainant to the Custodian. The Complainant states that no records responsive to his November 21, 2007 OPRA request have been provided to date.

Additionally, the Complainant states that he reviewed the August 6, 2007 Town Council meeting minutes in response to his November 22, 2007, OPRA request Item No. 1(a) on this date and does not believe the minutes are responsive. The Complainant contends that he attended the August 6, 2007 meeting and gave a presentation. The Complainant states that there is no mention of an analysis by the Town Council. The Complainant states that he is requesting the Town Council meeting minutes where the verbal analysis was presented as per the Custodian's previous statement.

The Complainant states that the review of the August 6, 2007 Town Council meeting minutes contained no reference to or analysis for the cost of a stand alone Police building or a reference to \$20 million; therefore, the Complainant's November 22, 2007 request Item No. 1(b) has not been satisfied.

December 3, 2007

Letter from the Complainant to the Custodian. The Complainant states that he will be filing a complaint with the GRC and is prepared to file additional complaints unless the current outstanding requests are fulfilled in an expeditious manner.

December 4, 2007

Letter from the Complainant to the Mayor and Council. The Complainant states that the Custodian's response to request Item No. 2 of the Complainant's November 21, 2007 OPRA request directly contradicts the fact that the Custodian had already provided

⁶ The Custodian received the Complainant's November 21, 2007 OPRA request on November 21, 2007 and the Complainant's November 22, 2007 OPRA request on November 26, 2007.

⁷ The Custodian's letter does not include a response to request Item No. 1 of the Complainant's November 21, 2007 OPRA request.

the Complainant with the requested signed agreement dated October 29, 2007 in response to a separate OPRA request. The Complainant asserts that Counsel also advised that she was given authorization by the Town Council to negotiate and conclude a contract with the BID.

December 6, 2007

Letter from the Complainant to the Custodian. The Complainant states that ten (10) days has passed since the Complainant submitted his November 21, 2007 OPRA request to the Custodian. The Complainant requests that the Custodian advise as to when the requested records will be made available for review.

December 17, 2007

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

- Complainant’s OPRA request dated November 21, 2007.
- Complainant’s OPRA request dated November 22, 2007.
- Letter from the Custodian to the Complainant dated November 28, 2007.
- Letter from the Complainant to the Custodian dated November 28, 2007.
- Letter from the Complainant to the Custodian dated December 3, 2007.
- Letter from the Complainant to Mayor and Council dated December 4, 2007.
- Letter from the Complainant to the Custodian dated December 6, 2007.

The Complainant contends that he had hoped that after repeated reminders, the Custodian would have made an effort to comply with OPRA regarding the outstanding items relevant to this complaint in the Complainant’s November 21, 2007 and November 22, 2007 OPRA requests. The Complainant asserts that he now considers the Custodian’s non-compliance to be a knowing and willful violation of OPRA and an unreasonable denial of access to the records requested.

The Complainant does not agree to mediate this complaint.

January 15, 2008

Request for the Statement of Information (“SOI”) sent to the Custodian.

January 22, 2008

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

January 23, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until February 1, 2008 to file the SOI.

February 1, 2008

E-mail from the Custodian to the GRC. The Custodian requests an additional extension of the deadline to submit the SOI because the Custodian is currently preparing for an election and will not be able to complete the SOI until February 4, 2008.

February 4, 2007

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until February 4, 2007 to file the SOI.

February 4, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated November 21, 2007.
- Complainant’s OPRA request dated November 22, 2007.
- Letter from the Custodian to the Complainant dated November 28, 2007.

