



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Costantino Colasante
Complainant

Complaint No. 2010-18

v.

County of Bergen
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Although the Council is not satisfied that the Custodian’s Counsel established the necessary criteria for reconsideration pursuant to Cummings, supra; D’Atria, supra; In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003), in light of the clarification presented by the Custodian’s Counsel, the GRC will grant the motion for reconsideration.
2. Counsel’s argument that the Custodian’s vacation constituted extraordinary circumstances which prevented the Custodian from complying with the terms of the Council’s September 27, 2011 Interim Order in a timely manner is not persuasive and does not excuse the Custodian from complying with the terms of said Order in a timely manner. As such, Paragraph 1 of the Council’s January 31, 2012 Interim Order shall remain unchanged.
3. Because the Custodian made clear that a memorandum of authorization is identical to a change order in its purpose and there was no credible evidence proffered to dispute such clarification, and because the evidence of record reveals the Custodian disclosed to the Complainant memoranda of authorization which he determined were responsive to the Complainant’s request along with e-mail correspondence related to said memoranda, the Custodian by disclosing those records did not unlawfully deny access to the change order but rather disclosed records equivalent to the change order and thereby complied with the Council’s September 27, 2011 Interim Order. Any finding by the Council hereunder which is inconsistent with this determination is hereby abrogated.



4. The Custodian failed to respond in writing to the Complainant's January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a "deemed" denial of the Complainant's request and the Custodian's untimely response to the Complainant's OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial of each. The Custodian also failed to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance. However, the Custodian did disclose to the Complainant the records ordered for disclosure pursuant to the Council's September 27, 2011 Interim Order. As such, it is concluded upon reconsideration that although the Custodian did not at all times act in full compliance with the provisions of OPRA, 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. Any finding by the Council hereunder which is inconsistent with this determination is hereby abrogated.

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 31st Day of July, 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: August 7, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Costantino Colasante¹
Complainant**

GRC Complaint No. 2010-18

v.

**County of Bergen²
Custodian of Records**

Records Relevant to Complaint: Examination of all records regarding the exterior renovation of stairs and retaining walls to the William Carlos Williams Center for the Performing Arts, 15 Sylvan Avenue, Rutherford, NJ, specifically the minutes of the pre-bid meeting that took place on Tuesday, April 21, 2009, along with any RFI submitted by any bidders.

Request Made: January 11, 2010

Response Made: January 11, 2010

Custodian: John Cascone

GRC Complaint Filed: January 22, 2010³

Background

January 31, 2012

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed and refused to comply with the terms of the Council’s September 27, 2011 Interim Order within the time provided for such compliance, Custodian John Cascone, is in contempt of said Order.
2. Based on the inconclusive evidence in this matter, the Council is unable to determine whether, by disclosing the Memorandums of Authorization, the Custodian unlawfully denied access to the Change Order. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. *See Semprevivo v. Pinelands Regional School District Board of Education*, GRC Complaint No. 2007-135 (October 2008).

¹ No legal representation listed on record.

² Represented by John P. Libretti, Esq. (Hackensack, NJ).

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

3. The Custodian failed to respond in writing to the Complainant's January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a "deemed" denial of the Complainant's request. The Custodian's response to the Complainant's OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial of each. The Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order. The Custodian also failed and refused to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance. Therefore, it is possible that Custodian John Cascone'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.

February 3, 2012

Council's Interim Order distributed to the parties.⁴

February 17, 2012

Custodian's request for reconsideration of the Council's Interim decision dated February 3, 2012. Counsel asserts extraordinary circumstances and mistake as the reasons for reconsideration.

Counsel states that the agency received the Council's September 27, 2011 Interim Order on October 3, 2011; however, Counsel states that extraordinary circumstances were present in that both the Custodian and the Custodian's Counsel were on vacation at the time the Order was received by Bergen County ("County") and the Custodian did not personally learn of the Order until after the time provided for compliance had expired. Counsel states that once the Custodian returned from vacation and became aware of the Council's Order, he disclosed the requested records to the Complainant in compliance with said Order.

