



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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2009-197

v.

Township of Irvington (Essex)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, adopts the Administrative Law Judge’s Initial Decision dated March 20, 2012 in which the Judge approved the Settlement Agreement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

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 25th Day of April, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: April 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2009-197

v.

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

Records Relevant to Complaint: On-site inspection of the following:

1. Audit from Samuel Klien & Co. for fiscal year 2008
2. Audits from all sources that loaned and/or granted funds to Irvington
3. Accounting of general funds
4. All expense reports obtained by the Department of Neighborhood Services, Division of Public Works during the Wayne Smith administration
5. All expense reports obtained by the Irvington Neighborhood Improvement Corp. during the Wayne Smith administration
6. All expense reports obtained by the Department of Parks & Recreation during the Wayne Smith administration
7. Documentation of the source of salary for Barbara Nezlick, former employee of the Department of Community Development

Request Made: May 28, 2009

Response Made: May 28, 2009

Custodian: Harold E. Wiener

GRC Complaint Filed: June 17, 2009³

Background

July 27, 2010

Government Records Council's ("Council") Interim Order. At its July 27, 2010 public meeting, the Council considered the July 20, 2010 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 based on the inadequate evidence presented by the Township in this matter, the GRC is unable to determine whether or not the Custodian properly responded to the Complainant's OPRA request and whether or not the Custodian unlawfully denied access to the requested records. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This

¹ Represented by Walter M. Luers, Esq. of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Evans Anyanwu, Esq. (Irvington, NJ).

³ The GRC received the Denial of Access Complaint on said date.

complaint is also referred for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

July 28, 2010

Council's Interim Order distributed to the parties.

August 23, 2010

Complaint transmitted to the Office of Administrative Law.

March 20, 2012

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **FINDS** as follows:

1. "The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law."

Therefore, the ALJ:

"...**CONCLUDE[S]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded."

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council adopt the Administrative Law Judge's Initial Decision dated March 20, 2012 in which the Judge approved the Settlement Agreement signed by the parties or their representatives and ordered the parties to comply with the settlement terms and determined that these proceedings be concluded.

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012



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

LORI GRIFA
Commissioner

INTERIM ORDER

July 27, 2010 Government Records Council Meeting

Jacqueline Andrews
Complainant

Complaint No. 2009-197

v.

Township of Irvington (Essex)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 2010 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 based on the inadequate evidence presented by the Township in this matter, the GRC is unable to determine whether or not the Custodian properly responded to the Complainant’s OPRA request and whether or not the Custodian unlawfully denied access to the requested records. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint is also referred for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 27th Day of July, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 28, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting**

**Jacqueline Andrews¹
Complainant**

GRC Complaint No. 2009-197

v.

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

Records Relevant to Complaint: On-site inspection of the following:

1. Audit from Samuel Klien & Co. for fiscal year 2008
2. Audits from all sources that loaned and/or granted funds to Irvington
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4. All expense reports obtained by the Department of Neighborhood Services, Division of Public Works during the Wayne Smith administration
5. All expense reports obtained by the Irvington Neighborhood Improvement Corp. during the Wayne Smith administration
6. All expense reports obtained by the Department of Parks & Recreation during the Wayne Smith administration
7. Documentation of the source of salary for Barbara Nezlick, former employee of the Department of Community Development

Request Made: May 28, 2009

Response Made: May 28, 2009

Custodian: Harold E. Wiener

GRC Complaint Filed: June 17, 2009³

Background

May 28, 2009

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.

May 28, 2009

Memorandum from Custodian to Wayne Bradley, Business Administrator and Faheem J. Ra'Oof, Revenue & Finance Director, with a copy to the Complainant. The

¹ Represented by Walter M. Luers, Esq. of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Willie L. Parker, Esq. (Irvington, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Custodian forwards the Complainant's OPRA request and asks Township personnel to provide the requested records to the Complainant within seven (7) business days.

June 12, 2009

Memorandum from Toni Bennett, Director of Community Development & Planning to Custodian regarding the Complainant's OPRA request. The Director states that no one from the Office of Community Development & Planning is authorized to respond to personnel inquiries. The Director suggests that the Complainant's OPRA request be forwarded to the Department of Personnel.

