



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**April 25, 2012 Government Records Council Meeting**

William F. Cimochofski  
Complainant

Complaint No. 2009-261

v.

New Jersey Department of Community Affairs,  
Division of Codes and Standards,  
Office of Code Enforcement  
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The evidence of record indicates that the Custodian provided the Council with a certification of compliance on March 6, 2012, three (3) business days following the receipt of the Council’s Interim Order on March 1, 2012. The Custodian certified that he mailed the Complainant all of the responsive inspection reports on March 5, 2012, via regular and certified mail. Accordingly, the Custodian has complied with the Council’s February 28, 2012 Interim Order.
2. The Custodian’s failure to respond in writing to the Complainant’s OPRA request in writing within the statutorily mandated seven (7) business days resulted 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 (Interim Order October 31, 2007). Also, Ms. Lindaberry should have notified the Complainant in writing that the Custodian was not in the office or should have directed the Complainant’s OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h. However, because the Custodian certified that no records exist which are responsive to the Complainant’s request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, the Custodian did not unlawfully deny access to this requested letter. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian complied with the Council’s February 28, 2012 Interim Order and provided certified confirmation of compliance to the GRC within the prescribed time limits to do so. Accordingly, the evidence of record does not indicate that the Custodian’s nor Ms. Lindaberry’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that neither the Custodian’s actions nor Ms. Lindaberry’s actions rise to the level of a

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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 25<sup>th</sup> Day of April, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**William F. Cimochoowski<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-261**

v.

**N.J. Department of Community Affairs,  
Division of Codes and Standards,  
Office of Code Enforcement<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copies of:

1. The letter from Bethlehem Township stating they will do all inspections on construction of the salt barn
2. All inspection reports on the salt barn
3. The Certificate of Occupancy for the salt barn

**Request Made:** June 29, 2009

**Response Made:** July 14, 2009

**Custodian:** Dave Reif

**GRC Complaint Filed:** September 8, 2009<sup>3</sup>

**Background**

**February 28, 2012**

At its February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s failure to respond *in writing* to the Complainant’s OPRA 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.,

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There is no evidence in the record regarding the date that the Denial of Access Complaint was received by the GRC.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Ms. Lindaberry should have notified the Complainant in writing that the Custodian was not in the office or should have directed the Complainant's OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h.
3. Because the Custodian has certified that no records exist which are responsive to the Complainant's request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, and because the Complainant has provided no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested letter from Bethlehem Township stating they will do all inspections on construction of the salt barn. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Council has no authority to determine whether copies of tests performed to ensure compliance with construction specifications are properly part of the requested inspection reports. *See* Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005) (the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004) (the 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); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005) (the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Twp. of Edison BOE, GRC Complaint No. 2007-179 (January 2008) ( GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain).
5. It is unclear from the evidence of record whether inspection reports for the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site exist. However, to the extent that such records exist, such records must be provided to the Complainant or a lawful exemption to their disclosure under OPRA must be asserted by the Custodian. The Custodian must disclose to the Complainant inspection reports from the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site, if any exist, provide a lawful exemption to disclosure under OPRA, or provide a certification that such records do not exist.

6. **The Custodian shall comply with item #5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **February 29, 2012**

Council's Interim Order distributed to the parties.

### **March 2, 2012**

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

- Inspection reports for the retaining wall
- Final inspection reports of the salt barn
- Inspection reports of the site

The Custodian asserts that the Council's February 28, 2012 Interim Order was received on March 1, 2012. The Custodian states that in response to the Interim Order, he has enclosed the requested inspection reports. The Custodian maintains that there are no further records responsive to the Complainant's request beyond those that are attached to this letter.

### **March 6, 2012**

Custodian's certification of compliance. The Custodian certifies that the inspection reports for the retaining wall, salt barn, and site were mailed to the Complainant on March 5, 2012 via regular and certified mail. The Custodian certifies that he provided the Complainant with all of the documents responsive to the Complainant's request as required in the Council's February 28, 2012 Interim Order.