Counsel further argues that, despite the fact the requested records were disclosed to the Complainant, the Complainant continues to insist that the Custodian denied him the requested records; to wit, a change order. Counsel states that although in the construction industry changes to contracted work are usually accomplished via change orders, this is not the case with the County. The Custodian's Counsel states that when the County bids a project it puts a contingency allowance in its contracts to cover any unforeseen changes in the contracted work and the contingency is encumbered in the contract amount and approved by the governing body at the time the contract is awarded by resolution. Counsel states that thereafter, the County uses memoranda of authorization to deduct

⁴ UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on February 6, 2012 at 10:04 a.m.

monies from the contingency allowance when necessary and that a memorandum of authorization is identical to a change order in its purpose but is used instead of a change order. Counsel states that a change order is only issued when the contingency is depleted and additional work is required. Counsel further states that in the project for which the Complainant requested records, the contingency allowance was not depleted and therefore a change order was never issued.

Counsel asserts that the only records responsive to the Complainant's request were the memoranda of authorization that were disclosed to the Complainant in compliance with the Council's September 27, 2011 Interim Order. Counsel states that the Custodian did, in fact, certify to the existence of a change order in his certification dated October 18, 2011; however, the Custodian meant the memoranda of authorization. The Custodian's Counsel states that that the Council was therefore mistaken in its findings that the Custodian failed to comply with the Order, because the Custodian did comply with the Council's September 27, 2011 Interim Order by disclosing to the Complainant the Memorandum for Authorization No. 1 William Carlos Williams Center, Memorandum for Authorization No. 1 for the William's Project, and the final payment voucher for the contractor.

Counsel further argues that the Council was mistaken in its finding that the Custodian's actions in his initial response to the Complainant's OPRA request amounted to a knowing and willful violation of OPRA; therefore, Counsel argues that the request for reconsideration should be granted.⁵

March 1, 2012

Letter from the Complainant to the GRC. The Complainant files his objections to the Custodian's request for reconsideration. The Complainant makes the following argument:

1. The Custodian's Counsel, who is the Deputy County Counsel, is not the legal counsel responsible for representing the Custodian in this complaint.
2. The Custodian did not respond to the Complainant's OPRA request in a timely manner; therefore, the Custodian did not act diligently. Further, the Custodian's response to the OPRA request was legally insufficient and therefore the Custodian's actions were intentional and deliberate with knowledge of their wrongfulness.
3. Counsel failed to support his allegation of mistake for requesting reconsideration with an explanation.

⁵ Counsel provides a narrative explaining why the Custodian did not intentionally violate OPRA by failing to respond to the Complainant's request in writing within the statutorily-mandated period; however, it is not necessary to set forth Counsel's argument at length because the Council did not make a finding that the Custodian's actions amounted to a knowing and willful violation of OPRA. In its January 31, 2012 Interim Order, the Council stated that it is *possible* that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness and the Council referred the complaint 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.

4. Extraordinary circumstances did not prevent the custodian from complying with the Council's September 27, 2011 Interim Order in a timely manner and the evidence does not support the Custodian's allegation that he was unavailable at the time the Complainant submitted his OPRA request.

The Complainant states that for all of the reasons he listed, the Custodian's request for reconsideration should be denied.⁶

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's Interim Order dated January 31, 2012?

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

In the matter before the Council, the evidence of record reveals that the Council's Interim Order dated January 31, 2012 was received by the Custodian on February 6, 2012 and that the Custodian's Counsel submitted his request for reconsideration of the Council's Order on February 17, 2012, which is the ninth (9th) business day following receipt of the Council's Order. The evidence of record also reveals that the Complainant filed his objections to the Custodian's request for reconsideration by letter dated March 1, 2012, which is the eighth (8th) business day following receipt of the request for reconsideration. Thus, pursuant to *N.J.A.C. 5:105-2.10*, the GRC will consider the Complainant's motion for reconsideration and the Complainant's objections to the Custodian's request for reconsideration as timely filed.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 *N.J. Super.* at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Custodian’s Counsel submitted a legal argument in which Counsel stated that extraordinary circumstances were present in the instant complaint requiring reconsideration. Counsel asserts that such extraordinary circumstances prevented the Custodian from responding in a timely manner to the Council’s September 27, 2011 Interim Order that required the Custodian to disclose to the Complainant a change order and certain correspondence between the contractor and the architect related to the change order. Counsel asserts that the extraordinary circumstances consisted of both the Custodian and the Custodian’s Counsel being on vacation at the time the County received the Order; therefore, the Custodian was unavailable to comply with the Order in a timely manner.

The Complainant argues that the Custodian’s vacation should not be considered extraordinary circumstances sufficient to warrant reconsideration of the Interim Order. The Council agrees with the Complainant.