June 17, 2009

Memorandum from Wayne Bradley, Business Administrator, to Custodian. The Business Administrator states that the records requested by the Complainant are not maintained in his office, but are maintained by the Office of Revenue and Finance. The Business Administrator notes that the Custodian already forwarded said request to the Revenue and Finance Director, Faheem Ra'Oof.

June 17, 2009

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

- Complainant's OPRA request dated May 28, 2009
- Memorandum from the Custodian to Wayne Bradley, Business Administrator and Faheem J. Ra'Oof, Chief Financial Officer, dated May 28, 2009

The Complainant states that she submitted her OPRA request on May 28, 2009. The Complainant states that she received a written response from the Custodian asking the appropriate personnel to provide access to the requested records; however, the Complainant has received no further response.

Additionally, the Complainant does not agree to mediate this complaint.

July 22, 2009

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

July 22, 2009

Letter from Custodian to Custodian's Counsel. The Custodian forwards the GRC's request for an SOI and states that the SOI is due to the GRC by July 29, 2009. The Custodian requests Counsel's immediate response to the GRC's request.

August 11, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on July 22, 2009 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

August 11, 2009

Letter from Custodian to Custodian's Counsel. The Custodian forwards the GRC's letter dated August 11, 2009 regarding the Custodian's failure to submit an SOI to the GRC. The Custodian requests Counsel's immediate response to the GRC's request.

August 13, 2009

E-mail from GRC to Custodian's Counsel. The GRC grants an extension until the close of business on August 19, 2009 for Counsel to submit the Custodian's completed SOI.⁴

August 19, 2009

Certification of Faheem J. Ra'Oof, Chief Financial Officer ("CFO"). Mr. Ra'Oof certifies that he is aware of the numerous OPRA requests the Complainant has submitted to the Township. Mr. Ra'Oof certifies that at all times concerning the OPRA requests for which the Department of Revenue and Finance has knowledge, he has cooperated fully with the Complainant's requests. However, Mr. Ra'Oof certifies that prior to disclosing records, he first determines which records are public records and which records are not. Mr. Ra'Oof also certifies that at no time during this complaint has he refused, denied or disallowed the Complainant access to the requested records.⁵

August 19, 2009

Certification of Mia Miller, Purchasing Assistant. Ms. Miller certifies that she is aware of the numerous OPRA requests the Complainant has submitted to the Township. Ms. Miller certifies that at all times concerning the OPRA requests for which the Department of Revenue and Finance has knowledge, she has cooperated fully with the Complainant's requests. However, Ms. Miller certifies that prior to disclosing records, she first determines which records are public records and which records are not. Ms. Miller also certifies that at no time during this complaint has she refused, denied or disallowed the Complainant access to the requested records.⁶

August 19, 2009

Certification of Willie L. Parker, Esq., Assistant Township Attorney.⁷ Mr. Parker certifies that he is aware of the numerous OPRA requests the Complainant has submitted to the Township. Mr. Parker certifies that at all times concerning the OPRA requests for which the Township has knowledge, he has cooperated fully with the Complainant's requests. However, Mr. Parker certifies that prior to disclosing records, he first determines which records are public records and which records are not. Mr. Parker also certifies that at no time during this complaint has he refused, denied or disallowed the Complainant access to the requested records.⁸

⁴ In response to Counsel's verbal request on said date.

⁵ Mr. Ra'Oof makes additional statements in his certification; however, said statements are not relevant to the adjudication of this Denial of Access Complaint.

⁶ Ms. Miller makes additional statements in his certification; however, said statements are not relevant to the adjudication of this Denial of Access Complaint.

⁷ Mr. Parker is also the Custodian's Counsel in this matter.

⁸ Mr. Parker makes additional statements in his certification; however, said statements are not relevant to the adjudication of this Denial of Access Complaint.

August 20, 2009

Letter from Custodian's Counsel to GRC enclosing the three (3) certifications dated August 19, 2009. The Custodian's Counsel states that the Complainant has been provided every opportunity to review and purchase the requested records. However, Counsel states that instead of purchasing the requested records, the Complainant often sifts through hundreds of pages to purchase only a few or sometimes none at all.

Counsel asserts that the Complainant's numerous OPRA requests and GRC complaints serve no purpose other than to harass the Township. Counsel contends that the Township has never denied the Complainant access to public records.

August 28, 2009⁹

The Complainant's response to the Custodian's SOI. The Complainant asserts that she requested on-site inspection of the requested records and thus it is not unreasonable for her to sift through records before deciding which records she wanted copied.¹⁰

July 5, 2010

Letter of Representation from Complainant's Counsel.

