



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Acting Commissioner*

**FINAL DECISION**

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

Jacqueline Andrews  
Complainant

Complaint Nos. 2008-232, 2008-243 and 2009-39

v.

Township of Irvington (Essex)  
Custodian of Record

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

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

Final Decision Rendered by the  
Government Records Council  
On The 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 27, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jacqueline Andrews<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-232, 2008-243 &  
2009-39 (Consolidated)**

v.

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

**Records Relevant to Complaint:** Various

**Requests Made:** Various

**Response Made:** Various

**Custodian:** Harold E. Wiener, Municipal Clerk

**GRC Complaint Filed:** Various

**Background**

**September 30, 2009**

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Council considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 17:27*, [these] complaint[s] should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

**October 5, 2009**

Council's Interim Order distributed to the parties.

**August 23, 2010**

Complaints transmitted to the Office of Administrative Law.

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

<sup>2</sup> Represented by Evans Anyanwu, Esq., of Township of Irvington Legal Department (Irvington, NJ).  
Jacqueline Andrews v. Township of Irvington (Essex), 2008-232, 2008-243 & 2009-39 (Consolidated) – Supplemental Findings and Recommendations of the Executive Director

**March 20, 2012**

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

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

Therefore, the ALJ:

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

#### **Analysis**

No analysis is required.

#### **Conclusions and Recommendations**

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

Prepared By: Dara Lownie  
Communications Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 18, 2012



**Decision Distribution Date: October 6, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 30, 2009 Council Meeting**

**Jacqueline Andrews<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-232; 2008-243; 2009-39  
(Consolidated)**

**v.**

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

**Records Relevant to Complaint:** Various

**Requests Made:** Various

**Response Made:** Various

**Custodian:** Harold E. Wiener, Municipal Clerk

**GRC Complaint Filed:** Various

**Background**

**June 23, 2009**

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties in the matter of Jacqueline Andrews v. Township of Irvington (Essex), GRC Complaint No. 2008-232. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s February 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council’s Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council’s February 25, 2009 Interim Order and is therefore in contempt of said Order.
  
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s February 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.

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

<sup>2</sup> Represented by Willie L. Parker, Esq., of Township of Irvington Legal Department (Irvington, NJ).

3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

At the same meeting, the Council considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties in the matter of Jacqueline Andrews v. Township of Irvington (Essex), GRC Complaint No. 2008-243. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's March 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's March 25, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's March 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

### **August 11, 2009**

At the August 11, 2009 public meeting, the Council considered the August 4, 2009 Supplemental Findings and Recommendations of the Executive Director in the matter of Jacqueline Andrews v. Township of Irvington (Essex), GRC Complaint No. 2009-29, 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. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's June 11, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

### **Analysis**

OPRA provides that:

“[t]he right to institute any proceeding under this section shall be solely that of the requestor. *Any such proceeding shall proceed in a summary or expedited manner.* The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” (Emphasis added). N.J.S.A. 47:1A-6.e.

OPRA further provides that:

“[i]f the council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the ‘Administrative Procedure Act’ ...” N.J.S.A. 47:1A-7.e.

The Council's regulations provide that:



“[t]he rules in this chapter shall be liberally construed to permit the Council to discharge its statutory function.” *N.J.A.C. 5:105-1.2*

The Council’s regulations also provide that:

“[i]n response to the complaint before it, the Council may raise issues and defenses pertaining to that complaint on a *sua sponte* basis if it deems such action appropriate or necessary and if said action on behalf of the Council would be in the interest of furthering the provisions and intent of [OPRA].” *N.J.A.C. 5:105-1.6(h)*.

The Council’s regulations further provide that:

“[i]f the Council is unable to make a determination as to the accessibility of a record based upon the complaint and the custodian's response thereto, the Council may conduct a hearing, pursuant to N.J.S.A. 47:1A-7.e, and in conformity with the rules provided for administrative hearings by a public agency in contested cases pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, insofar as they may be applicable and practicable.” *N.J.A.C. 5:105-2.7*.

The Council’s regulations also provide that “[t]he Council, at its own discretion, may reconsider any decision it renders.” *N.J.A.C. 5:105-2.10(a)*.