Pursuant to OPRA, the Custodian of a county agency is “...the officer officially designated by formal action of that agency’s director or governing body, as the case may be.” N.J.S.A. 47:1A-1.1. Here, the County by formal action could have designated another individual to serve as the custodian of records in the Custodian’s absence by name or position. Alternatively, failing such formal designation, the Custodian could have named a designee to serve temporarily as custodian of records whenever the Custodian is unavailable. Providing for such eventualities is common practice because governmental entities cannot cease to function when a key person goes on vacation, becomes ill or is otherwise unavailable to perform his/her regular duties.

Here, the Custodian’s Counsel argues that the Custodian’s failure to act due to a vacation constitutes extraordinary circumstances warranting reconsideration of the Council’s Interim Order. The Council rejects this argument and refuses to reconsider its Order based upon extraordinary circumstances.

The Custodian’s Counsel also argues, however, that the Council mistakenly determined that the Custodian failed to bear his burden of proving a lawful denial of access to the change order dated December 27, 2009 and the correspondence between the contractor and the architect related to the change order. Counsel states that such misunderstanding was exacerbated by the Custodian because he certified in his Statement of Information that a change order dated December 27, 2009 did exist.

Counsel clarifies this issue by explaining that when the County bids a project it puts a contingency allowance in its contracts to cover any unforeseen changes in the contracted work and that the contingency is encumbered in the contract amount and approved by the governing body at the time the contract is awarded by resolution. Counsel states that the County then uses a memorandum of authorization to deduct

monies from the contingency allowance when necessary and that a memorandum of authorization is identical to a change order in its purpose but is used instead of a change order. Counsel emphasized that the contingency allowance was not depleted in the underlying construction project and therefore a change order was never issued. For this reason, Counsel asserts, there was no change order responsive to the Complainant's request in the instant complaint and this misunderstanding is a mistake sufficient to warrant reconsideration of the Interim Order.

As the moving party, Counsel was required to establish either of the necessary criteria set forth above; namely 1) that the Council's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings, supra*. Although the Council is not satisfied that the Custodian's Counsel established said criteria, in light of the clarification presented by Counsel, the GRC will grant the motion for reconsideration.

Accordingly, although the Council is not satisfied that the Custodian's Counsel established the necessary criteria for reconsideration pursuant to *Cummings, supra*; *D'Atria, supra*; In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003), in light of the clarification presented by the Custodian's Counsel, the GRC will grant the motion for reconsideration.

Whether the Custodian complied with the Council's September 27, 2011 Interim Order in a timely manner?

Paragraph 1 of the Council's January 31, 2012 Interim Order provides:

"Because the Custodian failed and refused to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance, Custodian John Cascone, is in contempt of said Order."

The Custodian's Counsel argued that extraordinary circumstances prevented the Custodian from complying with the terms of the Council's September 27, 2011 Interim Order in a timely manner because both the Custodian and the Custodian's Counsel were on vacation at the time the Order was received by the County and therefore the Custodian did not learn of the Order until after the time provided for compliance with the Order had expired. Counsel also asserted that once the Custodian returned from vacation and became aware of the Council's Order, he disclosed the requested records to the Complainant in compliance with said Order.

The Council determined in its January 31, 2012 Interim Order that the Custodian received the Council's September 27, 2011 Interim Order on October 4, 2011, and that pursuant to the terms of said Order the Custodian was to have fully complied with its provisions no later than October 12, 2011. The Council found, however, that the Custodian failed and refused to comply with the terms of the Council's Interim Order

until November 14, 2011, and then only after being prompted to reply to the Complainant's letter to the GRC dated October 31, 2011. The Custodian therefore failed to comply with the Council's September 27, 2011 Interim Order until the twenty-seventh (27th) business day following receipt of the Order.

As discussed *supra*, the County should have designated another individual to serve as the custodian of records in the Custodian's absence by name or position. Alternatively, failing such formal designation by the County, the Custodian should have named a designee to serve temporarily as custodian of records when he is unavailable. In this case, either no such preventative action was taken or any contingency plans for such eventuality were ineffective. Furthermore, neither the person who received the Council's Interim Order on behalf of the Custodian nor any other County official notified the GRC that the Custodian was on leave and unavailable. The Custodian cannot go on vacation and neglect his duties as the custodian of records, then claim that extraordinary circumstances intervened to excuse his inaction.

