



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
Commissioner

FINAL DECISION

March 22, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint Nos. 2009-203 & 2009-211

v.

Township of Livingston (Essex)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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 these complaints be dismissed because the Complainant withdrew same via letter to the Office of Administrative Law dated March 7, 2013. Therefore, no further adjudication is required.

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 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 26, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2009-203 & 2009-211²

v.

**Township of Livingston (Essex)³
Custodian of Records**

Records Relevant to Complaint:

1. Capital/Trust Budget account status/transaction audit Trail C-04-55-005-007-00A and transaction audit Trail C-04-55-005-007-00B (for Bond Ordinance 7-2005 for the Town Hall and Police Building project).
2. Copies of:
 - Library resolution dated June 9, 2004 for the amount of \$650,985.00
 - Library resolution dated June 9, 2004 for the amount of \$300,000.00
 - Library grant during 2004 in the amount of \$65,000.00
 - Library fundraising for enhancements.⁴

Request Made: October 25, 2008

Response Made: November 12, 2008

GRC Complaint Filed: June 26, 2009, July 7, 2009⁵

Background

At its September 27, 2011 public meeting, the Council considered the August 23, 2011 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, found that:

“... because the Complainant has established in his request for reconsideration of conclusion No. 3 of the Council’s January 25, 2011 Final Decision that it is obvious that the GRC did not consider the significance of probative, competent

¹ No legal representation listed on record.

² The Complainant filed two (2) separate Denial of Access Complaints for these request items requested in one OPRA request. Due to the commonality of the parties and the issues herein, the GRC has consolidated these matters for adjudication.

³ Glenn Turteltaub, Custodian of Records. Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner (Riverdale, NJ).

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received these Denial of Access Complaints on said date.

evidence, said request for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the Complainant's submissions, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. This matter should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.”

The Council distributed its Interim Order to all parties on September 29, 2011. On April 20, 2012, the GRC transmitted this complaint to the Office of Administrative Law (“OAL”). On March 7, 2013, the Complainant sent a letter to the OAL stating that he wished to withdraw these matters from consideration.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that these complaints be dismissed because the Complainant withdrew same via letter to the Office of Administrative Law dated March 7, 2013. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013



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

September 27, 2011 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2009-203 & 2009-211

v.

Township of Livingston (Essex)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the August 23, 2011 *Reconsideration* 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 because the Complainant has established in his request for reconsideration of conclusion No. 3 of the Council's January 25, 2011 Final Decision that it is obvious that the GRC did not consider the significance of probative, competent evidence, said request for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the Complainant's submissions, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. This matter should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the original 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 September, 2011

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: September 29, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting

Larry A. Kohn¹
Complainant

GRC Complaint No. 2009-203 & 2009-211²

v.

Township of Livingston (Essex)³
Custodian of Records

Records Relevant to Complaint:

1. Capital/Trust Budget account status/transaction audit Trail C-04-55-005-007-00A and transaction audit Trail C-04-55-005-007-00B (for Bond Ordinance 7-2005 for the Town Hall and Police Building project).
2. Copies of:
 - Library resolution dated June 9, 2004 for the amount of \$650,985.00
 - Library resolution dated June 9, 2004 for the amount of \$300,000.00
 - Library grant during 2004 in the amount of \$65,000.00
 - Library fundraising for enhancements.⁴

Request Made: October 25, 2008

Response Made: November 12, 2008

Custodian: Glenn Turteltaub

GRC Complaint Filed: June 26, 2009, July 7, 2009⁵

Background

January 25, 2011

Government Records Council's ("Council") Interim Order. At its January 25, 2011 public meeting, the Council considered the January 18, 2011 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 No legal representation listed on record.

² The Complainant filed two (2) separate Denial of Access Complaints for these request items requested in one OPRA request. Due to the commonality of the parties and the issues herein, the GRC has consolidated these matters for adjudication.

³ Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received these Denial of Access Complaints on said date.

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). *See also* Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).
2. The GRC has no authority over the content of the two (2) conflicting audit trails that the Complainant contends were both responsive to request Item No. 1, pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004) and Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Custodian certified that he provided all records responsive that existed at the time of the Complainant's OPRA request Item No. 1 and there is no credible evidence in the record to refute the Custodian's certification. Specifically, the evidence of record herein indicates that the second audit trail at issue did not actually exist at the time of the Complainant's request. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to request Item No. 1 of the Complainant's OPRA request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Although there is no evidence in the record to support the Custodian's contention that the Complainant inspected records responsive to the instant request item on January 30, 2009, or the Custodian's further contention that the Complainant took delivery of records responsive to the request item on February 3, 2009, the Council notes that the parties agree that all of the records responsive to the request item were provided to the Complainant in the SOI dated September 10, 2009. The Council therefore declines to order disclosure of the requested record.
5. Although the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny access to the audit report responsive to request Item No. 1 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), and both parties agree that the Complainant received the records responsive to request Item No. 2. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

February 7, 2011

Council's Interim Order distributed to the parties.

February 18, 2011

Complainant's request for reconsideration with the following attachments:

- Capital/Trust Budget account status/transaction audit trail provided to the Complainant in response to request Item No. 1.
- Capital/Trust Budget account status/transaction audit trail provided to the Complainant in response to a subsequent OPRA request.

The Complainant requests that the Council reconsider conclusion No. 3 of its January 25, 2011 Final Decision pursuant to *N.J.A.C. 5:105.2.10* based on a mistake. The Complainant argues that there is a basic misunderstanding by the Council on the sequential timing of the events relevant to the audit trails at issue in this complaint.

The Complainant states that the first attached audit trail was provided by the Custodian in response to OPRA request Item No. 1. The Complainant notes that the audit trail is marked "year to date as of January 29, 2008" and appears to have been printed from the Township of Livingston's ("Township") computer system on February 14, 2008.

The Complainant states that on page 15 of the Findings and Recommendations of the Executive Director ("FR"), the Custodian quoted the Chief Financial Officer ("CFO") as follows:

"... I encumbered the contract once I was made aware of it. I do not recall the exact date ... however ... the contract must have been entered in the account *on or before March 13, 2008.*" (Emphasis added.) *Id.*

The Complainant asserts that the CFO was referring to the second (2nd) attached audit trail, which was provided by the Custodian in response to a subsequent OPRA request dated April 21, 2009. The Complainant notes that March 13, 2008 was before the Complainant submitted the request at issue in this complaint. The Complainant argues that based on the following, the second (2nd) audit trail existed prior to the Complainant's October 25, 2008 OPRA request.

The Complainant asserts that the facts presented above confirm that both audit trails existed at the time the Custodian received the Complainant's October 25, 2008 OPRA request; however, the Custodian failed to provide both audit trails. The Complainant asserts that the Custodian instead only provided one (1) of the records and erred by not providing both. The Complainant argues that the Council should amend conclusion No. 3 of its January 25, 2011 Final Decision to reflect the Custodian's failure to provide the second (2nd) audit trail.

The Complainant further requests that if for any reason the facts are not now perfectly clear, the GRC should refer the complaint to the Office of Administrative Law (“OAL”).