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

## Analysis

### **Whether the Custodian complied with the Council's February 28, 2012 Interim Order?**

The Council's February 28, 2012 Interim Order specifically directed the New Jersey Department of Community Affairs, Division of Local Code Enforcement, to provide the Complainant with the requested "inspection reports for the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site." The Interim Order required the Custodian to certify to such within five (5) business days following the receipt of the Interim Order. The Council distributed the Interim Order on February 29, 2012.

The evidence of record indicates that the Custodian provided the Council with a certification of compliance on March 6, 2012, three (3) business days following the receipt of the Council's Interim Order on March 1, 2012. The Custodian certified that he mailed the Complainant all of the responsive inspection reports on March 5, 2012 via regular and certified mail. Accordingly, the Custodian has complied with the Council's February 28, 2012 Interim Order.

### **Whether the Custodian's or Ms. Lindaberry's actions rise 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)).

The Custodian's failure to respond in writing to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days resulted 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 (Interim Order October 31, 2007). Also, Ms. Lindaberry should have notified the Complainant in writing that the Custodian was not in the office or should have directed the Complainant's OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h. However, because the Custodian certified that no records exist which are responsive to the Complainant's request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, the Custodian did not unlawfully deny access to this requested letter. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian complied with the Council's February 28, 2012 Interim Order and provided certified confirmation of compliance to the GRC within the prescribed time limit to do so. Accordingly, the evidence of record does not indicate that the Custodian's nor Ms. Lindaberry's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that neither the Custodian's actions nor Ms. Lindaberry's action 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 evidence of record indicates that the Custodian provided the Council with a certification of compliance on March 6, 2012, three (3) business days following the receipt of the Council's Interim Order on March 1, 2012. The Custodian certified that he mailed the Complainant all of the responsive inspection reports on March 5, 2012, via regular and certified mail. Accordingly, the Custodian has complied with the Council's February 28, 2012 Interim Order.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days resulted 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 (Interim Order October 31, 2007). Also, Ms. Lindaberry should have notified the

Complainant in writing that the Custodian was not in the office or should have directed the Complainant's OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h. However, because the Custodian certified that no records exist which are responsive to the Complainant's request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, the Custodian did not unlawfully deny access to this requested letter. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian complied with the Council's February 28, 2012 Interim Order and provided certified confirmation of compliance to the GRC within the prescribed time limits to do so. Accordingly, the evidence of record does not indicate that the Custodian's nor Ms. Lindaberry's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that neither the Custodian's actions nor Ms. Lindaberry's actions 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: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill  
Executive Director

April 18, 2012





State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

William F. Cimochofski  
Complainant

Complaint No. 2009-261

v.

NJ Department of Community Affairs,  
Division of Codes and Standards,  
Office of Code Enforcement  
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, 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 (Interim Order October 31, 2007).
2. Ms. Lindaberry should have notified the Complainant in writing that the Custodian was not in the office or should have directed the Complainant’s OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h.
3. Because the Custodian has certified that no records exist which are responsive to the Complainant’s request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, and because the Complainant has provided no credible evidence to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested letter from Bethlehem Township stating they will do all inspections on construction of the salt barn. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Council has no authority to determine whether copies of tests performed to ensure compliance with construction specifications are properly part of the requested inspection reports. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record);

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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); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Twp. of Edison BOE, GRC Complaint No. 2007-179 (January 2008)( GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain). Thus, the Council has no authority to determine whether copies of tests performed to ensure compliance with construction specifications are properly part of the requested inspection reports.

5. It is unclear from the evidence of record whether inspection reports for the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site exist. However, to the extent that such records, such records must be provided to the Complainant or a lawful exemption to their disclosure under OPRA must be asserted by the Custodian. The Custodian must disclose to the Complainant inspection reports from the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site, if any exist, provide a lawful exemption to disclosure under OPRA, or provide a certification that such records do not exist.
6. **The Custodian shall comply with item #5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 29, 2012**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 28, 2012 Council Meeting**

**William F. Cimochoowski<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-261**

**v.**

**N.J. Department of Community Affairs,  
Division of Codes and Standards,  
Office of Code Enforcement<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copies of:

1. The letter from Bethlehem Township stating they will do all inspections on construction of the salt barn
2. All inspection reports on the salt barn
3. The Certificate of Occupancy for the salt barn

**Request Made:** June 29, 2009

**Response Made:** July 14, 2009

**Custodian:** Dave Reif

**GRC Complaint Filed:** September 8, 2009<sup>3</sup>

**Background**

**June 29, 2009**

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

**July 14, 2009<sup>4</sup>**

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request via a telephone message on the same business day as the Custodian's receipt of the request. The Custodian states that the Complainant must come to the Custodian's Office and look for the records himself.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There is no evidence in the record of the date that the GRC received the Denial of Access Complaint.