Accordingly, Counsel's argument that the Custodian's vacation constituted extraordinary circumstances which prevented the Custodian from complying with the terms of the Council's September 27, 2011 Interim Order in a timely manner is not persuasive and does not excuse the Custodian from complying with the terms of said Order in a timely manner. As such, Paragraph 1 of the Council's January 31, 2012 Interim Order shall remain unchanged.

Whether the Custodian complied with the terms of the Council's September 27, 2011 Interim Order?

In the September 27, 2011 Interim Order the Custodian was directed by the Council to disclose to the Complainant the change order dated December 27, 2009 and the correspondence between the contractor and the architect related to the change order. The evidence of record reveals that the Custodian on October 18, 2011 disclosed to the Complainant:

- A Memorandum for Authorization No. 1 William Carlos Williams Center Rutherford
- A Memorandum for Authorization No. 1 for the William's Project
- A final payment voucher for the contractor
- An e-mail from the contractor to the architect dated December 16, 2009
- An e-mail from the architect to the contractor dated December 23, 2009

The Custodian argued that the above listed records constituted all of the records that the Council order disclosed to the Complainant; however, the Complainant stated that the Custodian failed to disclose the correct records. The Council ordered disclosure of these records because the Custodian had certified in his Statement of Information under the subheading "Change Orders" that there was a change proposal dated December 27, 2009 for temporary stairs. After reviewing the conflicting statements made by the Custodian and the Complainant, the Council stated that it was not sure if the change orders and the memoranda for authorization were equivalent records; therefore, because the Council was unclear as to whether the Custodian did disclose the correct records, it

directed in its January 31, 2012 Interim Order that the complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.

In his request for reconsideration, Counsel clarified the discrepancy between the change orders and the memoranda for authorization. Counsel made clear that when the County bids a project it puts a contingency allowance in its contracts to cover any unforeseen changes in the contracted work and that the contingency is then encumbered in the contract amount and approved by the governing body at the time the contract is awarded by resolution. Counsel stated that the County uses memoranda of authorization to deduct monies from the contingency allowance when necessary and that said memoranda are identical to change orders in their purpose but are used instead of change orders. Counsel further stated that a change order is only issued when the contingency is depleted and additional work is required but that this was not the case here because the contingency allowance was not depleted. Counsel asserted that the records responsive to the Complainant's request were the memoranda of authorization that were disclosed to the Complainant in compliance with the Council's September 27, 2011 Interim Order.

In his objection to the request for reconsideration, the Complainant did not dispute Counsel's explanation clarifying the County's use of memoranda of authorization rather than change orders in the construction project for which the Complainant requested the records relevant to this complaint.

Therefore, because the Custodian made clear in the request for reconsideration that a memorandum of authorization is identical to a change order in its purpose and there was no credible evidence proffered to dispute such clarification, and because the evidence of record reveals the Custodian disclosed to the Complainant memoranda of authorization which he determined were responsive to the Complainant's request along with e-mail correspondence related to said memoranda, the Custodian by disclosing those records did not unlawfully deny access to the change order but rather disclosed records equivalent to the change order and thereby complied with the Council's September 27, 2011 Interim Order. Any finding by the Council hereunder which is inconsistent with this determination is hereby abrogated.

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 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. 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).

In the instant complaint, the Custodian failed to respond in writing to the Complainant’s January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a “deemed” denial of the Complainant’s request and the Custodian’s untimely response to the Complainant’s OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant’s request individually and provide a specific reason for denial of each. The Custodian also failed to comply with the terms of the Council’s September 27, 2011 Interim Order within the time provided for such compliance. However, the Custodian did disclose to the Complainant the records ordered for disclosure pursuant to the Council’s September 27, 2011 Interim Order. As such, it is concluded upon reconsideration that although the Custodian did not at all times act in full compliance with the provisions of OPRA, 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. Any finding by the Council hereunder which is inconsistent with this determination is hereby abrogated.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Council is not satisfied that the Custodian’s Counsel established the necessary criteria for reconsideration pursuant to Cummings, supra; D’Atria, supra; In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003), in light of the clarification presented by the Custodian’s Counsel, the GRC will grant the motion for reconsideration.

