



**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**

**November 4, 2009 Government Records Council Meeting**

Julie O'Connor  
Complainant

Complaint No. 2008-164

v.

Town of Dover (Morris)  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian unlawfully denied access to the requested settlement agreement and failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, because the requested settlement agreement was provided to the Complainant on October 15, 2009, the GRC declines to order disclosure.
3. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App.



Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian's other raised exemptions.

4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial and the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, because the requested record was provided to the Complainant on October 15, 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. However, the Custodian's unlawful "deemed" 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.

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 4<sup>th</sup> Day of November, 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: November 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

**Julie O'Connor<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-164**

v.

**Town of Dover (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the separation agreement between the Town of Dover and Ms. Bibi Stewart Garvin (“Ms. Garvin”).

**Request Made:** June 25, 2008

**Response Made:** July 23, 2008

**Custodian:** Margaret J. Verga

**GRC Complaint Filed:** July 30, 2008<sup>3</sup>

**Background**

**June 25, 2008**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

**July 23, 2008**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the nineteenth (19<sup>th</sup>) business day following receipt of such request. The Custodian states that, based on Counsel’s advice, access to the requested record is denied because the separation agreement includes a confidentiality provision.

**July 30, 2008**

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

- Complainant’s OPRA request dated June 25, 2008.
- Letter from the Custodian to the Complainant dated July 23, 2008.

The Complainant states that she submitted an OPRA request to the Town of Dover (“Town”) on June 25, 2008. The Complainant states that the Custodian responded

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

<sup>2</sup> Represented by David Pennella, Esq. (Dover, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

in writing on July 23, 2008, stating that access to the requested separation agreement is denied because it contains a confidentiality provision. The Complainant contends that the Town will not disclose the financial terms of Ms. Garvin's termination.

The Complainant does not agree to mediate this complaint.

**August 21, 2008**

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

**August 28, 2008**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 25, 2008.
- Letter from the Custodian to the Complainant dated July 23, 2008.<sup>4</sup>

The Custodian certifies that she received the Complainant's OPRA request on June 25, 2008 and responded verbally on the same day.<sup>5</sup> The Custodian certifies that she sent a letter to the Complainant on July 23, 2008 stating that pursuant to a conversation on June 25, 2008, access to the requested separation agreement was denied on advice of Counsel because the settlement agreement includes a confidentiality provision. Additionally, the Custodian certifies that the Complainant advised that she would await the final decision of the GRC in separate matter regarding the record at issue in this complaint.

The Custodian contends that the requested separation agreement is a personnel record which is exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian asserts that N.J.S.A. 47:1A-1.1. also exempts the requested record based on the following:

"...information generated by or on behalf of public employers or public employees in connection

- with any sexual harassment complaint filed with a public employer or
- with any grievance filed by or against an individual or
- in connection with collective negotiations, including documents and statements of strategy or negotiating position..." (Emphasis added.)  
N.J.S.A. 47:1A-1.1.

Additionally, the Custodian asserts that the separation agreement contains a mutually negotiated confidentiality provision, pursuant to which disclosure of the agreement by the Town may be deemed a breach of said agreement.

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<sup>4</sup>The Custodian did not certify to the search conducted or whether any records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

<sup>5</sup>The Custodian does not identify whether she granted or denied access to the requested record.  
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**July 14, 2009**

E-mail from the GRC to the Custodian. The GRC states that the Custodian certifies in the SOI that she responded on June 25, 2008 and July 23, 2008; however, there is no evidence to support the Custodian's asserted response dated June 25, 2008. Additionally, the GRC states that the Complainant asserted in the Denial of Access Complaint that Counsel initially denied access to the requested record. The GRC requests that the Custodian certify to the following:

1. Whether the Custodian or Counsel responded to the Complainant on June 25, 2008?
2. Whether there is any written evidence of the response on June 25, 2008?

The GRC requests that the Custodian provide the requested legal certification by close of business on July 17, 2009 and advises that Counsel may also want to submit a legal certification.

**July 24, 2009**

Legal certification of the Custodian and Counsel attaching the following:

- Complainant's June 25, 2008 OPRA request.
- Letter from the Custodian to the Complainant dated July 23, 2008.
- Custodian's SOI.

The Custodian certifies that upon receipt of the Complainant's OPRA request on June 25, 2008, she explained to the Complainant that a complaint regarding a previous request for the same record was currently filed with the GRC. The Custodian certifies that the Complainant advised that she would wait until the GRC decided the issue. The Custodian certifies that she provided a written response to the Complainant on July 23, 2008 per the Complainant's request to put said denial in writing.

Counsel certifies that there is no "separation agreement" between the Town and Ms. Garvin, but there is a settlement agreement.

Counsel certifies that the Custodian requested advice from Counsel regarding the Complainant's request. Counsel certifies that he did not deny access to the record, but advised the Custodian of the legal implications of providing access to the requested record.

Additionally, Counsel certifies that he advised the Complainant that if the GRC ordered disclosure of the agreement in a separate complaint before the Council, then Counsel would advise the Town to provide access to the Complainant in this complaint.

Finally, Counsel certifies that the financial terms of the settlement agreement were made available to the public following the issuance of a check to Ms. Garvin.