<sup>4</sup> The delivery signature on the Complainant's OPRA request form indicates that Christine Lindaberry, a full time temporary clerk, received said request on June 30, 2009. The evidence of record indicates that at this time, the Custodian was out on vacation, and he himself did not receive the request until July 14, 2009.

William F. Cimochoowski v. Dept. of Community Affairs, Division of Codes and Standards, Office of Code Enforcement, 2009-261

**September 8, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching Complainant’s OPRA request dated June 29, 2009.

The Complainant states that he sent a request for records to the Custodian on June 29, 2009. The Complainant states that the request was sent Certified Mail and the return receipt was signed and dated June 30, 2009. The Complainant states that he received a telephone message from Mr. David Reif on July 14, 2009, in which Mr. Reif stated that if the Complainant wanted the records requested, the Complainant must come to the Office of Local Code Enforcement and go through the files.

The Complainant states that he returned Mr. Reif’s telephone call on July 15, 2009 and left a message stating that the Complainant wanted copies of the requested records sent to him. The Complainant further states that Mr. Reif returned the telephone call on the same day and again stated that if the Complainant wanted the requested records, he would have to come in to the office and go through the files.

The Complainant states that he again spoke to Mr. Reif on July 17, 2009 and again stated that he wanted copies of the requested records; Mr. Reif again stated that if the Complainant wanted the requested records, the Complainant must come to the office and go through the files.

The Complainant declines to mediate this complaint and requests that the GRC conduct a full investigation.

**September 28, 2009**

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

**October 1, 2009**

Custodian’s SOI attaching Complainant’s OPRA request dated June 29, 2009.<sup>5</sup>

The Custodian states that he is surprised by the Complainant’s allegations that the Custodian has unlawfully denied access to the requested records because the Custodian has allowed the Complainant total access to the files he seeks. The Custodian states that he now understands that the appropriate means of responding to OPRA requests is in writing and that in the future he will follow this policy.

The Custodian certifies that he did not personally receive the Complainant’s OPRA request until July 14, 2009 because he was on vacation. The Custodian further certifies that he responded to the Complainant’s OPRA request on July 14, 2009. The Custodian maintains that he has not denied access to the requested records. The Custodian certifies that after receiving the Complainant’s latest request for records, the Custodian left a message on the Complainant’s answering machine stating that he was welcome to come to the office, review the files and the copies of the requested records would be provided to the Complainant.

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<sup>5</sup> The Custodian’s SOI included several attachments not relevant to the adjudication of this complaint. William F. Cimochoowski v. Dept. of Community Affairs, Division of Codes and Standards, Office of Code Enforcement, 2009-261 -- Findings and Recommendations of the Executive Director

The Custodian further certifies that a few days later, he informed the Complainant that the files have become quite voluminous and that it would require several hours of research to locate the requested records. The Custodian certifies that he then told the Complainant that OPRA does not require the Custodian to perform research and repeated the offer to for the Complainant to come to the Office of Local Code Enforcement and the Custodian would provide the Complainant with any records to which he is legally entitled.

The Custodian certifies that the Complainant has written to the Office of Local Code Enforcement and its Bureau Chief, their Director, the Commissioner, Regulatory Affairs, and the Governor. The Custodian asserts that over the past two years, their office has spent countless hours responding to letters from the Complainant. The Custodian states that the latest request from the Complainant seeks a copy of a letter from Bethlehem Township stating they will do all of the inspections on the construction of the salt barn. The Custodian certifies that to the best of his knowledge, such letter does not, and never did, exist.

