



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 11, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-49

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council ("Council") considered the May 20, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian mailed the requested records to the Complainant on March 12, 2009 but failed to simultaneously provide certified confirmation of his compliance to the GRC until March 26, 2009. Therefore, the Custodian has not fully complied with the Council's February 25, 2009 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint No. 2007-299; 2007-307 (April 2009).
2. Although the Custodian's failure to respond to the Complainant's three (3) November 16, 2007 OPRA requests resulted in a deemed denial, and the Custodian failed to fully comply with the Council's February 25, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director, the Custodian did provide the requested records to the Complainant within the five (5) business days after receipt of the Council's Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful 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.

¹ "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."



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

Final Decision Rendered by the
Government Records Council
On The 11th Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-49

v.

**Borough of South Bound Brook
(Somerset)²
Custodian of Records**

Records Relevant to Complaint: On site inspection of:

1. All resolutions passed by the Borough that authorized Mayor and Council to go into executive session on November 13, 2007.
2. All public notices and/or proof that the media received prior notification of the Mayor and Council's intention to go into executive session on November 13, 2007.
3. Executive session minutes dated November 13, 2007.

Request Made: November 16, 2007³

Response Made: None

Custodian: Donald E. Kazar

GRC Complaint Filed: March 17, 2008⁴

Background

February 25, 2009

Government Records Council's ("Council") Interim Order. At its February 25, 2009 public meeting, the Council considered the February 18, 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's failure to respond in writing to the Complainant's OPRA requests 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).

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The evidence of record shows that the requests relevant to this complaint were dated November 16, 2007 but sent to the Custodian via e-mail on November 17, 2007.

⁴ The GRC received the Denial of Access Complaint on said date.

2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful denial of access to the records requested in the Complainant's three (3) November 16, 2007 OPRA requests. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to Item No. 1 exists, the Custodian must certify to this fact.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.**
4. 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.

March 6, 2009

Council's Interim Order distributed to the parties.

March 24, 2009

E-mail from the GRC to the Custodian. The GRC states that compliance for this complaint was due on March 13, 2009. The GRC states that to date, no response has been received. The GRC requests that the Custodian provide certified confirmation of compliance immediately.

March 26, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that he received the Council's February 25, 2009 Interim Order on March 9, 2009. The Custodian certifies that all records responsive were mailed to the Complainant on March 12, 2009 and that the Custodian has fully complied with the Council's February 25, 2009 Interim Order.

Analysis

Whether the Custodian complied with the Council's February 25, 2009 Interim Order?

The Custodian in this complaint certified that he received the Council's Interim Order on March 9, 2009 and provided all records responsive to the Complainant via U.S.

⁵ "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."
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-49 – Supplemental Findings and Recommendations of the Executive Director 2

mail on March 12, 2009. However, the Custodian failed to simultaneously provide certified confirmation of compliance to the GRC until March 26, 2009, or fourteen (14) business days after receipt of the Council's February 25, 2009 Interim Order.

In Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint No. 2007-299; 2007-307 (April 2009), the Council's December 18, 2008 Interim Order ordered the Custodian to comply with the Administrative Law Judge's ("ALJ") decision to provide records responsive:

"within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director."

The Custodian complied with the ALJ's order, but failed to provide certified confirmation to the GRC within five (5) business days. The GRC held that the Custodian failed to fully comply with the Council's Interim Order.

Similarly in this complaint, the Custodian mailed the requested records to the Complainant on March 12, 2009 but failed to simultaneously provide certified confirmation of his compliance to the GRC until March 26, 2009. Therefore, the Custodian has not fully complied with the Council's February 25, 2009 Interim Order pursuant to Jung & O'Halloran, *supra*.

Whether the Custodian's delay in 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?

