



**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**

**September 30, 2009 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2008-253

v.

Borough of South Bound Brook (Somerset)  
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 entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian properly responded in writing requesting an extension of ten (10) to fourteen (14) days to respond to the Complainant’s OPRA request on the same business day as receipt of such request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Because the Custodian conducted a reasonable search for the requested executive session meeting minutes, and because the Custodian certified that he was not aware of the existence of the additional executive session meeting minutes which were misfiled within the Custodian’s office, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the extended time frame resulted in a “deemed” denial, because the Custodian certified that he provided the executive session meeting minutes responsive for inspection to the Complainant on April 23, 2009 and because the Custodian did not unlawfully



deny access to the additional executive session meeting minutes located in his office because he was unaware of their existence, 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 he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of 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 7, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-253**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** On site inspection of all executive session meeting minutes between September 2005 and September 2008.

**Request Made:** October 4, 2008

**Response Made:** October 6, 2008

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** October 31, 2008<sup>3</sup>

**Background**

**October 4, 2008**

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

**October 6, 2008**

Custodian Counsel's response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant's OPRA request on the same business day as receipt of such request.<sup>4</sup> The Custodian states that additional time will be needed to compile and review the records responsive to the Complainant's request. Counsel states that the Borough will respond to the Complainant's OPRA request within ten (10) to fourteen (14) days.

**October 30, 2008**

E-mail from the Custodian to the GRC. The Custodian states that the Complainant received a response requesting additional time to respond to his OPRA request. Further, the Custodian avers that the Complainant never objected to the requested extension of time nor did he respond to Counsel's letter requesting such time.

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

<sup>2</sup> Represented by William T. Cooper III, Esq. (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint, which was e-mailed to the GRC on October 30, 2008, on said date.

<sup>4</sup> The Complainant's request was sent to the Custodian on a Saturday and received on Monday, October 6, 2008.

The Custodian asserts that the request for additional time to respond was proper because the requested executive session meeting minutes span three (3) years.<sup>5</sup>

**October 31, 2008**

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

- Complainant’s OPRA request dated October 4, 2008.
- Letter from the Custodian’s Counsel to the Complainant dated October 6, 2008.

The Complainant states that he submitted an OPRA request to the Custodian on October 4, 2008. The Complainant states that Counsel responded to the OPRA request on October 6, 2008, requesting an extension of ten (10) to fourteen (14) days to respond to the Complainant’s request.

The Complainant states that twenty-five (25) days have passed since Counsel’s October 6, 2008 letter yet no written correspondence from Counsel or the requested records have been received. The Complainant asserts that the Custodian and Counsel are knowingly and willfully refusing to provide the Complainant with government records. The Complainant argues that the Custodian’s actions show a pattern of refusing OPRA requests and ignoring requestors.

The Complainant does not agree to mediate this complaint.

**November 18, 2008**

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

**November 21, 2008**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until December 3, 2008 to submit the SOI.

**November 21, 2008**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until December 3, 2008 to file the SOI.

**December 3, 2008**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 4, 2008.
- Letter from the Custodian’s Counsel to the Complainant dated October 6, 2008.
- E-mail from the Custodian to the GRC dated October 30, 2008.

The Custodian certifies that he received the Complainant’s OPRA request on October 6, 2008.

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<sup>5</sup> The Custodian sent this e-mail in response to the Complainant’s filing of the Denial of Access which was sent on October 30, 2008, but not received by the GRC until October 31, 2008.

Counsel states that he responded to the Complainant's request on October 6, 2008 requesting additional time to respond based on the breadth of the OPRA request. Counsel asserts that the Borough believed it would be able to respond to the Complainant's OPRA request within two (2) weeks but was unable to meet the ten (10) to fourteen (14) day extension based on the voluminous nature of the request.

Counsel asserts that the Custodian reiterated the Borough's need for additional time to respond to the Complainant's OPRA request in an e-mail dated October 30, 2008. Counsel asserts that, as of the date of the submission of the SOI, the Complainant has been advised that the requested executive session meeting minutes are available for review with redactions for personnel and pending litigation matters.

