



**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**

**May 24, 2011 Government Records Council Meeting**

Larry A. Kohn  
Complainant

Complaint No. 2009-289

v.

Township of Livingston (Essex)  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne his burden of proving that he responded in writing within the statutorily mandated seven (7) business days as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Specifically, the Custodian received the Complainant’s September 8, 2009 OPRA request on September 9, 2009 and responded in writing on the fourth (4<sup>th</sup>) business day after receipt of same. See N.J.S.A. 47:1A-5.a.
2. Because the Custodian responded timely and in writing, granting access to two (2) ordinances and subsequently certifying to the GRC that he provided all records responsive to the Complainant’s September 8, 2009 OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian has unlawfully denied access to the records responsive that he failed to provide on October 16, 2009 because the Custodian should have provided all records he deemed to be responsive and available in his written response to the Complainant dated October 15, 2009. Additionally, the Custodian failed to bear his burden of proving that access to those records provided on October 21, 2009 and October 22, 2009 could not have been provided as part of the Complainant’s inspection on October 16, 2009. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of any records because the Custodian certified in the Statement of Information that he provided access to all records responsive to the Complainant’s October 5, 2009 OPRA request on October 16, 2009, October 21, 2009 and October 22, 2009.
4. Regarding the Complainant’s October 5, 2009 OPRA request, the Custodian unlawfully denied access to those records for which access was not provided until October 21, 2009 and October 22, 2009; however, the Custodian responded in writing



to the Complainant's September 8, 2009 OPRA request in a timely manner and provided access to all records responsive and ultimately provided access to all records responsive to the Complainant's October 5, 2009 OPRA request. 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 24<sup>th</sup> Day of May, 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: June 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 24, 2011 Council Meeting**

**Larry A. Kohn<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2009-289**

v.

**Township of Livingston (Essex)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:**

OPRA request dated September 8, 2009: Resolution approving short term notes providing interim financing for new municipal complex.<sup>3</sup>

OPRA request dated October 5, 2009: Inspection of the resolution(s) giving power to the Chief Financial Officer (“CFO”) to award bonds in accordance with the public sale of the previous four (4) bond anticipation notes/bonds and the report required to be created by the CFO for each.

**Request Made:** September 8, 2009 and October 5, 2009

**Response Made:** September 15, 2009 and October 15, 2009

**Custodian:** Glenn Turtleaub

**GRC Complaint Filed:** October 22, 2009<sup>4</sup>

**Background**

**September 8, 2009**

Complainant’s first (1<sup>st</sup>) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.<sup>5</sup>

**September 15, 2009**

Custodian’s response to the first (1<sup>st</sup>) OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that the CFO has advised that Bond Ordinance No. 7-2005 (4 pages) and Ordinance No. 26-2007 (4 pages) are the records

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

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Complainant hand-delivered his first (1<sup>st</sup>) OPRA request to the Custodian after normal business hours at a Township Council meeting on September 8, 2009.

responsive to the Complainant's OPRA request. The Custodian states that these two (2) ordinances are available for inspection or duplication.

### **September 18, 2009**

Letter from the Complainant to the Custodian. The Complainant states that this letter recapitulates the conversation held at the Custodian's office earlier in the day. The Complainant states that the two (2) ordinances provided by the Custodian do not satisfy the Complainant's September 8, 2009 OPRA request. The Complainant states that the two (2) ordinances are not an adequate substitute for a resolution required pursuant to N.J.S.A. 40A:2-28.<sup>6</sup>

### **September 29, 2009**

Letter from the Custodian to the Complainant. The Custodian states that he informed the Complainant on September 18, 2009 that according to the CFO, the ordinances reviewed by the Complainant are the records responsive to the Complainant's September 8, 2009 OPRA request. The Custodian states that with regard to the Complainant's comments about N.J.S.A. 40A:2-28, the CFO advises as follows:

“With respect to the letter of September [18] requesting a resolution authorizing the sale of [b]ond [a]nticipation [n]otes, the statutory reference provided, [N.J.S.A.] 40A:2-28, pertains to the private sale of bond anticipation notes. The Township's notes sales are public. I believe the relevant statute is 40A:2-8.1 which states, in part, ‘... a local unit may, in anticipation of the issuance of bonds, borrow money and issue notes if *the bond ordinance or subsequent resolution so provides.*’ (Emphasis added.)”

### **October 5, 2009**

Letter from the Complainant to the Custodian, attaching the Complainant's second (2<sup>nd</sup>) OPRA request. The Complainant acknowledges receipt of the Custodian's letter dated September 29, 2009. The Complainant states that based on that letter, the Complainant acknowledges that he incorrectly assumed the sale of bond anticipation notes was negotiated. The Complainant acknowledges that N.J.S.A. 40A:2-28 is not applicable to the records requested.

The Complainant states that upon further review, he believes the applicable statute is N.J.S.A. 40A:2-34.<sup>7</sup> The Complainant states that he is seeking the last four (4) issues of bond anticipation notes and bonds. The Complainant refers the Custodian to

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<sup>6</sup> N.J.S.A. 40A:2-28 provides that “[a]ll bond anticipation notes or capital notes may be sold at private sale pursuant to resolution of the governing body, or by a financial officer of the local unit expressly designated by resolution to sell such notes. The financial officer making any such sale shall report in writing to the governing body at the next meeting thereof as to the principal amount, interest rate, and maturities of the notes sold, the price obtained and the name of the purchaser.”