The Custodian certifies that his search for the requested records involved making copies of the OPRA requests as they were received and providing copies of the Complainant’s OPRA requests to various City officials and departments that the Custodian believed were most likely to possess any records responsive. The Custodian certifies that the OPRA requests were delivered via memo which also reminded the various City officials of the Custodian’s duty to respond within seven (7) business days granting access, denying access or requesting an extension of time to respond. The Custodian further certifies that he and the Custodian’s assistant searched through relevant files for any records requested that were in the possession of the Custodian (i.e., minutes, agendas, resolutions, certificate of availability of funds, contracts, etc.). The Custodian finally certifies that he and the Custodian’s assistant followed up with the appropriate City officials to collect records responsive and sought Counsel’s review for redactions, if necessary, prior to disclosure.⁸

The Custodian states each request was handled in the following manner:

November 21, 2007 OPRA request Item No. 1 (received November 21, 2007)

The Custodian states in the SOI that the records responsive to this request were not provided because the Complainant had previously been provided access to the records responsive.⁹ Additionally, the Custodian identifies seven (7) records as responsive to the Complainant’s request as follows:

Records Responsive	Records provided in their entirety or with redactions	Legal Explanation
Purchase Order No. 4-54100 (1 page)	Not provided.	This record is associated with the Hillside Avenue Construction project which became the subject of ongoing

⁸ The Custodian avers that the Complainant does not set forth a specific complaint in GRC Complaint No. 2007-320 et seq., but rather sets forth a compilation of all of his requests from August 16, 2007, to December 4, 2007, in the form of a three (3) page chart. The Custodian further avers that the Complainant followed up his OPRA requests with numerous correspondence in an attempt to clarify his requests, but actually changed the nature of the Complainant’s original requests. The Custodian contends that, pursuant to OPRA, a custodian is not required to respond to supplemental information attached to the Complainant’s Denial of Access Complaint.

⁹ The Custodian does not contend that the records provided in response to the Complainant’s previous OPRA request contained redactions.

		litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Purchase Order No. 05-0984 (1 page)	Not provided.	See Above.
Purchase Order No. 07-01095 (1 page)	Not provided.	See Above.
Purchase Order No. 07-01404 (1 page); Resolution R-07-52 (1 page)	Provided.	These records were incorrectly identified as related to the Hillside Avenue Construction project, but are actually related to the Library project; as such the records are available for review.
Memorandum dated December 12, 2006 (2 pages)	Not provided.	This record is associated with the Hillside Avenue Construction project which became the subject of ongoing litigation. Therefore, access to this record denied because said record is deemed confidential due to pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Purchase Order Gen. Cap. Check WIT dated February 22, 2007 (1 page); Escrow Deposit Agreement (16 pages)	Not provided.	See Above.
Budget Audit Status/Transaction Audit Trail Account 7-05-55-502-001-237 (3 pages); Budget Audit Trail Account 7-05-55-502-001-259 (3 pages)	Provided (with the SOI).	These records were incorrectly identified as related to the Hillside Avenue Construction project, but are actually related to the Library project.

November 21, 2007 OPRA request Item No. 2 (received November 21, 2007)

The Custodian states that he responded in writing to the Complainant on November 28, 2008 stating that no records responsive exist because the Township of Livingston has not entered into a contract with BID and no resolution was passed to specifically approve the agreement, as authorization to provide funding had previously been granted.

November 22, 2007 OPRA request Item No. 1 (received November 26, 2007)

The Custodian states that he responded in writing to the Complainant on November 28, 2007 stating that the meeting minutes from August 6, 2007 responsive to request Item No. 1(a) are available for review and duplication. The Custodian asserts that he believed these minutes were responsive because the Complainant had made a detailed presentation addressing the issue of the new Municipal Complex. Further, the Custodian asserts that the Complainant clarified his request to ask for subsequent meetings where the Council would have discussed the Complainant's presentation. The Custodian asserts that the Complainant regularly attends meetings and would know that Council never discussed the presentation at a subsequent meeting.

Additionally, the Custodian states that, based on the Complainant's indication that he believed no minutes existed responsive to request Item No. 1(b) regarding the estimated \$20 million cost of the Police building, the Custodian did not send the Complainant a response confirming what the Complainant indicated he already knew.

The Custodian asserts that the Complainant was not intentionally and deliberately denied access to government records; rather, records were not disclosed because either no records responsive existed or records were unavailable pursuant to N.J.S.A. 47:1A-1.1., or due to an inadvertent oversight in responding to a few of the requests.