July 5, 2010

Complainant's Certification. The Complainant provides her certification in response to the certifications of Faheem Ra'Oof, Mia Miller and Willie L. Parker. The Complainant certifies that there are five (5) items at issue in this complaint:

1. Fiscal year 2008 audit by Samuel Klein
2. Audits from sources that loaned or granted funds to Irvington during fiscal year 2008
3. Accounting of the general fund for fiscal year 2008
4. Expense reports for grants
5. Source of salary for B. Nezlick.

The Complainant certifies that she has not been provided with any of the records listed above, nor have they been made available to her for inspection.

July 6, 2010

Letter from Complainant to GRC. The Complainant forwards the following two (2) letters she received from the Township after the filing of this Denial of Access Complaint:

- Memorandum from Toni Bennett, Director of Community Development & Planning to Custodian dated June 12, 2009.
- Memorandum from Wayne Bradley, Business Administrator, to Custodian dated June 17, 2009.

⁹ 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.

¹⁰ The Complainant makes additional statements; however, said statements are not relevant to the adjudication of this Denial of Access Complaint.

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 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.

The Complainant stated that she submitted her OPRA request on May 28, 2009. The Complainant stated that she received a letter from the Custodian on the same date asking the appropriate personnel to provide access to the requested records; however, the Complainant stated that she received no further response.

In response to this complaint, on July 22, 2009 the GRC requested that the Custodian complete a Statement of Information form which requires the Custodian to provide the GRC with specific information regarding the OPRA request at issue in this complaint, including:

- The date the Custodian received the Complainant’s OPRA request;
- The date the Custodian responded to said request;
- A document index required by Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) which includes the following:
 - An itemized list of all records responsive to the Complainant’s OPRA request that were made, maintained, kept on file or received by the agency

on the date of the request, regardless of whether the agency deems such records are exempt from disclosure.

- The agency's Records Retention Period (in years) and Destruction Schedule (in years) for each record responsive to the request as established and approved by the New Jersey Department of State, Division of Archives and Records Management.
 - Of the records responsive to the request, indicate which records, if any, were provided to the Complainant, in their entirety or with redactions, and the dates such records were provided.
 - Of the records responsive to the request and provided to the Complainant with redactions, give a general nature description of the redactions.
 - Of the records responsive to the request, and *not* provided to the Complainant in their entirety, give a general nature description of the record.
 - The legal explanation and statutory citation (to OPRA or other law that applies) for such denial based on a public agency's burden of proving that all denials of access are authorized by law pursuant to N.J.S.A. 47:1A-6 and the court's instruction to provide same in Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App.Div. 2007).
- A description of the search undertaken to satisfy the records request upon which this complaint is based.
 - The Custodian's signature on the SOI form.

Because the Custodian failed to submit the completed SOI to the GRC by the required date, the GRC sent the Custodian a second request for an SOI via letter dated August 11, 2009. In response to Counsel's verbal request, the GRC granted an extension until the close of business on August 19, 2009 to submit the Custodian's completed SOI.

On August 20, 2009 Counsel provided the GRC with three (3) certifications dated August 19, 2009, from Counsel himself, Mr. Ra'Oof (the Township's CFO), and Ms. Miller (the Township's Purchasing Agent). All three certifications are almost identical and provide general descriptions of the parties' actions in response to the Complainant's numerous OPRA requests.

The GRC provided the Custodian three (3) opportunities over a period of approximately one (1) month to provide a completed SOI to the GRC.¹¹ The Custodian failed to do so. Moreover, the certifications submitted by the Custodian's Counsel to the GRC fail to provide any of the required information from the SOI as listed above.

Therefore, based on the inadequate evidence presented by the Township in this matter, the GRC is unable to determine whether or not the Custodian properly responded to the Complainant's OPRA request and whether or not the Custodian unlawfully denied access to the requested records. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint is also referred for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

¹¹ The GRC requested that the Custodian complete said form on July 22, 2009, August 11, 2009 and granted an extension for such completion on August 13, 2009.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the inadequate evidence presented by the Township in this matter, the GRC is unable to determine whether or not the Custodian properly responded to the Complainant's OPRA request and whether or not the Custodian unlawfully denied access to the requested records. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint is also referred for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 2010