<sup>7</sup> N.J.S.A. 40A:2-34 provides that “[t]he governing body, by resolution, may designate a financial officer of the local unit to sell and award bonds in accordance with the advertised terms of public sale. The financial officer making any such sale shall report in writing to the governing body at the next meeting thereof as to the principal amount, interest rate, and maturities of the bonds sold, the price obtained and the name of the purchaser.”

Section 4 of Bond Ordinances No. 7-2005 and No. 26-2007 in the interest of further clarification.<sup>8</sup>

The Complainant states that in the event the Custodian considers that the four (4) bond anticipation notes sought were not included as part of the Complainant's first (1<sup>st</sup>) OPRA request, the Complainant has attached a new OPRA request for these records. The Complainant states that he is requesting the records relevant to this complaint on an official OPRA request form.<sup>9</sup>

#### **October 15, 2009**

Custodian's response to the second (2<sup>nd</sup>) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that the following ordinances and documentation are available for review and, if requested, photocopying:

- Notes dated September 18, 2008 sold to fund Ordinance No. 29-2007.
- Notes dated February 11, 2009 sold to fund Ordinance No. 7-2005, 23-2006, 19-2007, 26-2007, 18-2007 and 13-2008.
- Notes dated April 30, 2009 sold to fund Ordinance No. 7-2005, 9-2005, 11-2005, 22-2006, 23-2006, 17-2007, 18-2007, 19-2007, 20-2007, 26-2007, 37-2007, 5-2008, 12-2008, 13-2008 and 16-2008.
- Notes dated July 30, 2009 sold to fund Ordinance No. 26-2007, 29-2007, 13-2008, 12-2009, 13-2009, 14-2009 and 15-2009.

#### **October 21, 2009**

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

- C.M. No. 110<sup>10</sup> dated September 12, 2008.
- Memorandum from the CFO to Ms. Michele Mead ("Township Manager Mead") dated September 10, 2008.
- Bond anticipation notes sheet dated September 18, 2008.

The Custodian states that as a follow-up to his October 15, 2009 written response and the Complainant's inspection on October 16, 2009, attached are the records pertaining to Ordinance No. 29-2007 (bond anticipation notes dated September 18, 2008).

#### **October 22, 2009**

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

- C.M. No. 110 dated September 12, 2008.
- Memorandum from the CFO to Township Manager Mead dated September 10, 2008 attaching a bond anticipation notes sheet dated September 18, 2008.
- C.M. No. 22 dated February 5, 2009.

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<sup>8</sup> The Complainant did not detail the content of Section 4 of Bond Ordinances No. 7-2005 and No. 26-2007.

<sup>9</sup> The Complainant hand-delivered his second (2<sup>nd</sup>) OPRA request to the Custodian after normal business hours at a Council meeting on October 5, 2009.

<sup>10</sup> There is no evidence in the record to indicate what "C.M." stands for.

- Memorandum from the CFO to Township Manager Mead dated February 4, 2009 attaching a bond anticipation notes sheet dated February 11, 2009.
- C.M. No. 59 dated April 24, 2009.
- Memorandum from the CFO to Township Manager Mead dated April 22, 2009 attaching a bond anticipation notes sheet dated April 30, 2009.
- C.M. No. 120 dated July 23, 2009.
- Memorandum from the CFO to Township Manager Mead dated July 22, 2009.

The Custodian states that as a follow-up to his October 15, 2009 written response and the Complainant's inspection on October 16, 2009, these records are being provided in response to the Complainant's October 5, 2009 OPRA request.

### **October 22, 2009**

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

- Complainant's first (1<sup>st</sup>) OPRA request dated September 8, 2009.
- Letter from the Complainant to the Custodian dated September 18, 2009.
- Letter from the Custodian to the Complainant dated September 29, 2009.
- Letter from the Complainant to the Custodian dated October 5, 2009 attaching the Complainant's second (2<sup>nd</sup>) OPRA request.
- Letter from the Custodian to the Complainant dated October 15, 2009.
- Records responsive to the Complainant's OPRA request:
  - Memorandum from the CFO to Township Manager Mead, Township Manager, dated February 4, 2009 attaching a bond anticipation notes sheet dated February 11, 2009.
  - Memorandum from the CFO to Township Manager Mead dated April 22, 2009 attaching a bond anticipation notes sheet dated April 30, 2009.
  - Memorandum from the CFO to Township Manager Mead dated July 22, 2009 attaching a bond anticipation notes sheet dated September 18, 2008.<sup>11</sup>

The Complainant states that he submitted an OPRA request to the Township of Livingston ("Township") on September 8, 2009. The Complainant contends that the Custodian provided no written response to this OPRA request. The Complainant states that he went to the Custodian's office on September 18, 2009 and was shown two (2) ordinances. The Complainant states that he subsequently sent a letter to the Custodian on the same day advising that the two (2) ordinances provided did not satisfy the September 8, 2009 OPRA request. The Complainant states that the Custodian responded on September 29, 2009 advising the Complainant that the CFO deemed the two (2) ordinances to be responsive to the Complainant's OPRA request.