In all of these consolidated matters, the Custodian failed to file a Statement of Information and failed to respond to several requests for same from the GRC. The Council ordered that enforcement proceedings be instituted in the Superior Court of New Jersey, Law Division, to require the Custodian to make such filings to the GRC.

The Council is required, however, to dispose of Denial of Access Complaints in a summary or expedited manner pursuant to N.J.S.A. 47:1A-6.e.. Referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is therefore in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

Therefore, because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform

Administrative Procedures Rules, *N.J.A.C. 1:1*, this complaint should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, this complaint should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

Prepared By: Karyn G. Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

September 23, 2009



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

**JON S. CORZINE**  
*Governor*

**CHARLES A. RICHMAN**  
*Acting Commissioner*

**INTERIM ORDER**

**August 11, 2009 Government Records Council Meeting**

Jacqueline Andrews  
Complainant

Complaint No. 2009-39

v.

Township of Irvington (Essex)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s June 11, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council’s Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council’s June 11, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s June 11, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence of record, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.



Interim Order Rendered by the  
Government Records Council  
On The 11<sup>th</sup> Day of August, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: August 14, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jacqueline Andrews<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-39**

v.

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

**Records Relevant to Complaint:** Names of events and corresponding invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to present.<sup>3</sup>

**Request Made:** December 29, 2008

**Response Made:** March 11, 2009

**Custodian:** Harold Wiener

**GRC Complaint Filed:** January 27, 2009<sup>4</sup>

**Background**

**June 11, 2009**

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

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

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

<sup>2</sup> Represented by Willie Parker, Esq., of Irvington Township Law Department (Irvington, NJ).

<sup>3</sup> Complainant requested additional records which are not the subject of this complaint.

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

2. Because the Custodian failed to immediately grant or deny access to the requested bills and vouchers, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. The Council knows of no factual or legal basis to exempt the disclosure of invoices for photography services as requested in this matter. **Therefore, the Custodian shall disclose to the Complainant all invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to December 29, 2008 pursuant to N.J.S.A. 47:1A-5.e.**
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.**
5. 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.

#### **June 12, 2009**

Council's Interim Order distributed to the parties.

#### **June 12, 2009**

Letter from Custodian to Custodian's Counsel.<sup>6</sup> The Custodian encloses a copy of the Council's June 11, 2009 Interim Order. The Custodian states that said Order requires the Township to provide records to the Complainant within five (5) business days from receipt of the Order. The Custodian requests Counsel's immediate attention and reply to said Order.

#### **July 2, 2009**

Custodian's Certification. The Custodian certifies that he has put a system into place regarding the acceptance of OPRA requests. The Custodian certifies that if a requested record is in the possession of the Municipal Clerk's Office and is not exempt from disclosure, the Custodian provides the requestor immediate access to the record. The Custodian certifies that if the requested record is not physically maintained in the Clerk's Office, the Custodian forwards the OPRA request to the municipal official who maintains custody of the requested records with a directive to provide said records to the requestor within the statutorily mandated seven (7) business days. The Custodian certifies that he sends subsequent requests to the municipal officials who maintain physical custody of the requested records when he receives notice from the requestor that the records have not been provided. The Custodian asserts that he has done everything in his power to provide requestors with any and all records requested under OPRA.

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<sup>5</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>6</sup>The Custodian also forwarded said letter to the Revenue and Finance Director, Faheem J. Ra'Oof. Jacqueline Andrews v. Township of Irvington (Essex), 2009-39 – Supplemental Findings and Recommendations of the Executive Director 2

## Analysis

### **Whether the Custodian complied with the Council's June 11, 2009 Interim Order?**

On June 12, 2009, the date the GRC distributed the Council's Interim Order to the parties via e-mail and UPS Next Day Air®, the Custodian forwarded said Order to the Assistant Township Attorney and also copied the Revenue and Finance Director. In said letter, the Custodian requests Counsel's immediate attention and reply to said Order. The GRC has not received any additional correspondence from the Custodian in response to the Council's Interim Order.