The Custodian requests that the GRC review the volume and frequency of the Complainant's OPRA requests with the Township of Livingston and take into account the numerous items which the Custodian and his staff have satisfied. The Custodian contends that the Complainant has attempted to monopolize the time of the Custodian to the point that a part time staff member had to be hired largely to help handle the Complainant's requests. The Custodian asserts that the Township is doing everything in its ability to be responsive to the Complainant's multiple requests, which regularly and repeatedly seek the same records, in a timely fashion. The Custodian requests that the GRC provide direction on how to best respond to the Complainant's regular requests without disrupting agency operations.

Finally, the Custodian states that he has done everything possible to accommodate the Complainant including meeting with the Complainant during and after business hours. The Custodian asserts that, for the foregoing reasons, the Township's actions were responsive, proper and not in violation of OPRA.

February 14, 2008

The Complainant's response to the Custodian's SOI attaching the following:

- Exhibit 1 – Resolution authorizing a contract with Samuel Klein and Company dated December 17, 2007.
- Exhibit 2 – Budget transaction printout dating from October 22, 2001 to January 23, 2004.
- Exhibit 3 – Custodian's response to the Complainant's August 16, 2007 OPRA request dated August 28, 2007.

- Exhibit 4 – Letter from the Complainant to the Custodian dated September 4, 2007.
- Exhibit 5 – Letter from the Custodian to the Complainant dated October 8, 2007.
- Exhibit 6 – Capital/Trust Budget Account dated from January 1, 2004 to September 26, 2007.¹⁰

November 21, 2007 OPRA request Item No. 1¹¹

The Complainant contends that the Township has attempted to confuse the Complainant regarding a very simple request and, in essence, has pointed out their own inconsistencies in responding to the Complainant's requests over time. The Complainant asserts that the Custodian has denied access to the requested records by asserting that the records were previously provided. The Complainant asserts that, in response to one of the Complainant's previous requests, the Custodian granted access to the requested records on October 8, 2007. The Complainant asserts that, in the SOI submitted to the GRC on February 4, 2008, the Custodian again reverted back to his original response that the records were previously provided. The Complainant states that the Custodian then asserted in the SOI that five (5) of the seven (7) records responsive are confidential due to pending litigation. The Complainant contends that not only are the Custodian's responses very inconsistent, but the Custodian has now added a new exemption which does not apply because the records were previously provided to the Complainant.

November 22, 2007 OPRA Request

The Complainant asserts that unless there was an instantaneous analysis of his presentation to the Council on August 6, 2007, then it is impossible to claim that minutes from that meeting are responsive to this request. The Complainant asserts that he does not regularly attend Council meetings. The Complainant contends that regardless of whether he is at every Council meeting, the Council could have issued a written analysis regarding the Complainant's presentation.

The Complainant asserts that he is confused as to why the Custodian failed to respond to the Complainant's request for meeting minutes regarding the \$20 million estimated cost for the Police Building. The Complainant asserts that he finds of particular interest the Custodian's statement that there was no denial of access because the requested minutes do not exist even though no written response was provided. The Complainant states that OPRA requires a custodian to respond to an OPRA request in writing within seven (7) business days and questions where the law relieves the Custodian of his duty to respond in writing when no records responsive exist. Further, the Complainant argues that he has the right to file complaints when no written response is received from the Custodian.¹²

¹⁰ The Complainant provides other exhibits pertaining to past complaints and OPRA requests that are not relevant to this complaint.

¹¹ The Complainant speaks at length about a previous complaint which he withdrew from mediation and which is irrelevant to the instant complaint.

¹² The Complainant further argues that filing OPRA requests and complaints does not bar a requestor from communicating with elected officials.

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 ...If the custodian of a government record asserts that part of a particular record is exempt from public access...the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record” 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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

November 21, 2007 OPRA request Item No. 1:

The Custodian initially failed to address the Complainant’s request Item No. 1 in his response to the Complainant dated November 28, 2007. The Custodian subsequently stated in the SOI that the Complainant was not provided with the records responsive to request Item No. 1 because such records had been provided in response to a previous request. Additionally, the Custodian asserted that responsive records No. 1, No. 2, No. 3, No. 5 and No. 6 are exempt from disclosure due to pending litigation pursuant to N.J.S.A. 47:1A-1.1.

The Complainant argues that the Custodian’s response that these records are now confidential due to pending litigation is contradictory to the Custodian’s previous response, in which the Custodian provided access to the records he now claims are exempt from disclosure.