July 28, 2011

E-mail from the GRC to the Custodian. The GRC states that the Complainant has filed a request for reconsideration of the Council’s January 25, 2011 Final Decision. The GRC states that in said request for reconsideration, the Complainant asserted that the GRC made a mistake in conclusion No. 3 regarding the existence of a second (2nd) audit trail at the time of the Complainant’s OPRA request. The GRC acknowledges that the Custodian previously stated in the SOI that the Chief Financial Officer (“CFO”) made changes to the audit trail in question after he was hired as CFO for the Township. The GRC further states that the Custodian did not identify the exact date on which the CFO was formally employed by the Township. Therefore, the GRC requests that the Custodian certify to the following:

1. On what date was the CFO officially hired by the Township?
2. On what date did the CFO start his position at the Township?

The GRC requests that the Custodian provide the requested certification by close of business on July 29, 2011.

July 29, 2011

Custodian’s legal certification. The Custodian certifies that the CFO was hired by the Township on January 3, 2008. The Custodian further certifies that the CFO started working for the Township on January 3, 2008.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council’s January 25, 2011 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council’s Order dated January 25, 2011 on February 18, 2011, nine (9) business days from the issuance of the Council’s Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D’Atria v. D’Atria*, 242 *N.J. Super.* 392,

401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant submitted copies of the audit trail provided in response to the OPRA request at issue here and the audit trail subsequently provided in response to a later OPRA request. The Complainant argued that the GRC's conclusion No. 3 of its January 25, 2011 Final Decision represented a basic misunderstanding of the sequential timing of events in regard to the audit trails. Specifically, the Complainant argued that the audit trail provided in response to the request relevant to this complaint was printed out on February 14, 2008. The Complainant further stated that on page 15 of the Findings and Recommendations of the Executive Director ("FR"), the Custodian quoted the CFO as follows:

"... I encumbered the contract once I was made aware of it. I do not recall the exact date ... however ... the contract must have been entered in the account *on or before March 13, 2008.*" (Emphasis added.) *Id.*

The Complainant argued that the CFO was referring to the second (2nd) audit trail provided in April 2009. The Complainant stated that March 13, 2008 is obviously prior to October 25, 2008, the date he submitted his OPRA request seeking the audit trail at issue. The Complainant asserted that the above is proof that the second (2nd) audit trail existed at the time of the Complainant's OPRA request and should have been provided. The Complainant requested that the GRC amend conclusion No. 3 to indicate that the Custodian unlawfully denied access to the second (2nd) audit trail. The Complainant further requested that if the facts were not perfectly clear to the GRC, this complaint be referred to OAL.

Additionally, the GRC attempted to gain additional clarity from the Custodian regarding the CFO's starting date based on the Custodian's statement that the CFO made no changes to the audit trail until after he was hired by the Township. Presumably, if the CFO started after October 25, 2008, then he could not have made the changes to the second (2nd) audit trail prior to that time. The Custodian submitted a certification on July 29, 2011 certifying that the CFO was hired and started employment at the Township on January 3, 2008.

Thus, it is possible that the CFO could have added the encumbrances prior to the Complainant's October 25, 2008 OPRA request.

Based on all of the foregoing, it appears that the Complainant has met his burden of proving that the GRC did not consider, or failed to appreciate, the significance of probative, competent evidence as required by Cummings, *supra*. However, based on the Complainant's submissions, the GRC is unable to determine whether the Custodian unlawfully denied access to the second (2nd) audit trail. Thus, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to resolve the facts and for a determination of whether the Custodian knowing and willfully violated OPRA, if applicable.

Therefore, because the Complainant has established in his request for reconsideration of conclusion No. 3 of the Council's January 25, 2011 Final Decision that it is obvious that the GRC did not consider the significance of probative, competent evidence, said request for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the Complainant's submissions, the GRC is unable to determine whether the Custodian unlawfully denied access to the second (2nd) audit trail. Therefore, this matter should be referred to OAL for a hearing to resolve the facts. Also, this complaint should be referred to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has established in his request for reconsideration of conclusion No. 3 of the Council's January 25, 2011 Final Decision that it is obvious that the GRC did not consider the significance of probative, competent evidence, said request for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the Complainant's submissions, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. This matter should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 2011



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

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint Nos. 2009-203; 2009-211

v.

Township of Livingston (Essex)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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 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). *See also* Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).
2. The GRC has no authority over the content of the two (2) conflicting audit trails that the Complainant contends were both responsive to request Item No. 1, pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004) and Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Custodian certified that he provided all records responsive that existed at the time of the Complainant’s OPRA request Item No. 1 and there is no credible evidence in the record to refute the Custodian’s certification. Specifically, the evidence of record herein indicates that the second audit trail at issue did not actually exist at the time of the Complainant’s request. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny



access to the records responsive to request Item No. 1 of the Complainant's OPRA request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

4. Although there is no evidence in the record to support the Custodian's contention that the Complainant inspected records responsive to the instant request item on January 30, 2009, or the Custodian's further contention that the Complainant took delivery of records responsive to the request item on February 3, 2009, the Council notes that the parties agree that all of the records responsive to the request item were provided to the Complainant in the SOI dated September 10, 2009. The Council therefore declines to order disclosure of the requested record.
5. Although the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny access to the audit report responsive to request Item No. 1 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), and both parties agree that the Complainant received the records responsive to request Item No. 2. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

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 January, 2011

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: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2009-203, 2009-211²

v.

Township of Livingston (Essex)³
Custodian of Records

Records Relevant to Complaint:

1. Capital/Trust Budget account status/transaction audit Trail C-04-55-005-007-00A and transaction audit Trail C-04-55-005-007-00B (for Bond Ordinance 7-2005 for the Town Hall and Police Building project).
2. Copies of:
 - Library resolution dated June 9, 2004 for the amount of \$650,985.00
 - Library resolution dated June 9, 2004 for the amount of \$300,000.00
 - Library grant during 2004 in the amount of \$65,000.00
 - Library fundraising for enhancements.⁴

Request Made: October 25, 2008

Response Made: November 12, 2008

Custodian: Glenn Turteltaub

GRC Complaint Filed: June 26, 2009, July 7, 2009⁵

Background

October 25, 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.

November 12, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of

¹ No legal representation listed on record.

² The Complainant filed two (2) separate Denial of Access Complaints for these request items requested in one OPRA request. Due to the commonality of the parties and the issues herein, the GRC has consolidated these matters for adjudication.

³ Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received these Denial of Access Complaints on said date.

such request.⁶ The Custodian states that request Item No. 1 is too broad and seeks clarification of the request to include specific dates for the audit trail sought. The Custodian states that request Item No. 2 is also too broad and seeks clarification as to the name of the documents requested (*e.g.*, purchase order, audit trail, invoices).

December 2, 2008

Letter from the Complainant to the Custodian attaching the Custodian's response to the OPRA request dated November 12, 2008 with the Complainant's notes thereon.

The Complainant states that attached is the Custodian's response. The Complainant states that his clarifications, as requested by the Custodian, are noted in the margins.

The Complainant states that regarding request Item No. 1, the Complainant seeks an audit trail between December 30, 2005 and December 1, 2008.