The Council's June 11, 2009 Interim Order specifically directed the Custodian to disclose to the Complainant all invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to December 29, 2008 within five (5) business days from receipt of the Council's Order. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

To date, the GRC has not received any written notification that the Custodian provided the Complainant with the requested records. The GRC has also not received any certified confirmation of compliance from the Custodian. The GRC did receive a certification from the Custodian dated July 2, 2009; however, said certification does not provide any specific details regarding this instant complaint.

Therefore, because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's June 11, 2009 Interim Order and is therefore in contempt of said Order.

Moreover, because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.

### **Whether the Custodian'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 provides that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, 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:

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86 (App. Div. 1996) at 107).

In this matter, the Custodian demonstrated a pattern of behavior inconsistent with the duties statutorily imposed upon municipal custodians under OPRA. Specifically,

- The Custodian failed 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 resulting in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
- The Custodian failed to immediately grant or deny access to the requested bills and vouchers, request additional time to respond, or request clarification of the request, and thus violated N.J.S.A. 47:1A-5.e.
- The Custodian failed to respond to the GRC’s request for a Statement of Information, despite being granted an extension of time.
- The Custodian failed to comply with the terms of the Council’s June 11, 2009 Interim Order.

Based on the evidence of record, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the



Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, and because the Custodian has failed to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's June 11, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's June 11, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence of record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009



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

JON S. CORZINE  
Governor

JOSEPH V. DORIA, JR.  
Commissioner

INTERIM ORDER

June 11, 2009 Government Records Council Meeting

Jacqueline Andrews  
Complainant

Complaint No. 2009-39

v.

Township of Irvington (Essex)  
Custodian of Record

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

1. The Custodian’s and Custodian’s Counsel’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to immediately grant or deny access to the requested bills and vouchers, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. The Council knows of no factual or legal basis to exempt the disclosure of invoices for photography services as requested in this matter. **Therefore, the Custodian shall disclose to the Complainant all invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to December 29, 2008 pursuant to N.J.S.A. 47:1A-5.e.**
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously**



**provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**

5. 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 11<sup>th</sup> Day of June, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: June 12, 2009**

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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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jacqueline Andrews<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-39**

**v.**

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

**Records Relevant to Complaint:**

Names of events and corresponding invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to present.<sup>3</sup>

**Request Made:** December 29, 2008

**Response Made:** March 11, 2009

**Custodian:** Harold Wiener

**GRC Complaint Filed:** January 27, 2009<sup>4</sup>

**Background**

**December 29, 2008**

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

**December 29, 2008**

Memorandum from the Custodian to Township Revenue & Finance Director, Township Purchasing Agent and Township Urban Enterprise Zone Coordinator with copy to the Complainant. The Custodian attaches the Complainant's OPRA request and asks the persons named to respond directly to the Complainant within seven (7) business days and copy the Custodian.

**January 23, 2009**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA request dated January 16, 2009.<sup>5</sup>

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

<sup>2</sup> Represented by Willie Parker, Esq., of Irvington Township Law Department (Irvington, NJ).

<sup>3</sup> Complainant requested additional records which are not the subject of this complaint.

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

<sup>5</sup> The Complainant subsequently submits a copy of the Custodian's December 29, 2008 Memorandum. Jacqueline Andrews v. Township of Irvington (Essex), 2009-39 – Findings and Recommendations of the Executive Director

The Complainant asserts that the only response to her OPRA request that she received was a copy of the letter from the Custodian to the departments asking them to respond.

The Complainant did not agree to mediate this complaint.

**February 10, 2009**

Request for the Statement of Information sent to the Custodian.

**February 10, 2009**

Letter from the Custodian to Custodian's Counsel, Willie Parker, Esq., Assistant Township Attorney. The Custodian encloses the SOI and the entire file related to the Complainant's December 29, 2008, OPRA request. The Custodian states that Mr. Parker's immediate attention and proper response to the GRC is required.

**February 18, 2009**

Telephone call from Custodian's Counsel to the GRC. Counsel requests an extension of time to provide the SOI. The GRC grants a five (5) day extension of time for the Custodian to provide the SOI and requests that Counsel send a confirming e-mail to the GRC with a copy to the Complainant.

**February 18, 2009**

Facsimile from the GRC to Custodian's Counsel. The GRC confirms that a five (5) business day extension has been granted to submit the SOI and that same is now due on February 27, 2009.