2. Counsel's argument that the Custodian's vacation constituted extraordinary circumstances which prevented the Custodian from complying with the terms of the Council's September 27, 2011 Interim Order in a timely manner is not persuasive and does not excuse the Custodian from complying with the terms of said Order in a timely manner. As such, Paragraph 1 of the Council's January 31, 2012 Interim Order shall remain unchanged.
3. Because the Custodian made clear that a memorandum of authorization is identical to a change order in its purpose and there was no credible evidence proffered to dispute such clarification, and because the evidence of record reveals the Custodian disclosed to the Complainant memoranda of authorization which he determined were responsive to the Complainant's request along with e-mail correspondence related to said memoranda, the Custodian by disclosing those records did not unlawfully deny access to the change order but rather disclosed records equivalent to the change order and thereby complied with the Council's September 27, 2011 Interim Order. Any finding by the Council hereunder which is inconsistent with this determination is hereby abrogated.
4. The Custodian failed to respond in writing to the Complainant's January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a "deemed" denial of the Complainant's request and the Custodian's untimely response to the Complainant's OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial of each. The Custodian also failed to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance. However, the Custodian did disclose to the Complainant the records ordered for disclosure pursuant to the Council's September 27, 2011 Interim Order. As such, it is concluded upon reconsideration that although the Custodian did not at all times act in full compliance with the provisions of OPRA, 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. Any finding by the Council hereunder which is inconsistent with this determination is hereby abrogated.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Costantino Colasante
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Complaint No. 2010-18

v.

County of Bergen
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 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 and refused to comply with the terms of the Council’s September 27, 2011 Interim Order within the time provided for such compliance, Custodian John Cascone, is in contempt of said Order.
2. Based on the inconclusive evidence in this matter, the Council is unable to determine whether or not, by disclosing the Memorandums of Authorization, the Custodian unlawfully denied access to the Change Order. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. *See Semprevivo v. Pinelands Regional School District Board of Education*, GRC Complaint No. 2007-135 (October 2008).
3. The Custodian failed to respond in writing to the Complainant’s January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a “deemed” denial of the Complainant’s request. The Custodian’s response to the Complainant’s OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant’s request individually and provide a specific reason for denial of each. The Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order. The Custodian also failed and refused to comply with the terms of the Council’s September 27, 2011 Interim Order within the time provided for such compliance. Therefore, it is possible that Custodian John Cascone’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.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 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: February 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Costantino Colasante¹
Complainant**

GRC Complaint No. 2010-18

v.

**County of Bergen²
Custodian of Records**

Records Relevant to Complaint: Examination of all records regarding the exterior renovation of stairs and retaining walls to the William Carlos Williams Center for the Performing Arts, 15 Sylvan Avenue, Rutherford, NJ, specifically the minutes of the pre-bid meeting that took place on Tuesday, April 21, 2009, along with any RFI submitted by any bidders.

Request Made: January 11, 2010

Response Made: January 11, 2010

Custodian: John Cascone

GRC Complaint Filed: January 22, 2010³

Background

September 27, 2011

Government Records Council's ("Council") Interim Order. At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the August 23, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in *writing* to the Complainant's January 11, 2010 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 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 (January 2010).
2. The Custodian's January 11, 2010 response to the Complainant's January 11, 2010 OPRA request was legally insufficient because the Custodian failed to

¹ No legal representation listed on record.

² In the Custodian's Statement of Information dated March 11, 2010 the Custodian listed Haig Panossian, Esq. (Hackensack, NJ) as the Custodian's Counsel; however, there are no submissions on file from the Custodian's Counsel to the GRC.

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

designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

3. Because the Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order, the Custodian must disclose said records to the Complainant. *See N.J.S.A. 47:1A-6.*
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian certified in his Statement of Information dated March 11, 2010 that the Submittal, Schedule of Values and Notice to Proceed did not exist at the time of the Complainant's January 11, 2010 OPRA request, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. 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.

October 3, 2011

Council's Interim Order distributed to the parties.

October 12, 2011

Telephone call from the Complainant to the GRC. The Complainant informs the GRC that he has received a copy of the Council's Interim Order and asks the GRC if he is entitled to file a reply to it. The GRC informs the Complainant that he can file a request for reconsideration but must do so quickly because he only has ten (10) business days from the date of receipt of the Council's Order to do so. The Complainant states that he will not file a request for reconsideration.