The Complainant states that regarding request Item No. 2, the Complainant seeks the following:

- C-04-55-002-018-00A between August 22, 2002 and December 1, 2003.
- Library resolution dated June 9, 2004 for the amount of \$650,985.00
- Library resolution dated June 9, 2004 for the amount of \$300,000.00
- Library grant during 2004 in the amount of \$65,000.00
- Ordinance No. 15-1999 for the amount of \$34,142.00
- Ordinance No. 14-2000 for the amount of \$25,857.00
- 2007 Budget of capital appropriation of \$1,510,000.00
- 2008 Appropriation for the Municipal building in the amount of \$700,000.00
- Library fundraising for enhancements.

December 15, 2008

Letter from the Custodian to the Complainant. The Custodian states that the records responsive to request Item No. 1 from December 30, 2005 to December 1, 2008 will be provided to the Complainant.

The Custodian states that regarding the notations for request Item No. 2, the handwritten comments are illegible because the copy of the page provided was cut off on the right margin; thus, the notes are incomplete. The Custodian requests that the Complainant provide another copy and specifically name the documents sought.

December 21, 2008

Letter from the Complainant to the Custodian attaching the Custodian's response dated November 12, 2008 with the Complainant's notes thereon. The Complainant resubmits his comments at the request of the Custodian and confirms that he is seeking assorted records responsive to request Item No. 2.

⁶ The Custodian received the Complainant's OPRA request on October 27, 2008.
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December 23, 2008

Memorandum from the Custodian to the Chief Financial Officer (“CFO”) attaching the Complainant’s OPRA request with the Complainant’s notes thereon. The Custodian states that the attached OPRA request was received on December 23, 2008. The Custodian states that pursuant to OPRA, a response is due within seven (7) business days and that contracts and certain other records must be provided immediately. The Custodian states that the CFO may be in possession of some of the records requested. The Custodian requests that the CFO search his files and supply the Custodian with any records that may be responsive to the Complainant’s two (2) OPRA requests. The Custodian requests that the CFO advise if records cannot be made available or provide a date certain that records will be made available for disclosure.

January 2, 2009

Letter from the Complainant to the Custodian. The Complainant advises that he was not shown the following records for inspection on January 2, 2009:

- Library resolution dated June 9, 2004 for the amount of \$650,985.00
- Library resolution dated June 9, 2004 for the amount of \$300,000.00

January 12, 2009

E-mail from the Custodian to the Acting Library Director. The Custodian states that the Complainant’s OPRA request Item No. 2 seeks the following records:

- Library resolution dated June 9, 2004 for the amount of \$650,985.00
- Library resolution dated June 9, 2004 for the amount of \$300,000.00
- Library fundraising for enhancements.⁷

The Custodian requests that the Acting Library Director supply records responsive to the request, if any exist. The Custodian states that the Complainant is looking for an “accounting audit trail that shows rate, vendor and amount of the following and not copies of all invoices and purchase orders.”

January 14, 2009

Letter from the Custodian to the Complainant. The Custodian states that this letter serves as a recapitulation of the Complainant’s inspection of records on January 2, 2009. The Custodian states the following:

- Library resolution dated June 9, 2004 for the amount of \$650,985.00: The Custodian states that the five (5) pages of transaction reports are available for review and, if requested, photocopying. The Custodian requests that the Complainant advise as to whether he wishes to inspect the record or receive copies.

⁷ The evidence of record shows that the Custodian did not request that the Acting Library Director locate records responsive to the 2004 Library grant because the CFO located records responsive to same in the Township’s files.

- Library resolution dated June 9, 2004 for the amount of \$300,000.00: The Custodian requests an additional week to respond as the records are currently being compiled.
- Library grant during 2004 in the amount of \$65,000.00: The Custodian requests an additional week to respond as the records are currently being compiled.
- Library fundraising for enhancements: The Custodian requests an additional week to respond as the records are currently being compiled.

April 19, 2009

Letter from the Complainant to Mayor August copying the Custodian. The Complainant states that request Item No. 2 has not been satisfied in its entirety.

June 26, 2009

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

- Complainant’s OPRA request dated October 25, 2008
- Letter from the Custodian to the Complainant dated November 12, 2008
- Letter from the Complainant to the Custodian dated December 2, 2008 attaching the Custodian’s response dated November 12, 2008 with the Complainant’s notes thereon
- Letter from the Custodian to the Complainant dated December 15, 2008
- Letter from the Complainant to the Custodian dated December 21, 2008
- Letter from the Complainant to the Custodian dated January 6, 2009
- Letter from the Complainant to the Custodian dated January 14, 2009
- Letter from the Complainant to Mayor August copying the Custodian dated April 19, 2009
- C-04-55-005-007-00A dated December 1, 2005 to January 29, 2008
- C-04-55-007-026-001 dated January 1, 2007 to December 24, 2008⁸

Complainant’s request Item No. 1: Audit Trail⁹

The Complainant states that he submitted an OPRA request to the Custodian on October 25, 2008. The Complainant states that the Custodian responded on November 12, 2008 requesting clarification of specific dates for the audit trails requested. The Complainant states that by letter to the Custodian dated December 2, 2008, the Complainant informed the Custodian that he is requesting the audit trails between December 30, 2005 and December 1, 2008. The Complainant states that he received an audit trail on February 2, 2009.

The Complainant states that the audit trails requested are a running listing of the total money allotted and amount of money spent against a particular bond ordinance. The Complainant notes that he previously requested copies of this document; however, the instant request was made in order to update the audit trails he has previously received

⁸ The Complainant provided additional documentation that is not relevant to the instant complaint.

⁹ This request item pertains to GRC Complaint No. 2009-203.

from the Borough. The Complainant asserts that because the record he received did not properly reflect an encumbrance pursuant to a Council award of a construction contract in December 2007, he submitted a later OPRA request not relevant to this complaint. The Complainant argues that he was provided with a record at that time which he believes should have also been provided in response to request Item No. 1. The Complainant states that both records are for the same account identified in request Item No. 1 and cover the same time period identified by the Complainant, but that they contain conflicting information.¹⁰

The Complainant states that the issue in this complaint is not that access was denied; rather, the request was not properly satisfied. The Complainant requests that the GRC determine that because two (2) records responsive to request Item No. 1 existed at the time of the Complainant's request, the Custodian unlawfully denied access to the second (2nd) record responsive to said request item by not providing such.

Complainant's request Item No. 2: Library resolutions, grant information and fundraising records¹¹

The Complainant states that in response to the Custodian's written response dated November 12, 2008 seeking clarification, the Complainant clarified that he was requesting the following:

- C-04-55-002-018-00A between August 22, 2002 and December 1, 2003
- Library resolution dated June 9, 2004 for the amount of \$650,985.00
- Library resolution dated June 9, 2004 for the amount of \$300,000.00
- Library grant during 2004 in the amount of \$65,000.00
- Ordinance No. 15-1999 for the amount of \$34,142.00
- Ordinance No. 14-2000 for the amount of \$25,857.00
- 2007 Budget of capital appropriation of \$1,510,000.00
- 2008 Appropriation for the Municipal building in the amount of \$700,000.00
- Library fundraising for enhancements.