The Custodian asserts that for the Township to perform their own inspections on their project would be a conflict of interest and further asserts that the respective Subcode Officials/Inspectors in the Custodian's office have a statutory obligation to perform inspections within municipalities under the agency's jurisdiction. The Custodian certifies that the Complainant has a complete copy of those inspection logs.

Further, the Custodian certifies that the Complainant has previously reviewed the entire file and so is undoubtedly aware that a letter of this nature does not exist. The Custodian certifies that in a letter to the Complainant from Director Cynthia A. Wilk dated September 14, 2009, Ms. Wilk stated that there is no additional information that the Complainant has not already been given. The Custodian asserts that the Complainant is welcome to review the files during normal business hours. The Custodian asserts that the Complainant's actions are unreasonable and border on harassment.

#### **August 17, 2010**

Letter from the Custodian to the GRC. The Custodian states that he withdraws his argument that fulfilling the Complainant's request requires research. The Custodian attaches copies of the inspection reports and the Certificate of Occupancy for the municipal salt barn at 404 Mine Road, Asbury, NJ.

#### **August 18, 2010**

Letter from the Custodian to the Complainant. The Custodian provides the Complainant with copies of the requested inspection reports and the Certificate of Occupancy for the municipal salt barn at 404 Mine Road, Asbury, NJ.

#### **August 26, 2010**

E-mail from the Complainant to the GRC. The Complainant states that he received a letter from the Custodian dated August 18, 2010 attaching certain records. The Complainant asserts that the Custodian did not provide copies of all records responsive. The Complainant states that the missing records are the inspection reports for the retaining wall, the final inspection of the salt barn, and also states that there were no inspections of the site provided, only a letter from the Township Engineer. The Complainant further

asserts that he received no Office of Local Code Enforcement inspection reports of the site nor a letter stating no inspections were done.

### **September 16, 2010<sup>6</sup>**

E-mail from the Complainant to the GRC. The Complainant states that testing of the soil needed to be done as part of the inspections on the salt barn. The Complainant states that a statement by the Township Engineer looking at the site does not meet such requirements. The Complainant cites to the applicable specifications for the salt barn regarding footing excavations and subgrades. The Complainant states that he is requesting copies of the tests that were done to ensure compliance with such specifications and states that such testing should be part of the inspection report. The Complainant states that if no testing was done, the Custodian should so inform him.

### **November 17, 2010**

Letter from the Custodian to the GRC. The Custodian provides a legal certification that the individual who signed the receipt for the OPRA request, Christine Lindaberry, is an employee of Goodwill Industries of Greater New York and Northern New Jersey, Inc., who is a long-term temporary employee of the Division of Codes and Standards and is employed as a full time clerk. The Custodian states that Ms. Lindaberry has served as a full time clerk in his office for more than five (5) years. The Custodian certifies that Ms. Lindaberry did not contact the Complainant upon receipt of the OPRA request. The Custodian asserts that to his knowledge, no one other than himself contacted the Complainant regarding the instant case.

## **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:

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<sup>6</sup> The Complainant made additional submissions to the GRC which are not relevant to the adjudication of this Complaint.

“... [i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... 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.<sup>7</sup> 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 (Interim Order October 31, 2007).

In this complaint, the evidence of record indicates that a full time clerk in the Custodian’s office received the OPRA request on June 30, 2009 while the Custodian was out of the office on vacation. The evidence of record further indicates that the Custodian did not receive the OPRA request until July 14, 2009, upon the Custodian’s return to the

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<sup>7</sup> 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. William F. Cimochoowski v. Dept. of Community Affairs, Division of Codes and Standards, Office of Code Enforcement, 2009-261 5  
-- Findings and Recommendations of the Executive Director

office from vacation. Although the Custodian made a verbal response to the OPRA request on July 14, 2009, ten (10) business days elapsed between the agency's receipt of the OPRA request and issuance of a response to the Complainant.

Therefore, the Custodian's failure to respond *in writing* to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, OPRA provides that any officer or employee of a public agency who receives request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record. N.J.S.A. 47:1A-5.h.