October 18, 2011

Letter from the Custodian's Counsel to the Complainant.⁴ Counsel states that pursuant to the Council's Interim Order he has enclosed the following records for the Complainant:

- Memorandum for Authorization No.1 William Carlos Williams Center Rutherford
- Memorandum for Authorization No.1 for the Williams project
- Final payment voucher for the contractor⁵

The Custodian's Counsel states that the allowance under the Williams Center contract covered the additional cost and therefore there was no need for any formal change orders. Counsel also states that he enclosed a copy of the Custodian's reply to the GRC complaint in this matter.

October 23, 2011

E-mail from the Complainant to the GRC. The Complainant informs the GRC that he is in possession of a letter from the Custodian dated October 18, 2011. The Complainant states that the Custodian sent him certain documents. The Complainant asks the GRC if he can respond to the Custodian's October 18, 2011 letter.

October 24, 2011

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC has not received a copy of the Custodian's October 18, 2011 letter. The GRC further informs the Complainant that if the documents he received are the records that the Council ordered disclosed then it is unnecessary for the Complainant to respond to the Custodian. The GRC informs the Complainant that if the documents he received are not the records that the Council ordered disclosed, and he has not yet received the records that the Council ordered disclosed, he may respond to the Custodian and he should copy the GRC.

October 31, 2011

E-mail from the Complainant to the GRC. The Complainant informs the GRC that the deadline for the Custodian to comply with the terms of the Council's Interim Order has expired and the Custodian has failed to disclose to the Complainant the records ordered by the Council. The Complainant states that the records that should have been disclosed by the Custodian but were not disclosed are the following:

- Schedule of Values
- Schedule of Values reviewed and approved by the architect on January 13, 2010
- Correspondence between the contractor and the architect

⁴ The GRC did not receive a copy of this letter until it was received as an attachment to Counsel's letter to the GRC dated November 14, 2011.

⁵ The evidence of record also reveals that the Custodian disclosed a copy of an e-mail from the contractor to the architect dated December 16, 2009 and a copy of an e-mail from the architect to the contractor dated December 23, 2009.

November 14, 2011

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel informs the GRC that he is responding to the Complainant's correspondence to the GRC dated October 31, 2011. Counsel states that the Complainant continuously seeks a "change order" but that such a change order does not exist. Counsel states that in the Complainant's October 31, 2011 correspondence the Complainant is seeking records that were not required to be produced by the Council's Interim Order. Counsel also states that the Custodian disclosed all records that were required to be disclosed as attachments to the Custodian's letter to the Complainant dated October 18, 2011. Counsel invites the Complainant to stop by the Custodian's office to search the County's records for the requested records that the Complainant continues to allege were not disclosed. The Custodian's Counsel also states that the Custodian has prepared a certification as an attachment to Counsel's letter. Counsel further states that the County could not respond to the Council's Interim Order in a timely manner because Counsel was out of the office when the order arrived and the Custodian was out of the country during the same time period. Counsel states that the Custodian's delay in complying in a timely manner with the Council's Order did not cause irreparable harm to the Complainant.

November 21, 2011

E-mail from the Complainant to the GRC. The Complainant informs the GRC that, contrary to Counsel's letter to the GRC dated November 14, 2011, the Custodian has not complied with the terms of the Council's Interim Order. The Complainant states that the records he listed in his e-mail to the GRC dated October 31, 2011 still have not been disclosed and that said records should have existed prior to a Notice to Proceed being issued for the project. The Complainant also states that the Custodian should have submitted a Certification of Compliance within five (5) business days of September 27, 2011 but that it was not submitted until November 14, 2011. The Complainant states that the certification is untruthful because the records that the Custodian certified comply with the terms of the Interim Order do not in fact comply with said Order.

Analysis**Whether the Custodian complied with the Council's September 27, 2011 Interim Order?**

At its September 27, 2011 public meeting, the Council ordered the Custodian to deliver to the Complainant within five (5) business days of receiving said Order:

- A Change Order dated December 27, 2009
- Correspondence between the contractor and the architect related to the Change Order
- A detailed document index explaining the lawful basis for any redactions

The Council further ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director.

The Custodian received the Council's September 27, 2011 Interim Order on October 4, 2011 at 10:28 a.m.⁶ As such, pursuant to the terms of the Order, the Custodian was to have fully complied with its provisions no later than October 12, 2011; however, the Custodian failed and refused to comply with all of the terms of the Council's Interim Order until November 14, 2011, and then only after prompted to reply to the Complainant's letter to the GRC dated October 31, 2011.