The Complainant states that he inspected all of the records listed with the exception of the following four (4) records:

- Library resolution dated June 9, 2004 for the amount of \$650,985.00
- Library resolution dated June 9, 2004 for the amount of \$300,000.00
- Library grant during 2004 in the amount of \$65,000.00
- Library fundraising for enhancements.

The Complainant states that, in a letter to the Complainant dated January 14, 2009, the Custodian stated that the June 9, 2004 resolution material was available for inspection or copying. Additionally, the Complainant states that the Custodian requested

¹⁰ The Complainant acknowledges that the GRC has no jurisdiction over the accuracy of the content of a government record.

¹¹ This request item pertains to GRC Complaint No. 2009-211.

one (1) additional week to provide records responsive to the remaining three (3) identified items. The Complainant states that he inspected additional records on February 2, 2009; however, the Complainant was not shown the three (3) outstanding records that the Custodian requested additional time to provide. The Complainant states that in a letter to Mayor August copying the Custodian on April 19, 2009, the Complainant reiterated that some records responsive to request Item No. 2 were still outstanding.

The Complainant asserts that he subsequently left a message for the Custodian via telephone on April 21, 2009 regarding the outstanding records.¹² The Complainant states that he received no reply to the message and no further correspondence in response to the January 14, 2009 letter.

The Complainant does not agree to mediate this complaint.

August 19, 2009

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

August 20, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until September 4, 2009 to submit the requested SOIs for these two (2) complaints.

August 21, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension of time until September 4, 2009 for submission of the requested SOIs for these two (2) complaints.

September 4, 2009

Custodian’s SOI relevant to request Item No. 1 with the following attachments:

- Complainant’s OPRA request dated October 25, 2008.
- Letter from the Custodian to the Complainant dated November 12, 2008.
- Letter from the Complainant to the Custodian dated December 2, 2008 attaching the Custodian’s response dated November 12, 2008 with the Complainant’s notes thereon.
- Letter from the Custodian to the Complainant dated December 15, 2008.
- Letter from the CFO to the Complainant dated June 1, 2009.

The Custodian certifies that no records responsive to request Item No. 1 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”).

The Custodian certifies that he received the Complainant’s OPRA request on October 27, 2008. The Custodian certifies that he responded in writing on November 12, 2008 seeking clarification of the Complainant’s request Item No. 1 because the

¹² The Complainant included as part of the Denial of Access Complaint a handwritten note memorializing that he left a message for the Custodian.

Complainant failed to specify dates for which he was seeking a report on the “Capital/Trust Budget account status/transaction audit Trail C-04-55-005-007-00A and transaction audit Trail C-04-55-005-007-00B.”

The Custodian certifies that the Complainant submitted clarification on December 2, 2008 and again on December 21, 2008 (because the initial clarification was deemed by the Custodian to be illegible) requesting the report from December 30, 2005 to December 1, 2008. The Custodian certifies that he received the Complainant’s clarification on December 23, 2008, and at that time requested that the Chief Financial Officer (“CFO”) provide the reports responsive to the Custodian.

The Custodian certifies that when the CFO provided the reports on December 24, 2008, the Complainant was promptly notified that the reports were available and further certifies that the Complainant inspected and requested copies of the six (6) page report on January 2, 2009. The Custodian certifies that the Complainant was provided with copies of the reports on February 3, 2009¹³ after the appropriate copying costs were paid.

The Custodian argues that there was no denial of access to the records responsive to request Item No. 1. The Custodian notes that the Complainant admits this in the Denial of Access Complaint, stating that the request was not denied but that the request “wasn’t properly satisfied.” See Item No. 3 of the Complainant’s Denial of Access Complaint form. The Custodian states that the Complainant now asserts that a second unidentifiable record exists which is responsive to the request and which should have been provided as part of the Township’s response to request Item No. 1. The Custodian avers that he is unaware of a second record responsive but states that he believes that the Complainant may be confusing this record with an updated version of the report or an audit trail for a second Town Hall/Police Building account for which the encumbrances in question were applied.

The Custodian contends that although the Complainant never identified the second record at issue, the Complainant does not assert that the wrong records were provided in response to request Item No. 1. The Custodian further argues that the Complainant notes in the Denial of Access Complaint that this request was made as an update to past audit trail reports provided by the Township. The Custodian asserts that these reports are ever-changing records in a manner similar to a checkbook ledger. The Custodian states that the CFO also informed the Complainant on June 1, 2009 that several adjustments were made to the report, including encumbrances, after the current CFO had been hired. The Custodian asserts that the second report at issue here may have been a later version of the audit trail.

Further, the Custodian asserts that because the reports responsive to the Complainant’s OPRA request Item No. 1 were provided, there was no unlawful denial of access even given the fact that the Complainant’s request item was broad and unclear. The Custodian states that the Superior Court has held that OPRA “... is not intended *as a research tool litigants may use to force government officials to identify and siphon useful*

¹³ This date conflicts with the Complainant’s statement in the Denial of Access Complaint that he received the requested audit trail on February 2, 2009.

information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549. The Custodian also cited to Pizar v. Township of Millburn, GRC Complaint No. 2006-196 as applicable in the instant complaint.

The Custodian contends that even though his written response to the Complainant was beyond the statutorily mandated seven (7) business day time frame, the Complainant's invalid request did not necessitate a response within said time frame. The Custodian states that, to this end, the Appellate Division previously held that "... an untimely OPRA response cannot be a violation of the law where the OPRA request itself is invalid," although the court also acknowledged that best practices dictates that a custodian should respond with the prescribed time frame. See Mason v. City of Hoboken, Docket No. 0508-06T5 (January 2008). The Custodian asserts that verbal communication via telephone to commence the clarification process took place in the days following receipt of the Complainant's OPRA request item. The Custodian further argues that he could not have possibly requested an extension of time to include a date certain based on the overly broad nature of the request Item No. 1. The Custodian requests that the GRC determine that the Complainant's OPRA request Item No. 1 was not knowingly and willfully ignored, but rather a written response was delayed based on an unfortunate confluence of events.¹⁴

Moreover, the Custodian contends that the instant complaint displays a pattern of constant requests and correspondences with the Complainant that has monopolized the time of both the Custodian and a part-time employee. The Custodian avers that the Township would welcome the opportunity to submit an entire catalogue of the thousands of records requested by the Complainant. The Custodian contends that a review of the responses provided as part of these complaints shows the Township's good faith intent in responding to the Complainant's multiple OPRA requests for voluminous records. The Custodian further contends that the Township has even hired another employee to assist the Custodian based on the amount of requests submitted by the Complainant. The Custodian requests guidance on how to handle the Complainant's requests going forward in order to avoid a substantial disruption of agency operations.

Finally, the Custodian states that all records requested by the Complainant were provided and that any clarification needed prior to providing the records responsive was sought. The Custodian avers that no records were denied and that the Township went above and beyond OPRA to provide access to the requested reports. The Custodian asserts that for the foregoing reasons, the Township's actions were lawful under OPRA.