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much

more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Although the Custodian's failure to respond to the Complainant's three (3) November 16, 2007 OPRA requests resulted in a deemed denial, and the Custodian failed to fully comply with the Council's February 25, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director, the Custodian did provide the requested records to the Complainant within the five (5) business days after receipt of the Council's Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful 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. The Custodian mailed the requested records to the Complainant on March 12, 2009 but failed to simultaneously provide certified confirmation of his compliance to the GRC until March 26, 2009. Therefore, the Custodian has not fully complied with the Council's February 25, 2009 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint No. 2007-299; 2007-307 (April 2009).
2. Although the Custodian's failure to respond to the Complainant's three (3) November 16, 2007 OPRA requests resulted in a deemed denial, and the Custodian failed to fully comply with the Council's February 25, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director, the Custodian did provide the requested records to the Complainant within the five (5) business days after receipt of the Council's Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the

⁶ "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."

⁷ "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."

Custodian's unlawful 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

May 20, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-49

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful denial of access to the records requested in the Complainant’s three (3) November 16, 2007 OPRA requests. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to Item No. 1 exists, the Custodian must certify to this fact.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified**



confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.

4. 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 25th Day of February, 2009

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 6, 2009

¹ "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
February 25, 2009 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-49

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: On site inspection of:

1. All resolutions passed by the Borough that authorized Mayor and Council to go into executive session on November 13, 2007.
2. All public notices and/or proof that the media received prior notification of the Mayor and Council's intention to go into executive session on November 13, 2007.
3. Executive session minutes dated November 13, 2007.

Request Made: November 16, 2007³

Response Made: None

Custodian: Donald E. Kazar

GRC Complaint Filed: March 17, 2008⁴

Background

November 16, 2007

Complainant's three (3) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on three (3) official OPRA request forms.

November 20, 2007

E-mail from the Complainant to the Custodian. The Complainant asks if the Custodian received his OPRA requests.

November 21, 2007

E-mail from the Custodian to the Complainant. The Custodian states that he received the Complainant's e-mail, but did not open it yet.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The evidence of record shows that the requests relevant to this complaint were dated November 16, 2007 but sent to the Custodian via e-mail on November 17, 2007.

⁴ The GRC received the Denial of Access Complaint on said date.

November 28, 2007

E-mail from the Complainant to the Custodian. The Complainant reminds the Custodian that he has not responded to the OPRA requests as of this date.

November 28, 2007

E-mail from the Custodian to the Complainant. The Custodian states that he does not understand to what the Complainant is referring.

November 28, 2007

E-mail from the Complainant to the Custodian. The Complainant states that his requests relevant to this complaint were never processed.

March 17, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s three (3) OPRA requests dated November 16, 2007.

The Complainant states that he submitted three (3) OPRA requests via e-mail to the Custodian on November 16, 2007. The Complainant states that the Custodian failed to respond to the requests. The Complainant contends that the Custodian’s failure to respond is a knowing and willful violation of OPRA under the totality of the circumstances.

The Complainant states that the Custodian not only failed to grant or deny access to the requested records, but also failed to request an extension to respond to the Complainant’s requests. The Complainant further states that the Custodian merely did not act on these requests.

The Complainant did not agree to mediate this complaint.

March 17, 2008

E-mail from the Custodian to the GRC. The Custodian states that the Complainant’s assertions in the Denial of Access Complaint do not accurately reflect the Complainant’s actual dealings with the Custodian. The Custodian asserts that the Complainant informed him on many occasions that there was no rush in providing the records requested, but that the Complainant would advise the Custodian when he would need to obtain the records requested.

The Custodian states that the Complainant was an employee with the Borough at the time of these OPRA requests. The Custodian states that the Complainant visited the Custodian’s office several times to discuss multiple OPRA requests and at times was provided with records without the use of the OPRA request forms.

March 27, 2008

Request for the Statement of Information sent to the Custodian.

March 31, 2008

E-mail from Custodian to the GRC. The Custodian requests an extension of time until April 14, 2008 to submit the Statement of Information.

March 31, 2008

E-mail from the GRC to the Custodian. The GRC acknowledges receipt of the Custodian's request for an extension of the deadline to submit the Statement of Information. The GRC states that because the Custodian must also submit two (2) additional Statements of Information for other complaints, the GRC is extending the Custodian's deadline until close of business on April 16, 2008.⁵ The GRC further states that no additional extensions will be given and that the GRC will adjudicate this complaint with the evidence of record if the Statement of Information is not received by April 16, 2008.

April 14, 2008

Custodian's Statement of Information ("SOI") with no attachments.