Counsel contends that the Complainant is knowingly misusing OPRA by submitting multiple requests with which it will be difficult for the Custodian, a part-time employee, to comply immediately.

### **December 7, 2008**

The Complainant's response to the Custodian's SOI. The Complainant argues that he would have no need to file a complaint if the Custodian simply complied with the provisions set forth in OPRA. The Complainant asserts that the Custodian's record shows a pattern of violating OPRA.<sup>6</sup>

The Complainant contends that the Custodian attempted to deceive the GRC in the SOI. First, the Complainant argues that the Custodian should have responded by October 20, 2008, the fourteenth (14<sup>th</sup>) day of the extension, but failed to do so and asserted in the SOI that the extension was untenable. Second, the Complainant argues that Counsel's assertion that the Custodian reiterated the need for an extension on October 30, 2008 in an attempt to deceive the GRC, especially in light of the fact that the Custodian sent this e-mail to the GRC three (3) hours after the Complainant initially e-mailed the instant complaint to the GRC.

Finally, the Complainant argues that the Custodian's allegation that he is overburdened by the Complainant's OPRA requests is an unacceptable excuse for failing to abide by the provisions set forth in OPRA.

### **December 12, 2008**

E-mail from the Complainant to the Custodian. The Complainant requests to inspect and possibly copy the responsive executive session meeting minutes on December 19, 2008. The Complainant requests an estimated cost for copies of all executive session meeting minutes.

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<sup>6</sup> The Complainant cites two (2) past complaints against the Custodian that were adjudicated by the GRC; however, the actions of a custodian are not precedential in subsequent complaints. Each complaint is adjudicated individually based on the evidence of the instant record. See Hardwick v. NJ Dept. of Transportation, GRC Complaint No. 2007-164 (February 2008).

**December 20, 2008**

E-mail from the Complainant to the Custodian attaching an e-mail from the Complainant to the Custodian dated December 12, 2008. The Complainant states that seventy (70) days after the submission of the Complainant's OPRA request, Counsel advised that the requested records were prepared for inspection. The Complainant states that eight (8) days after sending the attached December 12, 2008 e-mail and one (1) day after the proposed December 19, 2008 inspection date, the Custodian has failed to agree to the inspection date. The Complainant requests that all requested records be provided by mail immediately.

**December 21, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that he waited in his office on December 19, 2008 for the Complainant to come in and inspect the records responsive to the Complainant's OPRA request. The Custodian asserts that the Complainant failed to mention in his December 12, 2008 e-mail that the Complainant may want copies of the records mailed. The Custodian advises that if the Complainant wants the records mailed, the Custodian will determine a cost and mail the records once payment has been received.

**December 21, 2008**

E-mail from the Custodian to the GRC. The Custodian contends that the Complainant identified December 19, 2008 as the day on which he would inspect the executive session meeting minutes responsive but failed to appear. The Custodian argues that now, after the Complainant did not appear to inspect the records, the Complainant expects the Custodian to provide the requested records via mail at no cost to the Complainant. The Custodian asserts that he does not see how the Complainant's failure to appear and inspect the records is the Custodian's fault.

**December 21, 2008**

E-mail from the Complainant to the Custodian. The Complainant states that he did, in fact, request the cost for all copies of the requested executive session meeting minutes in his December 12, 2008 e-mail and does so again in this e-mail. Additionally, the Complainant contends that, without a response from the Custodian confirming that the Complainant could inspect the requested records on December 19, 2008, the Complainant could not have known that the Custodian was available to provide the records for inspection on that date. The Complainant argues that the Custodian's failure to confirm the Custodian's availability on December 19, 2008 is more evidence of the Custodian ignoring his duties as a custodian of record.