The Complainant contends that the Custodian failed to respond in writing to the Complainant's September 8, 2009 OPRA request. The Complainant asserts that he visited the Township offices nine (9) business days after submitting said OPRA request.

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<sup>11</sup> The Complainant attached additional documents that are not relevant to the instant complaint.  
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The Complainant states that he submitted a letter to the Custodian on October 5, 2009 attaching a second (2<sup>nd</sup>) OPRA request. The Complainant states that the Custodian responded in writing on October 15, 2009 indicating that twenty-nine (29) different ordinances were available for review. The Complainant notes that the Custodian did not reference the requested CFO reports.

The Complainant states that he went to the Custodian's office on October 16, 2009 to review the records identified as responsive in the Custodian's October 15, 2009 written response. The Complainant asserts that the Custodian indicated that he did not have time to retrieve copies of the ordinances for the Complainant's review. The Complainant states that the Custodian provided access to three (3) memoranda from the CFO to Township Manager Mead. The Complainant states that he received copies of the three (3) memoranda and was advised by the Custodian that one (1) more memorandum would be provided at a later time.

The Complainant argues that the Custodian responded on the eighth (8<sup>th</sup>) business day after receipt of the Complainant's OPRA request, one (1) business day beyond the statutorily mandated seven (7) business day time frame. The Complainant argues that the Custodian also failed to address in his written response the portion of the request referring to the CFO's reports to the Township.

Additionally, the Complainant states that three (3) of the four (4) memoranda from the CFO were directed to the Township Manager and not the governing body, as was requested by the Complainant.

The Complainant argues that the Custodian also failed to disclose the twenty-nine (29) ordinances deemed to be responsive and available for review. Further, the Complainant argues that there is a disparity between the two (2) ordinances provided in response to the September 8, 2009 OPRA request compared to the twenty-nine (29) ordinances that Custodian identified as responsive to the October 5, 2009 OPRA request. The Complainant contends that until the ordinances are provided for inspection, the Complainant cannot determine whether they provide authorization for the CFO to act on the question of issuing bond anticipation notes. The Complainant notes that even if the ordinances are disclosed, the Complainant cannot tell whether same would satisfy his OPRA request.

The Complainant does not agree to mediate this complaint.

**November 10, 2009**

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

**November 12, 2009**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until November 24, 2009 to submit the requested SOI.

**November 13, 2009**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 24, 2009 to submit the requested SOI.

**November 24, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 5, 2009.
- Letter from the Custodian to the Complainant dated October 15, 2009.
- Letter from the Custodian to the Complainant dated October 21, 2009 attaching:
  - Memorandum from Township Manager Mead to the Township dated September 12, 2008.
  - Letter from the CFO to Township Manager Mead dated September 10, 2008.
  - Bond anticipation notes sheet dated September 18, 2008.
- Letter from the Custodian to the Complainant dated October 22, 2009 attaching:
  - C.M. No. 110 dated September 12, 2008.
  - Memorandum from the CFO to Township Manager Mead dated September 10, 2008 attaching a bond anticipation notes sheet dated September 18, 2008.
  - C.M. No. 22 dated February 5, 2009.
  - Memorandum from the CFO to Township Manager Mead dated February 4, 2009 attaching a bond anticipation notes sheet dated February 11, 2009.
  - C.M. No. 59 dated April 24, 2009.
  - Memorandum from the CFO to Township Manager Mead dated April 22, 2009 attaching a bond anticipation notes sheet dated April 30, 2009.
  - C.M. No. 120 dated July 23, 2009.
  - Memorandum from the CFO to Township Manager Mead dated July 22, 2009.

The Custodian states that although the Complainant asserted in the Denial of Access Complaint that only his October 5, 2009 OPRA request is at issue, the Complainant also includes arguments regarding his September 8, 2009 OPRA request. The Custodian states that he will briefly address the Complainant's September 8, 2009 OPRA request.

The Custodian states that the Complainant asserts in the Denial of Access Complaint that the Custodian did not respond to the September 8, 2009 OPRA request. The Custodian certifies that he responded in writing on September 15, 2009, stating that:

“[a]ccording to [the CFO], Ordinance No. 7-2005 (consisting of [4] pages) and Ordinance No. 26-2007 (consisting of 4 pages) are the documents responsive to your request. The two ordinances are available for your review, or duplication, if requested. Please advise if you would like to review these documents, or if you would like copies sent to you, in which case please submit payment of \$6.75.”

The Custodian certifies that the Complainant reviewed the two (2) ordinances on September 18, 2009. The Custodian certifies that in a letter to the Custodian dated September 18, 2009, the Complainant stated that his September 8, 2009 OPRA request was not satisfied. The Custodian certifies that in a letter to the Complainant dated



September 29, 2009, the Custodian advised the Complainant that according to the CFO the two (2) ordinances provided were responsive to the OPRA request.

The Custodian certifies that his search for the records responsive to the Complainant’s October 5, 2009 OPRA request included having a series of discussions with Township Counsel, the Deputy Manager and the CFO to determine which records would be responsive to the Complainant’s OPRA request. The Custodian certifies that he forwarded the Complainant’s October 5, 2009 OPRA request to the CFO on October 12, 2009; the CFO informed the Custodian on October 15, 2009 of the dates of the last four (4) bond anticipation note sales and the ordinances that gave him the authority to sell bond anticipation notes. The Custodian certifies that the CFO provided three (3) of the four (4) memoranda to the Custodian for disclosure on October 16, 2009. The Custodian certifies that he retrieved the fourth (4<sup>th</sup>) memorandum and provided it to the Complainant on October 21, 2009.