The evidence of record indicates that Ms. Lindaberry forwarded the Complainant's OPRA request to the Custodian but did not inform the Complainant that the Custodian was out of the office on vacation or notify someone in the Division of Codes and Standards with the authority to fulfill the request. Therefore, Ms. Lindaberry should have notified the Complainant in writing that the Custodian was not in the office or should have directed the Complainant's OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h.

In the SOI, the Custodian certified that no records responsive exist to the Complainant's request Item No. 1, a letter from Bethlehem Township stating they will do all inspections on the construction of the salt barn. The Complainant has provided no evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant did not submit any competent, credible evidence to refute the custodian's certification. The GRC determined the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records exist which are responsive to the Complainant's request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, and because the Complainant has provided no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested letter from Bethlehem Township stating they will do all inspections on construction of the salt barn. See Pusterhofer, *supra*.

In the SOI, the Custodian stated that the Complainant's requests for request Items No. 2 and 3, all inspection reports on the salt barn and the Certificate of Occupancy for the



salt barn, were denied because such request required research. The Custodian later withdrew this assertion in a letter to the GRC dated August 17, 2010 and provided copies of the records responsive to such request items by letter to the Complainant dated August 18, 2010. However, by e-mails to the GRC dated August 26, 2010 and September 16, 2010, the Complainant disputed the completeness of the records provided and asserted that missing from the records provided are the inspection reports for the retaining wall, the final inspection of the salt barn, Office of Local Code Enforcement inspection reports of the site or a letter stating no inspections were done, as well as copies of the tests which were done to ensure compliance with construction specifications. The Complainant asserted that such testing should be part of the inspection report. The Complainant also stated that if no testing was done, the Custodian should so inform him.

A review of the Complainant's OPRA request discloses that copies of tests are not specifically part of such request. Moreover, pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the 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); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Twp. of Edison BOE, GRC Complaint No. 2007-179 (January 2008)(GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain). Thus, the Council has no authority to determine whether copies of tests performed to ensure compliance with construction specifications are properly part of the requested inspection reports.

It is unclear from the evidence of record whether inspection reports for the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site exist. However, to the extent that such records exist, such records must be provided to the Complainant or a lawful exemption to their disclosure under OPRA must be asserted by the Custodian. Therefore, the Custodian must disclose to the Complainant inspection reports for the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site, if any exist, provide a lawful exemption to disclosure under OPRA, or provide a certification that such records do not exist.

**Whether the Custodian's deemed denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond *in writing* to the Complainant's OPRA 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 (Interim Order October 31, 2007).
2. Ms. Lindaberry should have notified the Complainant in writing that the Custodian was not in the office or should have directed the Complainant's OPRA request to someone in the Division of Codes and Standards with the authority to fulfill the request. N.J.S.A. 47:1A-5.h.
3. Because the Custodian has certified that no records exist which are responsive to the Complainant's request for a letter from Bethlehem Township stating they will do all inspections on construction of the salt barn, and because the Complainant has provided no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested letter from Bethlehem Township stating they will do all inspections on construction of the salt barn. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Council has no authority to determine whether copies of tests performed to ensure compliance with construction specifications are properly part of the requested inspection reports. *See* Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the 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); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Twp. of Edison BOE, GRC Complaint No. 2007-179 (January 2008)( GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain). Thus, the Council has no authority to determine whether copies of tests performed to ensure compliance with construction specifications are properly part of the requested inspection reports.
5. It is unclear from the evidence of record whether inspection reports for the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site exist. However, to the extent that such records, such records must be provided to the Complainant or a lawful exemption to their disclosure under OPRA must be asserted by the

Custodian. The Custodian must disclose to the Complainant inspection reports from the retaining wall, reports regarding the final inspection of the salt barn and Office of Local Code Enforcement inspection reports of the site, if any exist, provide a lawful exemption to disclosure under OPRA, or provide a certification that such records do not exist.

6. **The Custodian shall comply with item #5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 21, 2012<sup>10</sup>

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<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>10</sup> This complaint was prepared for adjudication on November 23, 2010; however, said complaint was not adjudicated due to the Council's lack of quorum.