¹⁴ The Custodian avers that among these events was a presidential election, during which the Custodian worked eighteen (18) hours on Election Day and focused solely on election matters.
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September 4, 2009

E-mail from the Custodian to the GRC. The Custodian requests a second (2nd) extension of time until September 11, 2009 to submit the SOI relevant to request Item No. 2.

September 9, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension of time until September 11, 2009 to submit the SOI relevant to request Item No. 2.

September 10, 2009

Custodian's SOI relevant to request Item No. 2 with the following attachments:

- Complainant's OPRA request dated October 25, 2008.
- Letter from the Custodian to the Complainant dated November 12, 2008.
- Letter from the Complainant to the Custodian dated December 2, 2008 attaching the Custodian's response dated November 12, 2008 with the Complainant's notes thereon.
- Letter from the Custodian to the Complainant dated December 15, 2008.
- Memorandum from the CFO to the Custodian dated December 23, 2008.
- E-mail from the Custodian to the Acting Library Director dated January 12, 2009.
- Letter from the Custodian to the Complainant dated January 14, 2009.
- Records responsive to request Item No. 2:
 - Livingston Public Library Resolution Exhibit V-1 (1 page)
 - Livingston Public Library Building Reserve Fund All Transactions Account: ShelvingAdd (1 page)
 - Livingston Public Library Building Reserve Fund All Transactions Account: BRF.FurAdd (1 page)
 - Livingston Public Library Building Reserve Fund All Transactions Account: ShelvingRP (1 page)
 - Livingston Public Library Building Reserve Fund All Transactions Account: BuildReFund ShelvingRP (1 page)
 - Livingston Public Library Building Reserve Fund All Transactions Account: Temp Reloc (1 page)
 - Ruth R. Rockwood Memorial Library Special Projects Fund for the month ending December 31, 2005 (1 page)
 - Ruth R. Rockwood Memorial Library Special Projects Fund for the month and eight (8) months ending August 31, 2006 (1 page)
 - Livingston Public Library Special Projects Fund for the Month and Eleven (11) months ending November 30, 2006 (1 page)
 - Livingston Public Library Special Projects Fund for the month and twelve (12) months ending December 31, 2006 (1 page)
 - Livingston Public Library Special Projects Fund for the month and five (5) months ending May 30, 2007 (1 page)
 - Livingston Public Library Special Projects Fund for the month and Twelve months ending December 31, 2007 (1 page)
 - Livingston Public Library Special Projects Fund for the month and eleven (11) months ending November 30, 2008 (1 page)

- Payment Voucher Request dated July 1, 2004 to July 1, 2008 including payment vouchers and checks to Integrated Construction Enterprises, Inc. (15 pages)
- Payment Voucher Request dated June 6, 2008 including payment vouchers and checks to Integrated Construction Enterprises, Inc. (151 pages)
- Livingston Public Library Statement of Operations Capital Campaign Fund for the Month and twelve (12) months ending December 31, 2008 (1 page)
- Livingston Public Library Statement of Operations Capital Campaign Fund for the month and eleven (11) months ending November 30, 2008 (1 page)
- Livingston Public Library Statement of Operations Capital Campaign Fund for the month and twelve (12) months ending December 31, 2007 (1 page)
- Livingston Public Library Statement of Operations Capital Campaign Fund for the month and ten (10) ending October 31, 2008 (1 page)

The Custodian certifies that no records responsive to request Item No. 2 were destroyed in accordance with the Records Destruction Schedule established and approved by DARM.

The Custodian certifies that he received the Complainant's OPRA request on October 27, 2008. The Custodian certifies that he responded in writing on November 12, 2008 seeking clarification of the Complainant's request item after previous conversations via telephone. The Custodian states that he received the Complainant's clarification on December 3, 2008 in which the Complainant sought the following four (4) records, among others:

- Library resolution dated June 9, 2004 for the amount of \$650,985.00
- Library resolution dated June 9, 2004 for the amount of \$300,000.00
- Library grant during 2004 in the amount of \$65,000.00
- Library fundraising for enhancements

The Custodian certifies that he responded to the Complainant on December 15, 2008 stating that the clarification was illegible and asked for clarification whether the Complainant was seeking audit trails or other specific records. The Custodian avers that the Complainant responded on December 23, 2008 providing the Custodian with all records responsive to the four (4) bullet points above.

The Custodian certifies that his search involved sending the Complainant's clarification to the CFO on December 23, 2008. The Custodian certifies that the CFO responded on December 24, 2008 stating that the records pertaining to the "Library grant during 2004" would require an additional ten (10) days to obtain because all records are in storage and that records responsive to the Library resolutions should be obtained directly from the Library.¹⁵ The Custodian certifies that he contacted the Library on January 12, 2009 to obtain the records pertaining to the resolutions, which were provided

¹⁵ The Custodian did not include a copy of this e-mail correspondence in the SOI.

to the Custodian on January 14, 2009. The Custodian certifies that the Complainant was promptly notified that the records were available and that the Complainant reviewed said records on January 30, 2009.

The Custodian certifies that the Township’s response to each bullet point is as follows:

Records Responsive to Request Item No. 2	Records Provided	Disposition of Township’s Response
<p>“Library resolution dated June 9, 2004 for the amount of \$650, 985.00.”</p> <p>Livingston Public Library Resolution Exhibit V-1 (1 page).</p> <p>Livingston Public Library Building Reserve Fund All Transactions Account: ShelvingAdd (1 page).</p> <p>Livingston Public Library Building Reserve Fund All Transactions Account: BRF.FurAdd (1 page).</p> <p>Livingston Public Library Building Reserve Fund All Transactions Account: ShelvingRP (1 page).</p> <p>Livingston Public Library Building Reserve Fund All Transactions Account: BuildReFund ShelvingRP (1 page).</p> <p>Livingston Public Library Building Reserve Fund All Transactions Account: Temp Reloc (1 page).</p>	<p>Yes. Provided for inspection on January 30, 2009.</p>	<p>The Custodian certifies that the six (6) records responsive to the Complainant’s OPRA request include the “Livingston Public Library Resolution” adopted June 9, 2004 by the Library Board of Trustees and five (5) pages of expenditure transaction reports dated January 14, 2009 with notes from the Library Bookkeeper detailing the lines in the resolution for which expenditures are attributed. The Custodian certifies that the Complainant inspected these records January 30, 2009. The Custodian certifies that the Complainant requested copies of all six (6) records, which were provided to the Complainant on February 3, 2009 upon payment of the appropriate copy costs.</p>
<p>“Library resolution dated June 9, 2004 for the amount of \$300,000.00.”</p> <p>Ruth R. Rockwood Memorial Library Special</p>	<p>Yes. Provided for inspection on January 30, 2009.</p>	<p>The Custodian certifies that the monthly reports for the Special Projects Fund from December 31, 2005 to November 30, 2008 were provided for the</p>