The Custodian also certifies that no records responsive to the Complainant’s October 5, 2009 OPRA request 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 the Complainant submitted his OPRA request to the Custodian at the Township’s October 5, 2009 Council meeting. The Custodian certifies that he initially responded in writing on October 15, 2009 and supplemented his response with two (2) additional letters on October 21, 2009 and October 22, 2009 respectively. The Custodian certifies that he provided access to the following records:

<b>Records Responsive</b>	<b>Records Provided</b>	<b>Legal Explanation for Denial of Access</b>
Ordinance No. 29-2007 (2 pages)	Yes. October 16, 2009	N/A
Ordinance No. 7-2005 (4 pages)	Yes. October 16, 2009	N/A
Ordinance No. 23-2006 (5 pages)	Yes. October 16, 2009	N/A
Ordinance No. 19-2007 (5 pages)	Yes. October 16, 2009	N/A
Ordinance No. 26-2007 (4 pages)	Yes. October 16, 2009	N/A
Ordinance No. 18-2007 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 13-2008 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 9-2005 (4 pages)	Yes. October 16, 2009	N/A
Ordinance No. 11-2005 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 22-2006 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 17-2007 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 18-2007 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 20-2007 (2 pages)	Yes. October 16, 2009	N/A
Ordinance No. 37-2007 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 5-2008 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 12-2008 (3 pages)	Yes. October 16, 2009	N/A
Ordinance No. 16-2008 (5 pages)	Yes. October 16, 2009	N/A
Ordinance No. 12-2009 (5 pages)	Yes. October 16, 2009	N/A
Ordinance No. 13-2009 (4 pages)	Yes. October 16, 2009	N/A
Ordinance No. 14-2009 (4 pages)	Yes. October 16, 2009	N/A

Ordinance No. 15-2009 (4 pages)	Yes. October 16, 2009	N/A
Memorandum dated February 4, 2009 (2 pages)	Yes. October 16, 2009	
Memorandum dated April 22, 2009 (2 pages)	Yes. October 16, 2009	N/A
Memorandum dated July 22, 2009 (1 page)	Yes. October 16, 2009	N/A
C.M. No. 110 dated September 12, 2008 (1 page)	Yes. October 21, 2009 (also provided again on October 22, 2009)	N/A
Memorandum dated September 12, 2008 (2 pages)	Yes. October 21, 2009	N/A
C.M. No. 22 February 5, 2009 (1 page)	Yes. October 22, 2009	N/A
C.M. No. 59 April 24, 2009 (1 page)	Yes. October 22, 2009	N/A
C.M. No. 120 dated July 23, 2009 (1 page)	Yes. October 22, 2009	N/A

The Custodian asserts that the Complainant came to the Township on October 16, 2009 to review the requested records. The Custodian certifies that the Complainant was supplied with a copy of the Custodian's written response at that time because the Complainant had not yet received it in the mail. The Custodian certifies that the Complainant was offered access to all of the ordinances referenced in the Custodian's response letter along with three (3) memoranda from the CFO to Township Manager Mead. The Custodian certifies that he informed the Complainant that the fourth (4<sup>th</sup>) memorandum would be provided once it was located.

The Custodian certifies that the Complainant served the Township with this complaint on October 19, 2009. The Custodian certifies that he provided the fourth (4<sup>th</sup>) memorandum to the Complainant under cover of letter on October 21, 2009. The Custodian certifies that he provided all four (4) memoranda from the CFO to Township Manager Mead and four (4) memoranda from Township Manager Mead to the Township Council (identified as C.M.) to the Complainant under cover of letter on October 22, 2009.

The Custodian contends that he responded in a timely manner. The Custodian states that the Township considers OPRA requests which are submitted after normal business hours as received on the next business day. The Custodian certifies that in this case, the Complainant placed his OPRA request in front of the Custodian's seat at a Council meeting three and one-half hours after normal close of business on October 5, 2009. The Custodian argues that the submission of the Complainant's OPRA request after hours equates to a submission on October 6, 2009; therefore, the statutorily mandated seven (7) business day time frame ended on October 15, 2009.

The Custodian contends that there was no denial of access to any of the records requested by the Complainant. The Custodian asserts that the letters sent to the Complainant on October 15, 2009, October 21, 2009 (with attachments) and October 22,

2009 (with attachments) constitutes a sufficient response under OPRA. The Custodian argues that the records pertaining to the sale of bond anticipation notes dated September 18, 2008 were sent to the Complainant on October 21, 2009 as promised during the Complainant's visit on October 16, 2009. Moreover, the Custodian argues that the records provided to the Complainant on October 22, 2009 pertained to each of the last four (4) dates of bond anticipation notes sales, as requested by the Complainant.