November 21, 2007 OPRA request Item No. 2:

The Custodian responded in writing to the Complainant on November 28, 2008 stating that no records responsive exist because the Township of Livingston has not entered into a contract with BID and no resolution was passed to specifically approve the agreement, as authorization to provide funding had previously been granted.

November 22, 2007 OPRA request Item No. 1(a):

The Custodian responded in writing to the Complainant on November 28, 2007 stating that the meeting minutes from August 6, 2007 responsive to request Item No. 1(a) are available for review and duplication. The Custodian asserted in the SOI that he believed these minutes were responsive because the Complainant had made a detailed presentation addressing the issue of the new Municipal Complex. Further, the Custodian asserts that the Complainant clarified his request to ask for subsequent meetings where the Council would have discussed the Complainant’s presentation. The Custodian also asserted that the Complainant regularly attends meetings and would know that Council never discussed the presentation at a subsequent meeting.

November 22, 2007 OPRA request Item No. 1(b):

The Custodian stated in the SOI based on the Complainant’s indication that he believed no minutes existed responsive to request Item No. 1(b) regarding the estimated \$20 million cost of the Police building, the Custodian did not send the Complainant a response confirming what the Complainant indicated he already knew.

OPRA specifically states that a custodian “shall promptly comply with a request... [for] a government record.” (Emphasis added.) N.J.S.A. 47:1A-5.g. Additionally, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.”

Based on OPRA and the GRC’s holding in Paff, supra, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within seven (7) business days after receipt of such request.

In this complaint, the Custodian responded to the Complainant’s November 21, 2007 Item No. 2 and November 22, 2007 request Item No. 1(a) on November 28, 2007, but failed to address each request item contained in each of the Complainant’s requests individually.¹³

Therefore, although the Custodian responded in writing to the Complainant’s November 21, 2007 and November 22, 2007 OPRA requests within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item contained in each individual request. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff, supra.

Additionally, In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian certified in the SOI that no records which were responsive to the Complainant’s November 21, 2007 request Item No. 2 and November 22, 2007 OPRA request relevant to this complaint existed at the time of the Complainant’s two (2) requests, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-

¹³ The Custodian later certified in the SOI that he did not respond to the Complainant’s November 21, 2007 request Item No. 1 because the records responsive had previously been provided to the Complainant in response to another request and did not respond to the Complainant’s November 22, 2007 request Item No. 1(b) because the Complainant indicated that he knew no records responsive existed.
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5.g. and N.J.S.A. 47:1A-5.i., he has not unlawfully denied access to the requested records pursuant to Pusterhofer, supra.¹⁴

Further, the Custodian certified in the SOI that he did not initially provide access to seven (7) records responsive to the Complainant's November 21, 2007 request Item No. 1 because said records were previously provided. The Custodian also certified that five (5) of the seven (7) records were exempt from disclosure as confidential due to pending litigation. The Complainant argued that if the records were previously provided, they should be provided again. The Complainant asserts that the Custodian's response regarding this request item shows the inconsistencies with which the Custodian responds to other OPRA requests.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁵ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7.f.,

¹⁴ Although the Complainant's November 22, 2007 OPRA request is broad and unclear in nature, the GRC declines to address said issue because the Custodian certified in the SOI that no records responsive to said request exist.

¹⁵ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the records No. 1, No. 2, No. 3, No. 5 and No. 6 responsive to the Complainant’s November 21, 2007 request to determine the validity of the Custodian’s assertion that the records pertain to pending litigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian’s denial of access to the records responsive to the Complainant’s November 21, 2007 request Item No. 1 rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s November 21, 2007 and November 22, 2007 OPRA requests within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no records which were responsive to the Complainant’s November 21, 2007 request Item No. 1 and November 22, 2007 OPRA request relevant to this complaint existed at the time of the Complainant’s two (2) requests, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records No. 1, No. 2, No. 3, No. 5 and No. 6 responsive to the Complainant’s November 21, 2007 request to determine the validity of the Custodian’s assertion that the records pertain to pending litigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver¹⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a document or redaction index¹⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁸, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009

¹⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."