Although the Custodian's Counsel stated that both Counsel and the Custodian were unavailable at the time the Council's Order was delivered to the agency, the GRC was not notified to that effect until it received Counsel's November 14, 2011 letter, well over a month after the Council's Order was delivered to the agency. Moreover, the Custodian's certification of compliance was provided to the GRC as an attachment to a letter sent to the GRC, the stated purpose of which was to respond to allegations made by the Complainant against the Custodian. Thus, it follows that if the Complainant had not raised any issues concerning the Custodian's compliance with the Interim Order, the Custodian would have never sent the GRC a certification of compliance.

Accordingly, because the Custodian failed and refused to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance, Custodian John Cascone is in contempt of said Order.

The Custodian argued that he disclosed to the Complainant all records that the Council ordered be disclosed to the Complainant; however the Complainant maintains that the Custodian failed and refused to disclose to him the records that were ordered to be disclosed. The evidence of record reveals that the Custodian, in response to the Council's Order, disclosed to the Complainant on October 18, 2011 the following:

- A Memorandum for Authorization No.1 William Carlos Williams Center Rutherford
- A Memorandum for Authorization No.1 for the Williams project
- A final payment voucher for the contractor
- An e-mail from the contractor to the architect dated December 16, 2009
- An e-mail from the architect to the contractor dated December 23, 2009

The Complainant asserts that the Custodian failed to comply with the Council's Order because the Custodian did not disclose the following records:

- A Schedule of Values
- A Schedule of Values reviewed and approved by the architect on January 13, 2010
- Correspondence between the contractor and the architect

The Council ordered the Custodian to disclose to the Complainant (1) a Change Order dated December 27, 2009 and (2) correspondence between the contractor and the

⁶ The GRC sent the Interim Order to the Custodian and Custodian's Counsel via UPS Next Day Air® on October 3, 2011 and the UPS Proof of Delivery reveals the Order was successfully delivered to the addressees and signed for by K. Glennon on the time and date indicated.

architect related to the Change Order. The Council ordered disclosure of these records because the Custodian certified in his Statement of Information under the subheading “Change Orders” that “there was a change proposal dated December 27, 2009 for temporary stairs...” and “...the only correspondence between the Contractor and the Architect prior to the 15th was related to the change proposal...”⁷ The Custodian certified that if the Complainant waited for his secretary, Eileen Petrosky, to assist him in his search, she most likely would have recalled the two (2) records; however, the Custodian certified that the Complainant did not wait for Mrs. Petrosky to assist him. The Custodian further certified that because the Complainant would not wait for Mrs. Petrosky, the Custodian “...arranged for someone unfamiliar with this project to show Mr. Colasante the file containing records responsive to his OPRA request.” This is the reason why the Custodian alleged that the Complainant did not review the Change Order dated December 27, 2009 and the correspondence between the contractor and the architect related to the Change Order. Accordingly, the Council ordered the Custodian to disclose said records to the Complainant.

The evidence of record reveals that the Custodian did disclose to the Complainant the correspondence between the contractor and the architect; however, instead of disclosing the Change Order as required, the Custodian disclosed two (2) Memorandums for Authorization. The record is not clear whether Change Orders and Memoranda for Authorization are equivalent records; however, in the construction trade such records may be close enough in character to be considered equivalent. As such, the record is not clear whether the records that were ordered to be disclosed were in fact disclosed because the Council does not have the same familiarity with the records that the Custodian, as the Bergen County Assistant Superintendent of Public Works, and the Complainant, as the owner of a construction company, do. To further confuse the issue, the Custodian certified that a Change Order dated December 27, 2009 did exist and was responsive to the Complainant’s request; the Custodian’s Counsel asserted that no such Change Order ever existed.

The Schedule of Values and the Schedule of Values reviewed and approved by the architect on January 13, 2010, which the Complainant contends should have been disclosed to him by the Custodian in compliance with the Council’s Order, is incorrect. It is clear on the face of the Order that the Council did not direct that such records be disclosed. Further, the Council will not order records to be disclosed when the OPRA request predates the date of such records, as here. The Complainant’s contention that the Custodian failed to disclose the correspondence between the contractor and the architect is also incorrect because the evidence of record reveals that said record was disclosed to the Complainant.

In Semprevivo v. Pinelands Regional School District Board of Education, GRC Complaint No. 2007-135 (October 2008), the GRC requested that the custodian provide information to the GRC which was missing from the custodian’s Statement of Information. In reply, the custodian forwarded to the GRC three Board policies that the custodian said would provide the legal basis for the custodian to deny the complainant access to requested Board records. The GRC found that because there was inadequate

⁷ The Custodian is making reference to January 15, 2010, which is the date that the Complainant visited the Custodian’s office to examine the requested records.

evidence for the Council to render a meaningful decision in the matter, the complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.