The Custodian notes that the Complainant argues in the Denial of Access Complaint that the Custodian did not satisfy his OPRA request and failed to comply with OPRA by not providing access to the ordinances and memoranda from the CFO to the Township. The Custodian asserts that the Complainant alleges that memoranda from the CFO to the Township should have been provided because (under the Complainant's interpretation of law) the Township "should" have required the memoranda to be between the CFO and the Township Council. Further, the Custodian notes that the Complainant argues that the three (3) memoranda initially provided were not responsive to the October 5, 2009 OPRA request because each was from the CFO to Township Manager Mead and not to the Township Council.

The Custodian certifies that contrary to the Complainant's interpretation of law, the Township's Council Manager form of government provides that a memorandum is directed from the CFO to the Township Manager, who then conveys it to the Township Council. The Custodian argues that even if the Complainant's interpretation of the law is correct thereby causing the Township's procedure to be improper, it does not constitute an OPRA issue. The Custodian argues that the GRC does not have the authority to adjudicate the way the Township does business.

The Custodian certifies that he provided all records responsive that existed. The Custodian certifies that no memoranda from the CFO to the Township Council existed; therefore, the Custodian could not have provided the records even if the Complainant believed they should have existed.

Moreover, the Custodian argues that the Complainant mischaracterized his visit to the Township on October 16, 2009. The Custodian asserts that the Complainant came to the Township unannounced while only the Custodian and a telephone receptionist were present. The Custodian asserts that because he was preparing for a Township Council meeting, he requested that the Complainant return at a time when more attention could be given to the Complainant's OPRA request. The Custodian asserts that the Complainant refused; thus, the Custodian stopped preparing for the meeting and attempted to gather the responsive ordinances and other documents for the Complainant's review. The Custodian asserts that he was able to locate most of the records responsive and then requested that the Complainant wait while the Custodian attempted to locate additional records from his office. The Custodian asserts that when he returned, he discovered that the Complainant had left the building.

The Custodian contends that a review of the records responsive to the Complainant's OPRA requests and numerous correspondence evidences the breadth and intensity of the Complainant's requests. The Custodian asserts that the evidence of record in this complaint and the many others that the Complainant has filed with the GRC

shows that the Complainant has monopolized the time of both the Custodian and one (1) part-time staffer hired to handle the Complainant's OPRA requests. The Custodian asserts that the Complainant's OPRA requests have become a detriment to the Township's normal operations and to other OPRA requestors.

The Custodian states that to illustrate the extent to which the Complainant has inundated the Township with OPRA requests and the extent to which the Custodian and staff have attempted to accommodate the Complainant, the Custodian would welcome the opportunity to present the GRC with an entire catalogue of the multitude of OPRA requests made by the Complainant, the Custodian's responses to each request and the records provided. The Custodian argues that he strongly disagrees with the Complainant's assertion that the Custodian, Counsel and Township Council have repeatedly knowingly and willfully violated OPRA based on the Township's attempts to accommodate the Complainant dating to before the inception of OPRA.

The Custodian further contends that the Township even hired another employee to assist the Custodian based on the number of requests submitted by the Complainant. The Custodian requests guidance as to how to handle the Complainant's requests in the future in order to avoid a substantial disruption of agency operations.

The Custodian reiterates that he provided the Complainant with all the records responsive to his October 5, 2009 OPRA request. The Custodian states that for all of the foregoing reasons, it is respectfully submitted that the Custodian did not violate OPRA.

### **November 30, 2009**

The Complainant's response to the Custodian's SOI. The Complainant asserts that he is not attempting to provide legal analysis or change the procedures and operations of the Township Council. The Complainant states that he based his October 5, 2009 OPRA request on the language of the bond ordinances provided by the Custodian in response to the Complainant's September 8, 2009 OPRA request. The Complainant states that specifically, Section 4 of those ordinances concludes with the following:

“the [CFO] is directed to report in writing to the Township Council of the Township at the meeting next succeeding the date when any sale or delivery of the notes pursuant to the ordinance is made. Such report must include the amount, the description, the interest rate and the maturity schedule of the Notes sold, the price obtained and the name of the purchaser.” *See* Ordinance No. 7-2005.

The Complainant notes that the Custodian clarified the Township's procedures after the filing of this Denial of Access Complaint.

The Complainant asserts that he did not include a copy of the Custodian's September 15, 2009 written response in the Denial of Access Complaint because he never received same. The Complainant notes that the Custodian also did not include a copy of this alleged response in the SOI.

The Complainant further argues that the Custodian failed to explain how the number of ordinances responsive grew from two (2) in the first (1<sup>st</sup>) OPRA request to twenty-nine (29) ordinances identified in the Custodian's response to the second (2<sup>nd</sup>) OPRA request.<sup>12</sup> The Complainant also questions why the Custodian failed to address the memorandum from the CFO to Township Manager Mead or from Township Manager Mead to the Township Council. Moreover, the Complainant notes that the Custodian provided access to the last memorandum from the CFO to Township Manager Mead and the four (4) memoranda from Township Manager Mead to the Township Council following receipt of this Denial of Access Complaint.

The Complainant argues that the Custodian confirms in the SOI that the records requested by the Complainant were not available for review within the seven (7) business days as prescribed by OPRA. The Complainant further argues that although the Custodian certified that he provided all records responsive that existed, the Custodian failed to state that all records were not provided until after the Custodian's receipt of this complaint. Additionally, the Complainant argues that the Custodian acknowledged in the SOI that the Complainant was seeking the reports made to the Township Council and not those memoranda from the CFO to the Township Manager initially provided to the Complainant.