**August 17, 2009**

Letter from GRC to Custodian. The GRC requests that the Custodian provide another legal certification describing the nature of the requested separation agreement.

Additionally, the GRC requests that the Custodian indicate whether the agreement is related to any sexual harassment complaint or grievance filed with the employer or in Superior Court.

**August 18, 2009**

Custodian's Certification. The Custodian certifies that the requested record is a settlement agreement, not a separation agreement. The Custodian certifies that Ms. Garvin was not terminated or fired by the municipality. Additionally, the Custodian certifies that the settlement agreement does not relate to any sexual harassment complaint or grievance filed by the employee. The Custodian certifies that the agreement was entered into to avoid possible litigation between the parties relating to the employee's terms of office.

**August 18, 2009**

Custodian's supplemental certification. The Custodian certifies that she provided the Complainant with information regarding payments made to Ms. Garvin. The Custodian certifies that the funds paid to Ms. Garvin have not been held confidential once they have been paid and she has provided same to the Complainant.

**October 15, 2009**

Letter from the Custodian's Counsel to the GRC. Counsel states that the requested settlement agreement is being voluntarily disclosed to the Complainant based on the Council's holding in Ungaro (on behalf of the Daily Record) v. Town of Dover (Morris), GRC Complaint No. 2008-115 (September 2009).

**October 21, 2009**

E-mail from the GRC to the Complainant. The GRC states that it is in receipt of the Custodian Counsel's letter dated October 15, 2009. The GRC requests that the Complainant advise as to whether she has received the requested record from the Complainant.

**October 22, 2009**

E-mail from the Complainant to the GRC. The Complainant confirms that she received the requested settlement agreement.

**Analysis**

**Whether the Custodian unlawfully denied access to the requested record?**

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 ... A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]... information generated by or on behalf of public employers or public employees in connection

- with any sexual harassment complaint filed with a public employer or
- with any grievance filed by or against an individual or
- in connection with collective negotiations, including documents and statements of strategy or negotiating position...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states 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 therefor ...” 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 ... failure to respond shall be deemed a denial of the request ....The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA also provides that:

“...the *personnel* or pension *records* of any individual in the possession of a public agency, including but not limited to records relating to any

*grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...*" (Emphasis added). N.J.S.A. 47:1A-10.

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.

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, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Custodian certified in the SOI that she responded verbally to the Complainant on the same day as receipt of the Complainant's request denying access to the requested record because it contained a confidentiality agreement. Further, the Custodian certified in the SOI that she responded in writing on the nineteenth (19<sup>th</sup>) business day after receipt of the Complainant's request stating the reason for her denial of access to the requested record.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Further, the Custodian denied access to the requested employment separation agreement, which the Custodian clarified in her certification dated August 18, 2009 is a settlement agreement, on the basis that said agreement contains a confidentiality clause. The Complainant contends that the Town will not disclose the financial terms of Ms. Garvin's termination. The Custodian subsequently certified on August 18, 2009 that she provided the Complainant with information regarding payments made to Ms. Garvin.



OPRA's purpose is "to maximize public knowledge about public affairs in order to ensure an informed citizenry." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law. Div. 2004)). OPRA provides that all government records are subject to public access unless specifically exempt. OPRA contains 24 specific exemptions to disclosure, none of which relate to confidentiality clauses. In fact, OPRA states that "any limitation on the right of access...shall be construed in favor of the public's right of access..." N.J.S.A. 47:1A-1.

The fact that the parties agreed to a confidentiality clause in the record at issue in this complaint does not override the public's right to access under OPRA. See Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307, 317-18 (App. Div. 2006), *certif. denied*, 188 N.J. 353 (2006). See also Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009)<sup>6</sup>; Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008) (holding that the public has the right to access confidential settlement agreements which are entered into by private parties under seal in civil court).

Therefore, because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman, *supra*, Asbury Park Press, *supra*, and Verni, *supra*, and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian unlawfully denied access to the requested settlement agreement and failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, because the requested settlement agreement was provided to the Complainant on October 15, 2009, the GRC declines to order disclosure.

Further, because the requested settlement agreement is subject to public access pursuant to Lederman, *supra*, Asbury Park Press, *supra*, and Verni, *supra*, the Council declines to address the Custodian's other raised exemptions.

**Whether the Custodian's 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:

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<sup>6</sup> The court in Asbury Park Press, *supra*, held that OPRA exempts from public access settlement agreements related to sexual harassment complaints filed with the employer, rather than in Superior Court. However, the Custodian in this complaint certified that the requested agreement does not relate to any sexual harassment complaints filed with the employer or in court.

“... 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).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated time frame resulted in a “deemed” denial and the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, because the requested record was provided to the Complainant on October 15, 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. However, the Custodian’s unlawful “deemed” 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.

### **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 either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis

for a denial of access under OPRA. As such, the Custodian unlawfully denied access to the requested settlement agreement and failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, because the requested settlement agreement was provided to the Complainant on October 15, 2009, the GRC declines to order disclosure.

3. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian's other raised exemptions.
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial and the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, because the requested record was provided to the Complainant on October 15, 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. However, the Custodian's unlawful "deemed" 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.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009