<p>Projects Fund for the month ending December 31, 2005 (1 page).</p> <p>Ruth R. Rockwood Memorial Library Special Projects Fund for the Month and eight (8) months ending August 31, 2006 (1 page).</p> <p>Livingston Public Library Special Projects Fund for the Month and eleven (11) months ending November 30, 2006 (1 page).</p> <p>Livingston Public Library Special Projects Fund for the Month and twelve (12) months ending December 31, 2006 (1 page).</p> <p>Livingston Public Library Special Projects Fund for the Month and five (5) months ending May 30, 2007 (1 page).</p> <p>Livingston Public Library Special Projects Fund for the Month and twelve months ending December 31, 2007 (1 page).</p> <p>Livingston Public Library Special Projects Fund for the Month and eleven (11) months ending November 30, 2008 (1 page).</p>		<p>Complainant's inspection on January 30, 2009. The Custodian certifies that the Complainant requested a copy of the November 30, 2008 statement (the most recent report available as of January 14, 2009).</p>
<p>“Library grant during 2004 in the amount of \$65,000.00.”</p> <p>Payment Voucher Request dated July 1, 2004 to July 1, 2008 including payment vouchers and checks to Integrated Construction</p>	<p>Yes. Provided for inspection on January 30, 2009.</p>	<p>The Custodian certifies that the two (2) requests made to the New Jersey Department of Community Affairs, Division of Local Government Services including payment vouchers relative to the Statewide Livable</p>

<p>Enterprises, Inc. (15 pages)</p> <p>Payment Voucher Request dated June 6, 2008 including payment vouchers and checks to Integrated Construction Enterprises, Inc. (151 pages).</p>		<p>Communities Local Library Grant 04-2301-00 and the associated purchase orders and payments were provided for the Complainant's inspection on January 30, 2009. The Custodian certifies that the Complainant did not request copies of these two (2) records.</p>
<p>“Library fundraising for enhancements.”</p> <p>Livingston Public Library Statement of Operations Capital Campaign Fund for the Month and twelve (12) months ending December 31, 2008 (1 page).</p> <p>Livingston Public Library Statement of Operations Capital Campaign Fund for the Month and eleven (11) months ending November 30, 2008 (1 page).</p> <p>Livingston Public Library Statement of Operations Capital Campaign Fund for the Month and twelve (12) months ending December 31, 2007 (1 page).</p> <p>Livingston Public Library Statement of Operations Capital Campaign Fund for the Month and ten (10) ending October 31, 2008 (1 page).</p>	<p>Yes. Provided for inspection on January 30, 2009.</p>	<p>The Custodian certifies that these four (4) records were provided to the Complainant for inspection on January 30, 2009. The Custodian certifies that the Complainant requested a copy of the Statement of Operations for the months ending December 31, 2008. The Custodian certifies that a copy of this record was provided to the Complainant on February 3, 2009 upon payment of the appropriate copy costs.</p>

The Custodian contends that access to the requested records was not denied, although technically the Complainant's request Item No. 2 was overly broad and could have been denied as such. The Custodian states that the Superior Court has held that OPRA "... is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to

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make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549. The Custodian also cites to Pizar v. Township of Millburn, GRC Complaint No. 2006-196 as applicable in the instant complaint.

The Custodian reiterates his arguments from the SOI relevant to request Item No. 1 regarding his failure to respond in writing within the required seven (7) business day time frame. Moreover, the Custodian reiterates his arguments from the SOI relevant to request Item No. 1 that the Complainant's multiple OPRA requests for voluminous records and subsequent submissions have caused a substantial disruption of agency operations.

Finally, the Custodian asserts that no records were denied and that the Township went above and beyond the requirements of OPRA to provide access to the requested reports. The Custodian argues that OPRA does not require him or other Township officials to explain or prepare any "reconciliation" reports in response to questions or letters regarding conflicting information contained within a government record. The Custodian asserts that for the foregoing reasons, the Township's actions were lawful under OPRA.

September 13, 2009

The Complainant's response to the Custodian's SOI relevant to request Item No. 1. The Complainant asserts that the Custodian's SOI has not clarified the dispute. The Complainant states that both parties can agree that the CFO stated at a public meeting on April 20, 2009 that the account at issue here was properly encumbered. The Complainant further states that a letter from the CFO to the Complainant dated April 21, 2009 affirms that the encumbrance was recorded in January 2008; however, the audit trail provided just over twelve (12) months later does not include the encumbrance. Further, the Complainant states that the record reviewed in response to a later OPRA request included the encumbrance; therefore, the Complainant contends that the two (2) reports provided by the Custodian pursuant to two (2) separate OPRA requests for the same account during the same period of time contain conflicting information regarding said encumbrance.

The Complainant argues that if the Custodian's assertion in the SOI is correct that the accounting report is (1) an ever-changing document similar to a checkbook ledger, which changes over time; (2) is the same record with an adjustment; or (3) a later version of the journal, and if the CFO's representation that the encumbrance adjustment was made in January 2008 is correct, then the Custodian failed to explain why the report provided in response to request Item No. 1 failed to include the encumbrance. The Complainant argues that even in the limited confines of this complaint, if the CFO's representation is correct, then the Custodian failed to provide the report that showed the encumbrance and therefore has not complied with the Complainant's OPRA request. The Complainant asserts that if the Township wishes to take the position that the report

showing the encumbrance did not exist at the time of the Complainant's OPRA request Item No. 1 and that the encumbrance was later added retroactively (more than a year later), the Complainant will withdraw this complaint and conclude that his request item was properly satisfied.

The Complainant contends that based on the evidence presented in connection with this complaint, the only conclusion that can be made is that the Custodian deliberately selected one version of the requested audit trail report and arbitrarily withheld the second version (which was later provided to the Complainant in response to another OPRA request), thereby creating a denial of access to all records responsive.¹⁶

September 17, 2009

Letter from the Custodian to the GRC. The Custodian states that he is in receipt of the Complainant's response to the SOI relevant to request Item No. 1 dated September 13, 2009. The Custodian states that upon receipt of this response, the Custodian again asked the CFO to review the reports that the Complainant asserts were both responsive to his request. The Custodian states that the CFO stated the following:

“There is nothing new I can offer on the subject, other than to reiterate the following points:

- I did not encumber the contract in question at the time it was approved in December, 2007 since I was not employed by the Township ... at that time.
- I encumbered the contract once I was made aware of it. I do not recall the exact date ... however, since the contract (08-00001) must exist in the Edmunds system before a purchase order can be charged to it, and since the first purchase order charged against this contract was entered on March 13, 2008, the contract must have been entered in the account on or before March 13, 2008.
- Since the [c]ontract was approved in December, 2007 and the encumbrances were effective at the beginning of the 2008 fiscal year, I dated the encumbrance January 1, 2008.

Although not directly related to the OPRA question, I will once again state that the document ... is NOT a financial statement, it is a working journal subject to ongoing adjustment and reconciliation.”¹⁷

The Custodian states that the CFO confirmed that the encumbrance appears in both the report provided in response to the Complainant's OPRA request Item No. 1 and in the

¹⁶ The Complainant notes that accounting records of a local government, unlike a checkbook, are required to adhere to State regulations (*N.J.A.C. 5:30-5.2*) regarding management of an encumbrance system. The Complainant notes that both reports prove that the Township is in violation of said regulation. The Complainant requests that, as part of the Division of Local Government Services (“DLGS”), the GRC should consider its obligation to forward what the Complainant believes to be a violation of *N.J.A.C. 5:30-5.2* to DLGS for further review. The GRC notes that it is not a subdivision of DLGS.