The Complainant states that because the Custodian acknowledged consulting with Counsel prior to responding, the Complainant will defer to the GRC to decide whether the court's holding in Borough of Paramus v. Ian I. Shore, Docket No. BER-L-8240-08 (Law Div. January 12, 2009) has any application in this complaint.<sup>13</sup>

The Complainant notes that the Custodian's assertion in the SOI that the Complainant's September 8, 2009 OPRA request is not at issue in this complaint is erroneous: the September 8, 2009 OPRA request is part of this complaint.

Finally, the Complainant asserts that he disagrees with the Custodian's interpretation of the Complainant's visit to the Township on October 16, 2009. The Complainant asserts that he believes that the only relevant portion of the Custodian's recounting of the Complainant's visit to the Township is that in which the Custodian admits that the records purported to be available for inspection were not actually available.

### **January 5, 2011**

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that pursuant to a telephone conversation with the Complainant, he has informed the GRC in writing that the September 8, 2009 OPRA request is part of this complaint. The GRC states that the Custodian notes in the SOI that although he believed this OPRA request was not at issue in this complaint, the Custodian

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<sup>12</sup> The GRC notes that some of the ordinances identified in the Custodian's October 15, 2009 written response to the Complainant's October 5, 2009 OPRA request appear more than once. The evidence of record indicates that there were actually twenty-one (21) total ordinances responsive to the second (2<sup>nd</sup>) OPRA request.

<sup>13</sup> In Paramus, *supra*, the Borough sued the custodian for declining to allow counsel to review all OPRA requests and responses to same. The facts in Paramus, *supra*, are inapposite to the Custodian in this complaint consulting with Counsel; thus, Paramus, *supra*, does not apply to the instant complaint.

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responded in writing on September 15, 2009. The GRC states that the Custodian also noted that the Complainant failed to provide to the GRC in the Denial of Access Complaint a copy of the Custodian's September 15, 2009 written response.

The GRC requests that the Custodian provide a copy of his September 15, 2009 written response to the Complainant's September 8, 2009 OPRA request.

### **January 5, 2011**

E-mail from the Custodian to the GRC attaching a letter from the Custodian to the Complainant dated September 15, 2009. The Custodian states that attached is the September 15, 2009 written response requested by the GRC in its e-mail dated January 5, 2011.

### **February 10, 2011**

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that the Complainant confirmed to the GRC in his response to the SOI dated November 30, 2009 that the September 8, 2009 OPRA request submitted as part of the Denial of Access Complaint is part of the instant complaint.

The GRC states that in response to the September 8, 2009 OPRA request, the Custodian provided access to two (2) ordinances on September 15, 2009. The GRC states that the evidence of record indicates that the Complainant inspected said ordinances on September 18, 2009 and subsequently wrote to the Custodian stating that the ordinances did not satisfy his OPRA request. The GRC states that the Custodian wrote back to the Complainant on September 29, 2009 advising that according to the CFO, the two (2) ordinances were responsive to the Complainant's September 8, 2009 OPRA request. The GRC requests that the Custodian legally certify to the following:

1. Whether the two (2) ordinances provided to the Complainant's September 8, 2009 OPRA request represent all records responsive to said OPRA request?

The GRC requests that the Custodian provide the requested legal certification by close of business on February 14, 2011.

### **February 14, 2011**

Custodian's legal certification. The Custodian certifies that the two (2) ordinances made available to the Complainant for inspection were, as advised by the CFO, the only records responsive to the Complainant's September 8, 2009 OPRA request.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the records sought in the Complainant's two (2) OPRA requests?**

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.

Further, OPRA provides that:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person *during regular business hours...*” N.J.S.A. 47:1A-5.a.

OPRA provides that:

“...[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.

Complainant's September 8, 2009 OPRA request:

The GRC first addresses whether the Custodian responded in a timely manner to the Complainant's September 8, 2009 OPRA request.

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>14</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 (October 2007).

When a Denial of Access Complaint is filed, a custodian of record must bear the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. As previously discussed, if a custodian fails to respond in writing within the statutorily mandated time frame, said failure results in a "deemed" denial of access. In complaints where it appears that a "deemed" denial may have occurred, the burden rests on the custodian to prove that he/she responded in a timely manner.

According to OPRA, a custodian is required to allow for inspection or copying of government records "during regular business hours." N.J.S.A. 47:1A-5.a. Therefore, if an OPRA request is received after "regular business hours" it is reasonable to conclude that the OPRA request is technically received on the next business day pursuant to N.J.S.A. 47:1A-5.a. Moreover, OPRA provides that a custodian must respond to an OPRA request "not later than seven business days after receiving the request." N.J.S.A. 47:1A-5.i. In determining whether the seven (7) business days have expired, the GRC has turned to Court Rule 1:3-1 of the New Jersey Rules of the Court, which provides that "... the day of the act or event from which the designated period begins to run is not to be included." *Id.* Thus, the statutorily mandated seven (7) business day time frame begins on the first business day after the date of receipt of an OPRA request.<sup>15</sup>

Based on the foregoing, if an OPRA request is received after normal business hours, then it is considered officially received on the following business day. Moreover,

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<sup>14</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.