**December 22, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that he will calculate the costs of copies for the requested records and provide them to the Complainant via mail once payment is received.<sup>7</sup>

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<sup>7</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

**July 6, 2009**

E-mail from the GRC to the Custodian. The GRC states that the evidence of record shows that the Custodian advised the Complainant on December 22, 2008 that the Custodian would calculate the cost of copies for the executive session meeting minutes responsive to the Complainant's OPRA request; however, there is no evidence to support that the Complainant was provided with access to said minutes. The GRC requests that the Custodian certify to the following:

1. Whether the Complainant was provided with access to the requested executive session meeting minutes?
2. If access was provided, on what date did the Complainant receive or inspect the requested meeting minutes?
3. If a copying cost was calculated, the estimated cost provided to the Complainant?

The GRC requests that the Custodian provide the requested legal certification by close of business on July 8, 2009.

**July 8, 2009**

Custodian's certification to the GRC. The Custodian certifies that the Complainant was granted access to inspect the requested meeting minutes on December 3, 2008. The Custodian certifies that the Complainant inspected the requested meeting minutes on April 23, 2009. The Custodian certifies that there was no cost because the Complainant inspected the meeting minutes.

**July 17, 2009**

E-mail from the Complainant to the GRC. The Complainant contends that the Custodian's certification is inaccurate. The Complainant avers that his request was for all executive session meetings between September 2005 and September 2008; however, the Custodian did not provide access to all meeting minutes. The Complainant contends that he was not given access to or provided with an explanation as to why meeting minutes from the following dates were not made available for the Complainant's inspection:<sup>8</sup>

- April 11, 2006.
- June 13, 2006.
- April 10, 2007.
- June 5, 2007.
- July 10, 2007.
- July 11, 2007.
- March 4, 2008.
- March 11, 2008.

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<sup>8</sup> The Complainant asserts that he discovered executive session meetings took place on these dates by searching through all the Council meeting minutes for the years 2005 through 2008, but also acknowledges that some errors may be possible and that some minutes were examined as part of previous OPRA requests. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-253 – Findings and Recommendations of the Executive Director 5

**July 17, 2009**

E-mail from the GRC to the Custodian. The GRC states that in light of the Complainant's e-mail dated July 17, 2009, the GRC requests that the Custodian legally certify to the following:

1. Whether the Complainant was denied access to the executive session meeting minutes for the dated identified in the Complainant's e-mail dated July 17, 2009?
2. If so, on what legal authority were said meeting minutes withheld from disclosure?

The GRC requests that the Custodian provide the requested legal certification by close of business on July 21, 2009.

**July 21, 2009**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 28, 2009 to submit his legal certification to the GRC. The Custodian asserts that he may have located additional executive session meeting minutes that were not inputted into the computer, but were still attached to the public session meeting minutes because they were composed by hand and not on the computer.

**July 21, 2009**

E-mail from the GRC to the Custodian. The GRC grants an extension of time until July 28, 2009 to submit the requested legal certification.

**July 28, 2009**

Legal Certification from the Custodian. The Custodian certifies that the Complainant was not denied access to the executive session meeting minutes identified in the Complainant's e-mail dated July 17, 2009. The Custodian certifies that the missing minutes were never inputted into the computer or kept within the meeting files, but were found in paper format in the office of the Custodian. The Custodian certifies that the minutes have now been entered into the computer and filed in the appropriate files. The Custodian certifies that the meeting minutes are available for disclosure if requested.<sup>9</sup>

**Analysis**

**Whether the Custodian's failure to respond within the extended time frame results in a "deemed" denial of access to the requested executive session meeting minutes?**

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:

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<sup>9</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-253 – Findings and Recommendations of the Executive Director



“... 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.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...* If the government record is in storage or archived, the requestor shall be so *advised within seven business days* after the custodian *receives 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 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 provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the Custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the Complainant’s March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the Complainant’s request. However, the Custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i....however...[b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

In this matter currently before the Council, as in Kohn, *supra*, the Custodian requested additional time to respond to the Complainant’s OPRA request within the statutorily mandated time frame. However, the Custodian failed to grant or deny access to the requested records until December 12, 2008, nearly eight (8) weeks following the end of the extension of time.