¹⁷ The excerpt is copied from an e-mail sent from the CFO to the Custodian.

subsequent report that the Complainant asserts should have been provided as well. The Custodian states that he stands by the arguments presented in the SOI.

September 21, 2009

Letter from the Complainant to the GRC with the following attachments:

- Capital/Trust Budget account status/transaction audit Trail provided to the Complainant in response to request Item No. 1.
- Capital/Trust Budget account status/transaction audit Trail provided to the Complainant in response to a subsequent OPRA request.

The Complainant states that the Township's letter dated September 17, 2009 fails to address the critical facts of this complaint: that because both reports do not include exactly the same information, both reports should have been provided to him as part of the Township's response to OPRA request Item No. 1. The Complainant attaches copies of both reports to illustrate that an entry dated January 1, 2008 is not present on the first report, but is clearly present on the second report.¹⁸

The Complainant states that the sole question raised by this matter is this: can the report provided in response to request Item No. 1 (which does not reflect the CFO's adjustment he claims he made in 2008) satisfy the requirements of said request or can a custodian of record provide access to a record which was factually inaccurate at the time of the request and still be in compliance with OPRA? The Complainant states that he believes that the second report was available at the time of submission of request Item No. 1 because the CFO confirmed that the change to add the encumbrance was made earlier in 2008; therefore, the Custodian questions whether the Township deliberately provided the Complainant with false, misleading and outdated information. The Complainant avers that the Township failed to answer this question, which the Complainant believes constitutes a denial of access to the second report.

September 22, 2009

The Complainant's response to the Custodian's SOI relevant to request Item No. 2, attaching a letter from the Custodian to the Complainant dated January 14, 2009. The Complainant states that the Custodian failed to acknowledge in the SOI the Complainant's April 14, 2009 correspondence indicating that his OPRA request Item No. 2 had not been satisfied. The Complainant states that the Township's failure to respond to this very correspondence initiated this complaint, upon the filing of which the Township provided access to records attached to the SOI.

The Complainant states that the SOI included a copy of the Custodian's response to the OPRA request dated January 14, 2009; however, omitted from such copy are the pages containing the Custodian's responses to the request for the four (4) outstanding records in which the Custodian requested an extension of time to respond to the bulleted points for Library resolution dated June 9, 2004 for the amount of \$650,985.00, Library resolution dated June 9, 2004 for the amount of \$300,000.00 and Library fundraising for

¹⁸ The GRC notes that both reports are formatted differently, making it difficult for someone not otherwise familiar with these types of documents to review and understand.

enhancements. The Complainant further states that the Township claims that two (2) weeks later it provided the records identified in the SOI for inspection. The Complainant notes that the Township deviated from its own standard practice of providing the Complainant with a written response stating that the records at issue here were available for review.

The Complainant further states that the total amounts of money contained in the five (5) pages of records identified as responsive to the first bullet point of OPRA request Item No. 2 conflict with the total expenditures appearing in a statement provided in response to the second bullet point of the Complainant's OPRA request Item No. 2. The Complainant asserts that this suggests that the Custodian's response to the first bullet point of OPRA request Item No. 2 is incomplete. The Complainant asserts that had he reviewed these records on January 30, 2009 as the Custodian certified in the SOI he would have argued that the Custodian's response was incomplete.

Finally, the Complainant asserts that the Township's argument regarding the Complainant's multiple submissions causing a substantial disruption of agency operations seems to exemplify the Township's reluctance to make an effort to comply with the provisions of OPRA.

September 20, 2010

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the evidence of record for the two (2) complaints at issue herein and is in need of additional information. The GRC states that the Custodian certifies in the two (2) SOIs submitted to the GRC that he provided all records requested by the Complainant in his October 25, 2008 OPRA request Items No. 1 and No. 2. The GRC requests that the Custodian legally certify to the following:

1. Whether the records provided to the Complainant in response to both request items represent all records responsive that existed at the time of the Complainant's OPRA request?
2. On what dates were these records provided to the Complainant (whether for inspection and/or copies)?

The GRC requests that the Custodian provide the requested legal certification no later than September 22, 2010.

September 22, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of two (2) days to provide the requested legal certification.

September 22, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of two (2) business days, or until September 24, 2010, to submit the requested legal certification.

September 24, 2010

Custodian's legal certification. The Custodian certifies that all records provided to the Complainant in response to request Items No. 1 and No. 2 represent all records responsive that existed at the time of the Complainant's OPRA request.

The Custodian certifies that the Complainant was notified as to the availability of records as follows:

- Request Item No. 1: November 12, 2008 and December 15, 2008
- Request Item No. 2:
 - Library Resolution \$650,985.00: November 12, 2008, December 15, 2008, January 5, 2009 and January 14, 2009.
 - Library Resolution \$300,000.00: November 12, 2008, December 15, 2008, January 5, 2009 and January 14, 2009.
 - Library Grant: November 12, 2008, December 15, 2008, January 5, 2009 and January 14, 2009.
 - Library Fundraising: November 12, 2008, December 15, 2008 and January 5, 2009.

The Custodian states that an in depth explanation of his responses to each request item is contained within the SOI submitted for each request item.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

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* ...” (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 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.¹⁹ 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 Custodian responded to the Complainant’s October 25, 2008 OPRA request on November 12, 2008, or ten (10) business days after receipt of said request. In the SOIs for both request items, the Custodian argues that certain circumstances, including a national election, contributed to the Custodian’s failure to provide a response within the statutorily mandated seven (7) business day time frame. The Custodian also points out that the Appellate Division previously held that “... an untimely OPRA response cannot be a violation of the law where the OPRA request itself is invalid,” although the court

¹⁹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

also acknowledged that best practices dictates that a custodian should respond with the prescribed time frame. *See* Mason v. City of Hoboken, Docket No. 0508-06T5 (January 2008).

The GRC notes that beyond the statutory requirement to grant or deny access to a request for records under OPRA, the GRC has expanded through case law the ability of a custodian of record to respond in writing to an OPRA request seeking clarification or requesting an extension of time to respond. *See* Kelley, supra. Thus, in keeping with the court's acknowledgment in Mason, the Custodian still should have responded within the statutorily mandated seven (7) business day time frame seeking clarification as he did in his response to request Item No. 2 on November 12, 2008.²⁰

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, supra. *See also* Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).

Complainant's request Item No. 1: Audit Trail

The Complainant argues that the Custodian failed to fully comply with request Item No. 1 because the Custodian failed to provide an additional record that the Complainant believes to be responsive to the request.²¹ The Complainant argues that an encumbrance which was not contained within the record provided in response to the instant request item is included in the additional record the Complainant believes is responsive to the request but not provided. The Complainant further contends that the absence of the encumbrance in the record provided contradicts the CFO's representation that the encumbrance was posted to the audit trail in question in January 2008, before the filing of the Complainant's request Item No. 1. The Complainant ultimately argues that the evidence of record indicates that the Custodian deliberately chose to provide one version of the requested audit trail and arbitrarily withheld the second version, thereby creating a denial of access.