<sup>15</sup> If an OPRA request is received on a Monday, the time frame begins on a Tuesday. The GRC notes that if requests are received on Friday after business hours or any time during the weekend, the time period still begins on Tuesday because the Custodian would not receive the request until Monday.



the seven (7) business day time frame would not begin until the day after official receipt of the OPRA request. *See* N.J.S.A. 47:1A-5.a. and Court Rule 1:3-1.

In the instant complaint, the evidence of record indicates that the Complainant submitted his first (1<sup>st</sup>) OPRA request to the Custodian at a September 8, 2009 Council meeting after normal business hours. Based on the foregoing, the OPRA request is considered to have been received on September 9, 2009 and the statutorily mandated seven business day time period for the Custodian to respond elapsed on September 18, 2009. The Custodian certified in the SOI that he responded in writing to the Complainant on September 15, 2009, or four (4) business days following receipt of the Complainant's OPRA request and subsequently provided to the GRC a copy of his September 15, 2009 written response at the GRC's request.<sup>16</sup>

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has borne his burden of proving that he responded in writing within the statutorily mandated seven (7) business days as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Specifically, the Custodian received the Complainant's September 8, 2009 OPRA request on September 9, 2009 and responded in writing on the fourth (4<sup>th</sup>) business day after receipt of same. *See* N.J.S.A. 47:1A-5.a.

The GRC next addresses whether the Custodian unlawfully denied access to the requested records.

In response to the Complainant's first (1<sup>st</sup>) OPRA request, the Custodian certified in the SOI that he responded in writing to the Complainant on September 15, 2009 stating that two (2) ordinances were available for review and the Complainant inspected said ordinances on September 18, 2009. The Complainant wrote to the Custodian on September 18, 2009 stating that the two (2) ordinances did not satisfy his OPRA requests. The Custodian wrote to the Complainant on September 29, 2009 stating that, according to the CFO, the ordinances provided were the records responsive to the Complainant's first (1<sup>st</sup>) OPRA request. The Complainant wrote to the Custodian on October 5, 2009 and noted that he incorrectly assumed the sale of bond anticipation notes was negotiated. The Complainant filed a Denial of Access Complaint alleging only that the Custodian failed to respond in a timely manner.

The Complainant subsequently argued in his response to the SOI dated November 30, 2009 that the Custodian failed to explain in the SOI how only two (2) ordinances were responsive to the Complainant's first (1<sup>st</sup>) OPRA request but twenty-nine (29) ordinances were responsive to the Complainant's second (2<sup>nd</sup>) OPRA request.<sup>17</sup>

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<sup>16</sup> The GRC notes that the Complainant asserted in a letter to the GRC on November 30, 2009 that he did not forward a copy of the Custodian's September 15, 2009 written response because he never received same. However, the Custodian certified in the SOI that he responded in writing on September 15, 2009 and subsequently provided his written response to the GRC on January 5, 2011.

<sup>17</sup> There is no evidence in the record to indicate that the additional ordinances provided in response to the Complainant's October 5, 2009 OPRA request were also responsive to the Complainant's September 8, 2009 OPRA request. Additionally, although each of the Complainant's two (2) OPRA requests seek similar types of records, the September 8, 2009 OPRA request narrows the scope of the request to the new municipal complex while the October 5, 2009 OPRA request seeks a broader range of resolutions and reports for the last four (4) bond anticipation notes.

On February 10, 2011, the GRC requested that the Custodian certify to whether the two (2) ordinances represented all records responsive to the Complainant's first (1<sup>st</sup>) OPRA request. The Custodian responded on February 14, 2011 certifying that the two (2) ordinances responsive represent all records responsive to the Complainant's first (1<sup>st</sup>) OPRA request.

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.” *Id.*

In this complaint, the Custodian certified on February 14, 2011 that the two (2) ordinances provided in response to the Complainant's September 8, 2009 OPRA request represent all records responsive and there is no credible evidence in the record to refute the Custodian's certification.

Therefore, because the Custodian responded timely and in writing, granting access to two (2) ordinances and subsequently certifying to the GRC that he provided all records responsive to the Complainant's September 8, 2009 OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Burns, *supra*.

#### Complainant's October 5, 2009 OPRA request:

The Complainant submitted his second (2<sup>nd</sup>) OPRA request on October 5, 2009, stating that he was seeking “resolution(s) giving power to the [CFO] to award bonds in accordance with the public sale of the previous four (4) bond anticipation notes/bonds...” in the instance that the Custodian had considered that the last four (4) bond anticipation notes were not included as part of the Complainant's first (1<sup>st</sup>) OPRA request. The Complainant also requested the report required to be created by the CFO for each award.

The Custodian initially responded in writing on October 15, 2009 granting access to the following ordinances and documentation:

- Notes dated September 18, 2008 sold to fund Ordinance No. 29-2007.
- Notes dated February 11, 2009 sold to fund Ordinance No. 7-2005, 23-2006, 19-2007, 26-2007, 18-2007 and 13-2008.

- Notes dated April 30, 2009 sold to fund Ordinance No. 7-2005, 9-2005, 11-2005, 22-2006, 23-2006, 17-2007, 18-2007, 19-2007, 20-2007, 26-2007, 37-2007, 5-2008, 12-2008, 13-2008 and 16-2008.