Therefore, although the Custodian timely responded to the Complainant’s OPRA request in writing requesting an extension of ten (10) to fourteen (14) days to respond to the Complainant’s OPRA request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

Additionally, the Custodian certified on July 8, 2009 that the Complainant inspected the requested records on April 23, 2009; however, in an e-mail to the GRC on July 17, 2009, the Complainant contended that he was not given access to all records responsive and provided a list of specific dates that the Complainant believed executive session meetings occurred.

The GRC has previously adjudicated complaints in which the Custodian initially denied access to the requested records. In May v. Township of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007), the Complainant sought access to schematic floor plans of Edison High School. The Custodian initially denied the Complainant access to the requested floor plans by stating that the Complainant must submit his request to the Board of Education. After the Complainant filed his Denial of Access Complaint, the Custodian made the requested records available to the Complainant and indicated that she misunderstood the Complainant’s request to be for Board of Education records. The Council held that:

“[e]ven though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.”

Additionally, in Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian initially denied access to the

requested records on the basis that no records responsive existed. However, in the Statement of Information, the Custodian certified that the additional meeting minutes found in his office were not located in either the computer or the files in which they were supposed to be located; thus, they were not located in his initial search.

In this instant complaint, the Custodian certified on July 8, 2009 that the executive session meeting minutes requested were provided for inspection to the Complainant on April 23, 2009. However, the Complainant identified several dates on which executive session meetings occurred, yet minutes were not provided for said dates. Following the GRC's request for a second certification regarding whether the Custodian had a legal authority for denying said executive session meeting minutes for the dates identified in the Complainant's July 17, 2009 e-mail to the GRC, the Custodian asserted that additional meeting minutes responsive which were not inputted into the computer but attached to the public session meeting minutes may have been located in his office. The Custodian subsequently certified on July 28, 2009 that the additional executive session meeting minutes were never inputted into the computer or filed appropriately, but that the minutes are now properly inputted, filed and are available for disclosure.

This instant complaint is distinguishable from May, *supra*, because the Custodian in May summarily denied the Complainant's request without conducting a search for said records. The Custodian here actually conducted a search for the requested executive session meeting minutes prior to providing access to all the minutes he believed existed.

Additionally, this complaint is distinguishable from Schneble, *supra*. In said complaint the Custodian admitted to performing an inadequate search for the requested records based on his misinterpretation of the request. In this instant complaint, the Custodian certified that the executive session meeting minutes that were not provided were misfiled in the Custodian's office and not inputted into the computer; thus, were not located during the initial search.

Therefore, because the Custodian conducted a reasonable search for the requested executive session meeting minutes, and because the Custodian certified that he was not aware of the existence of the additional executive session meeting minutes which were misfiled within the Custodian's office, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.

**Whether the Custodian's "deemed" denial of the Complainant's OPRA request 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).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the extended time frame resulted in a “deemed” denial, because the Custodian certified that he provided the executive session meeting minutes responsive for inspection to the Complainant on April 23, 2009, and because the Custodian did not unlawfully deny access to the additional executive session meeting minutes located in his office because he was unaware of their existence, 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 he 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. Although the Custodian properly responded in writing requesting an extension of ten (10) to fourteen (14) days to respond to the Complainant’s OPRA request on the same business day as receipt of such request, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

2. Because the Custodian conducted a reasonable search for the requested executive session meeting minutes, and because the Custodian certified that he was not aware of the existence of the additional executive session meeting minutes which were misfiled within the Custodian's office, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
  
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the extended time frame resulted in a "deemed" denial, because the Custodian certified that he provided the executive session meeting minutes responsive for inspection to the Complainant on April 23, 2009 and because the Custodian did not unlawfully deny access to the additional executive session meeting minutes located in his office because he was unaware of their existence, 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 he 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

September 23, 2009