**March 9, 2009**

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on February 10, 2009, and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**March 9, 2009**

Letter from the Custodian to Custodian's Counsel. The Custodian encloses the GRC's March 9, 2009 "No Defense" letter. The Custodian notes that the GRC's letter requires the Township to provide a Statement of Information within three (3) business days and states that Counsel's immediate attention is necessary and required.

**March 11, 2009**

E-mail from Custodian's Counsel to the Complainant. Custodian's Counsel responds to the Complainant's OPRA request on the forty-eighth (48<sup>th</sup>) business day following receipt of such request. Counsel states that the information requested from Ward Studios was available for pick up on this date.

**March 11, 2009**

E-mail from the Complainant to Custodian’s Counsel. The Complainant states that this is the first notice regarding the availability of the requested documents. The Complainant requests one (1) week to come in for an on-site inspection.

**March 12, 2009**

E-mail from Custodian’s Counsel to the Complainant. Counsel grants a one (1) week extension to inspect the documents.

**March 13, 2009**

E-mail from the GRC to the Custodian and Custodian’s Counsel with copy to the Complainant. The GRC informs the Custodian and Custodian’s Counsel that disclosing the requested documents at this time does not change the fact that the Custodian has failed to provide the GRC with a Statement of Information in the present complaint.

**March 16, 2009**

Letter from the Custodian to Custodian’s Counsel. The Custodian encloses the GRC’s March 13, 2009 e-mail which indicates that the SOI has still not been provided. The Custodian advises Counsel to contact the GRC to resolve this matter.

**March 27, 2009**

E-mail from the Complainant to the GRC. The Complainant states that the document she received in response to her OPRA request was a list of photography services and not the invoices as requested. Complainant states that she requires the specifics for each job such as the name of the event.

**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 states that:

“*[i]mmediate* access ordinarily shall be granted to budgets, *bills*, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA further provides that:

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

OPRA also states 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.

The Custodian responded to the Complainant’s OPRA request by sending her a copy of the memorandum he sent to three (3) township employees. The Custodian attached the Complainant’s OPRA request and asked the persons named in the memorandum to respond directly to the Complainant within seven (7) business days.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an

extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the matter before the Council, the Custodian’s written response on the day the request was received is legally insufficient since it neither grants nor denies access to the requested records. Subsequently, the Custodian’s Counsel responded in writing on the forty-eighth (48<sup>th</sup>) business day granting access to the records requested. However, the records which were provided to the Complainant were not the invoices requested in the OPRA request. See Hyman v. City of Jersey City, GRC Complainant No. 2007-118 (March 2009) (The Custodian responded in writing to the Complainant on the first (1<sup>st</sup>) business day from receipt of the OPRA request. The Custodian informed the Complainant that his OPRA request had been disseminated to the appropriate city offices. However, the Council found that the Custodian’s response was insufficient under OPRA).

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

Additionally, the invoices and bills requested are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In David Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required timeframe, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Therefore, because the Custodian failed to immediately grant or deny access to the requested bills and vouchers, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.

Although, the Custodian and the Custodian’s Counsel failed to respond to the GRC’s request for a Statement of Information, nor did they submit any evidence in this matter, the Council knows of no factual or legal basis to exempt the disclosure of invoices for photography services as requested in this matter. Therefore, the Custodian shall disclose to the Complainant all invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to December 29, 2008 pursuant to N.J.S.A. 47:1A-5.e.



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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's and Custodian's Counsel's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to immediately grant or deny access to the requested bills and vouchers, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. The Council knows of no factual or legal basis to exempt the disclosure of invoices for photography services as requested in this matter. **Therefore, the Custodian shall disclose to the Complainant all invoices for photography services by Ward Studios and/or Reggie Ward from January 2008 to December 29, 2008 pursuant to N.J.S.A. 47:1A-5.e.**
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>6</sup>, to the Executive Director.**
5. 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: Elizabeth Ziegler-Sears, Esq.  
Case Manager/Staff Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director  
May 20, 2009

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<sup>6</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."  
Jacqueline Andrews v. Township of Irvington (Essex), 2009-39 – Findings and Recommendations of the Executive Director