The Custodian avers in the SOI and subsequent submissions that there was no denial of access to the Complainant's request Item No. 1, to which both parties agree. The Custodian asserts that the issue seems to be whether the second record obtained by the Complainant through a different OPRA request should have been provided as part of the Township's initial response to request Item No. 1; however, the Custodian further asserts that the Complainant may be confusing this record with an updated version of the report or an audit trail for a second Town Hall/Police building account for which the encumbrances in question were applied. The Custodian avers that the reports are ever-

²⁰ The GRC notes that whether the Complainant's OPRA request items are invalid is not at issue in this complaint because at the request of the Custodian the Complainant provided clarification to include specific government records within specified time frames.

²¹ This second record in question was obtained by the Complainant in response to a subsequent OPRA request not at issue in this complaint.

changing and that the CFO informed the Complainant on June 1, 2009 that several adjustments had been made following the CFO's hiring.

The crux of the complaint relating to request Item No. 1 is centered on the conflicting content of the record provided to the Complainant in response to his OPRA request Item No. 1 and a second record received in response to a different OPRA request. The Complainant acknowledged in the Denial of Access Complaint that access to records responsive to request Item No. 1 was not necessarily denied but also contended that this second record should have been provided because it accurately reflected an encumbrance, whereas the record provided in response to the OPRA request did not. The Custodian certified in the SOI that all records responsive to the request were provided, and noted that the additional record the Complainant believes is responsive to request Item No. 1 but was not provided may have been a later version of the audit trail.

As the Complainant correctly noted in the Denial of Access Complaint, the GRC has no authority over the content of a government record. *See* FN No. 9, *supra*. N.J.S.A. 47:1A-7.b. delineates the Council's powers and duties. Such powers and duties do not include authority over a record's accuracy or whether a record was filed in accordance with existing guidelines. In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents." *See also* Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(GRC does not have authority over the condition of records provided by a Custodian); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate).

Therefore, the GRC has no authority over the content of the two (2) conflicting records that the Complainant contends were both responsive to request Item No. 1, pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa, *supra*; Toscano, *supra*; Gillespie, *supra*; and Katinsky, *supra*.

Based on the foregoing, the GRC must examine the evidence of record to determine whether the second record at issue existed at the time of the Complainant's October 25, 2008 OPRA request. The Custodian states in the SOI that the only record that existed at the time of the Complainant's OPRA request was provided and that the Complainant may be mistaking the record provided to him in response to a different OPRA request with an updated version of the requested report or another audit trail for a second account. The Complainant contends that he believes that the Custodian purposely provided one (1) of two (2) reports that existed at the time of the Complainant's OPRA request and arbitrarily withheld the other. The Custodian subsequently certified on September 24, 2010 that all records responsive that existed at the time of the Complainant's OPRA request Item No. 1 were provided.

The evidence of record herein supports a conclusion that the second record at issue did not actually exist at the time of the Complainant's request. The Complainant's supposition that the second record responsive to the OPRA request herein existed was

based on the date of the posted encumbrance (January 1, 2008) and a letter from the CFO to the Complainant dated April 21, 2009 which was attached to the SOI; this evidence is circumstantial at best, and there is no credible evidence in the record to support a conclusion that the second audit trail existed at the time of the Complainant's request. A closer review of the evidence submitted by the parties demonstrates that in the letter dated April 21, 2009, the CFO advised the Complainant that the encumbrance was merely dated January 1, 2008. Additionally, the Complainant asserted that the CFO stated in a meeting in April 2009 that the account was encumbered; however, the date of such meeting is nearly six (6) months after the Complainant submitted the instant OPRA request for the requested record.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant's March 2, 2005, OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified on August 1, 2005 that the record provided to the complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

In this complaint, the Custodian certified that he provided all records responsive that existed at the time of the Complainant's OPRA request and there is no credible evidence in the record to refute the Custodian's certification. Specifically, the evidence of record herein indicates that the second record did not actually exist at the time of the Complainant's request. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to request Item No. 1 of the Complainant's OPRA request pursuant to Burns, supra.

Complainant's request Item No. 2: Library resolutions, grant information and fundraising records

In the Denial of Access Complaint, the Complainant here argued that he never received records responsive to request Item No. 2 following the Custodian's January 14, 2009 request for an extension of time to provide such records. The Complainant further stated that in a letter to Mayor August copying the Custodian on April 19, 2009, the Complainant reiterated that some of the records requested in Item No. 2 had not yet been provided. The Complainant asserted that he never received the requested records after the Custodian's January 14, 2009 request for an extension of time to provide such records.

However, the Custodian certified in the SOI that the records responsive to request Item No. 2 were provided for the Complainant's inspection on January 30, 2009. The Custodian further certified that during the inspection, the Complainant selected records to be copied, and subsequently picked up such copies on February 3, 2009 after payment of the appropriate copying fees. The Custodian included in the SOI copies of all the records which the Custodian certifies the Complainant inspected on January 30, 2009.

The Complainant responded to the Custodian's SOI contending that the Custodian did not address in the SOI the Complainant's April 14, 2009 correspondence which indicated that request Item No. 2 had not yet been satisfied. The Complainant contends that the Township's failure to respond to such letter initiated the filing of this complaint. The Complainant further contends that the filing of this complaint eventually led the Township to disclose the records requested as part of the SOI.

The Custodian subsequently provided an additional certification on September 24, 2010 that all records responsive were inspected by the Complainant on January 30, 2009 and retrieved copies of selected records on February 3, 2009.

Although there is no evidence in the record to support the Custodian's contention that the Complainant inspected records responsive to the instant request item on January 30, 2009, or the Custodian's further contention that the Complainant took delivery of records responsive to the request item on February 3, 2009, the Council notes that the parties agree that all of the records responsive to the request item were provided to the Complainant in the SOI dated September 10, 2009. The Council therefore declines to order disclosure of the requested record.

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, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder 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 respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny access to the audit report responsive to request Item No. 1 pursuant to Burns, *supra*, and both parties agree that the Complainant received the records responsive to request Item No. 2. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

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). *See also* Russomano v. Township of Edison, GRC Complaint No. 2002-86 (July 2003).
2. The GRC has no authority over the content of the two (2) conflicting audit trails that the Complainant contends were both responsive to request Item No. 1, pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004) and Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Custodian certified that he provided all records responsive that existed at the time of the Complainant’s OPRA request Item No. 1 and there is no credible evidence in the record to refute the Custodian’s certification. Specifically, the evidence of record herein indicates that the second audit trail at issue did not actually exist at the time of the Complainant’s request.

Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant within the statutorily mandated time frame, he did not unlawfully deny access to the records responsive to request Item No. 1 of the Complainant's OPRA request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

4. Although there is no evidence in the record to support the Custodian's contention that the Complainant inspected records responsive to the instant request item on January 30, 2009, or the Custodian's further contention that the Complainant took delivery of records responsive to the request item on February 3, 2009, the Council notes that the parties agree that all of the records responsive to the request item were provided to the Complainant in the SOI dated September 10, 2009. The Council therefore declines to order disclosure of the requested record.
5. Although the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny access to the audit report responsive to request Item No. 1 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), and both parties agree that the Complainant received the records responsive to request Item No. 2. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011