The Custodian contends that he never received these OPRA requests from the Complainant. The Custodian avers that the Complainant did not follow up with the Custodian to ensure that the three (3) OPRA requests were received. The Custodian states that the Complainant was an employee of the Borough at the time of the requests and knew how to contact the Custodian.

The Custodian contends that if he had received the three (3) OPRA requests, he would have informed the Complainant that the records were not available until after the Mayor and Council approved them at the following month's meeting.

April 24, 2008

The Complainant's response to the Custodian's SOI. The Complainant states that the requests were sent via e-mail at 12:01 am on November 17, 2007. The Complainant further avers that the Custodian's statements to the GRC in regards to receiving the requests are conflicting. The Complainant points out that the Custodian states in the SOI that he never saw the requests, but then asserts that he does not remember seeing the requests. The Complainant further avers that the Custodian's assertion that he never saw the original OPRA requests is misleading because the OPRA requests were e-mailed to the Custodian; therefore, the Complainant retained the originals.

April 28, 2008

E-mail from the Custodian to the Complainant. The Custodian reiterates that he never saw the Complainant's three (3) OPRA requests. The Custodian asserts that the Complainant used several e-mail addresses over the past year to communicate with the Custodian and that there is a possibility that the Complainant's e-mail containing the OPRA requests was rejected by the Custodian's e-mail account. The Custodian asserts that this problem recently arose with one of the Complainant's e-mail addresses, but that the Complainant contacted the Custodian via telephone to see if e-mails were being delivered to the Custodian. The Custodian questions why the Complainant would send an important e-mail without following up to make sure the e-mail was received.

⁵ The Custodian filed three (3) Denial of Access Complaints simultaneously. This is one (1) of those three (3) complaints. The others are 2008-48 and 2008-50, adjudicated simultaneously herewith.
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-49 – Findings and Recommendations of the Executive Director

April 29, 2008

E-mail from the Complainant to Custodian. The Complainant reasserts that the Custodian's response to the GRC contained an inconsistency as to whether the Custodian never saw or does not remember seeing the Complainant's requests. The Complainant further contends that the Custodian's assertions regarding the Complainant's multiple e-mail addresses and issues with e-mail delivery are false.

May 12, 2008

E-mail from the Complainant to the GRC attaching the following:

- E-mail from the Complainant to the Custodian dated November 20, 2007.
- E-mail from the Custodian to the Complainant dated November 21, 2007.
- E-mail from the Complainant to the Custodian dated November 28, 2007.
- E-mail from the Custodian to the Complainant dated November 28, 2007.
- E-mail from the Complainant to the Custodian dated November 28, 2007.

The Complainant states that the attached e-mails provide sufficient evidence to refute the Custodian's certified statements regarding never receiving the November 16, 2007 OPRA requests. The Complainant states that the Custodian confirmed receipt of the Complainant's November 17, 2007 e-mail attaching the requests on November 20, 2007. The Complainant further states that on November 28, 2007 he reminded the Custodian to respond to the requests.

May 12, 2008

E-mail from the Custodian to the GRC. The Custodian contends that although the Complainant's May 12, 2008 attachments prove that e-mails were sent to the Custodian, the evidence does not say to which request the Complainant was referring. The Custodian questions why the Complainant would accuse him of making false statements when the Custodian received many e-mails for records from the Complainant over that time period and responded to them.

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:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” 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 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).

The evidence of record in this matter shows that the Custodian acknowledged receipt of the Complainant’s OPRA requests via e-mail on November 21, 2007, but failed

to provide a response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated time frame.

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).

Additionally, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful denial of access to the records requested in the Complainant's three (3) November 16, 2007 OPRA requests. The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to Item No. 1 exists, the Custodian must certify to this fact.

Whether the Custodian's delay in 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 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. The Custodian's failure to respond in writing to the Complainant's OPRA requests 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful denial of access to the records requested in the Complainant's three (3) November 16, 2007 OPRA requests. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to Item No. 1 exists, the Custodian must certify to this fact.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with**

appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.

4. 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

February 18, 2009

⁶ "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."
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-49 – Findings and Recommendations of the Executive Director