Notes dated July 30, 2009 sold to fund Ordinance No. 26-2007, 29-2007, 13-2008, 12-2009, 13-2009, 14-2009 and 15-2009

The Custodian subsequently provided access to additional records on October 21, 2009 and October 22, 2009.

The Custodian certified in the SOI that the Complainant submitted his second (2<sup>nd</sup>) OPRA request at an October 5, 2009 Council meeting three and a half hours after the Township's normal close of business. As previously discussed in regard to the Complainant's September 8, 2009 OPRA request, the date of the Custodian's receipt of the OPRA request is therefore October 6, 2009 and the Custodian's statutorily mandated seven (7) business day time period to respond elapsed on October 16, 2009. The evidence of record indicates that the Custodian responded to said OPRA request on October 15, 2009, or six (6) business days after receipt of the Complainant's OPRA request.

However, the Custodian's response to this OPRA request differs from the Custodian's handling of the Complainant's September 8, 2009 OPRA request. Specifically, the Custodian responded in writing within the statutorily mandated seven (7) business day time frame granting access to ordinances and documentation regarding the last four (4) bond anticipation notes; however, the Custodian only provided for inspection on October 16, 2009 the ordinances and three (3) of four (4) memoranda. The Custodian subsequently provided the remainder of the records responsive on October 21, 2009 and October 22, 2009, which was beyond the statutorily mandated seven (7) business day time frame to respond.

OPRA provides that a custodian must respond in writing within the statutorily mandated seven (7) business day time frame granting access, denying access, seeking clarification or requesting an extension of time. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, 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. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The facts of this complaint present a unique situation in which although the Custodian responded to the Complainant's October 5, 2009 OPRA request in writing granting access to records on the sixth (6<sup>th</sup>) business day after receipt of the request, the Custodian ultimately failed to provide all records responsive at the time of the Complainant's inspection on October 16, 2009. Because the Custodian responded in writing to the OPRA request granting access to all records responsive to the Complainant's request, the Custodian should have provided all records responsive for inspection on October 16, 2009; however, the Custodian only provided access to three (3) of the four (4) memoranda deemed to be responsive and the ordinances responsive and

did not provide access to the remaining memoranda until October 21, 2009 and October 22, 2009.

Therefore, the Custodian has unlawfully denied access to the records responsive that he failed to provide on October 16, 2009 because the Custodian should have provided all records he deemed to be responsive and available in his written response to the Complainant dated October 15, 2009. Additionally, the Custodian failed to bear his burden of proving that access to those records provided on October 21, 2009 and October 22, 2009 could not have been provided as part of the Complainant's inspection on October 16, 2009. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of any records because the Custodian certified in the SOI that he provided access to all records responsive to the Complainant's October 5, 2009 OPRA request on October 16, 2009, October 21, 2009 and October 22, 2009.

Finally, the GRC notes that the Complainant raised the issue that the Custodian failed to initially address whether memoranda from the CFO to the Township Council exist. The Complainant stated that the Custodian clarified the Township's procedures (that the CFO sends a memo to the Township Manager who then sends a memo identified as C.M. to the Township Council) after the filing of this Denial of Access Complaint. The GRC notes that it does not have the authority to determine whether a Township is following procedures set forth by ordinance. N.J.S.A. 47:1A-7.b.

**Whether the Custodian's delay in access to the records sought in the Complainant's October 5, 2009 OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Larry A. Kohn v. Township of Livingston (Essex), 2009-289 – Findings and Recommendations of the Executive Director

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)).

Regarding the Complainant's October 5, 2009 OPRA request, the Custodian unlawfully denied access to those records for which access was not provided until October 21, 2009 and October 22, 2009; however, the Custodian responded in writing to the Complainant's September 8, 2009 OPRA request in a timely manner and provided access to all records responsive and ultimately provided access to all records responsive to the Complainant's October 5, 2009 OPRA request. 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne his burden of proving that he responded in writing within the statutorily mandated seven (7) business days as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Specifically, the Custodian received the Complainant's September 8, 2009 OPRA request on September 9, 2009 and responded in writing on the fourth (4<sup>th</sup>) business day after receipt of same. *See* N.J.S.A. 47:1A-5.a.
2. Because the Custodian responded timely and in writing, granting access to two (2) ordinances and subsequently certifying to the GRC that he provided all records responsive to the Complainant's September 8, 2009 OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian has unlawfully denied access to the records responsive that he failed to provide on October 16, 2009 because the Custodian should have provided all records he deemed to be responsive and available in his written response to the Complainant dated October 15, 2009. Additionally, the Custodian failed to bear his burden of proving that access to those records provided on October 21, 2009 and October 22, 2009 could not have been provided as part of the Complainant's inspection on October 16, 2009. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of any records because the Custodian certified in the Statement of Information that he provided access to all records responsive to the Complainant's October 5,

2009 OPRA request on October 16, 2009, October 21, 2009 and October 22, 2009.

4. Regarding the Complainant's October 5, 2009 OPRA request, the Custodian unlawfully denied access to those records for which access was not provided until October 21, 2009 and October 22, 2009; however, the Custodian responded in writing to the Complainant's September 8, 2009 OPRA request in a timely manner and provided access to all records responsive and ultimately provided access to all records responsive to the Complainant's October 5, 2009 OPRA request. 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

April 20, 2011