Accordingly, based on the inconclusive evidence in this matter, the Council is unable to determine whether or not, by disclosing the Memorandums of Authorization, the Custodian unlawfully denied access to the Change Order. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. *See Semprevivo, supra.*

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 states that:

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

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

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

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

In the instant complaint, the Custodian failed to respond in writing to the Complainant’s January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a “deemed” denial of the Complainant’s request. The Custodian’s response to the Complainant’s OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was

responsive to the Complainant's request individually and provide a specific reason for denial of each. The Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order. The Custodian also failed and refused to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance. Therefore, it is possible that Custodian John Cascone'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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed and refused to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance, Custodian John Cascone, is in contempt of said Order.
2. Based on the inconclusive evidence in this matter, the Council is unable to determine whether or not, by disclosing the Memorandums of Authorization, the Custodian unlawfully denied access to the Change Order. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. *See Semprevivo v. Pinelands Regional School District Board of Education, GRC Complaint No. 2007-135 (October 2008).*
3. The Custodian failed to respond in writing to the Complainant's January 11, 2010 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, which resulted in a "deemed" denial of the Complainant's request. The Custodian's response to the Complainant's OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial of each. The Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order. The Custodian also failed and refused to comply with the terms of the Council's September 27, 2011 Interim Order within the time provided for such compliance. Therefore, it is possible that Custodian John Cascone'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.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

September 27, 2011 Government Records Council Meeting

Costantino Colasante
Complainant

Complaint No. 2010-18

v.

County of Bergen
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the August 23, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in *writing* to the Complainant's January 11, 2010 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 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 (January 2010).
2. The Custodian's January 11, 2010 response to the Complainant's January 11, 2010 OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Because the Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order, the Custodian must disclose said records to the Complainant. See N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**

¹ "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."



5. Because the Custodian certified in his Statement of Information dated March 11, 2010 that the Submittal, Schedule of Values and Notice to Proceed did not exist at the time of the Complainant's January 11, 2010 OPRA request, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. 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 27th Day of September, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 3, 2011

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Costantino Colasante¹
Complainant**

GRC Complaint No. 2010-18

v.

**County of Bergen²
Custodian of Records**

Records Relevant to Complaint: Examination of all records regarding the exterior renovation of stairs and retaining walls to the William Carlos Williams Center for the Performing Arts, 15 Sylvan Avenue, Rutherford, NJ, specifically the minutes of the pre-bid meeting that took place on Tuesday, April 21, 2009, along with any RFI submitted by any bidders.

Request Made: January 11, 2010

Response Made: January 11, 2010

Custodian: John Cascone

GRC Complaint Filed: January 22, 2010³

Background

January 11, 2010

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.

January 11, 2010

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the day the request was received. The Custodian certifies that he directed his secretary, Eileen Petrosky, to verify the request and thereafter inform the Complainant that the construction project for which the Complainant was seeking the records had not yet begun; therefore, very few records were available for examination.⁴

¹ No legal representation listed on record.

² In the Custodian's Statement of Information dated March 11, 2010 the Custodian listed Haig Panossian, Esq. (Hackensack, NJ) as the Custodian's Counsel; however, there are no submissions on file from the Custodian's Counsel to the GRC.

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

⁴ There was no written response for the GRC to review in order to determine how the Custodian framed his response to the Complainant; therefore, the GRC had to rely upon the Custodian's certification in his Statement of Information, wherein he certified that he responded verbally to the Complainant.

January 19, 2010

Letter from the Complainant to the Custodian. The Complainant confirms an earlier telephone conversation wherein he stated that the following records were missing from the records that he examined on January 15, 2010: Submittals, Schedule of Values, Notice to Proceed, Change Orders and correspondence to and from Conquest Industries, LLC.⁵ The Complainant states that the Custodian told him that the records were not in existence because the construction project had not yet started; however, the Complainant states that the construction project was in progress and that he took photographs of it.

January 21, 2010

Letter from the Complainant to the Custodian. The Complainant confirms an earlier telephone conversation wherein he stated that he never received a reply to his letter to the Custodian dated January 19, 2010. The Complainant demands an immediate reply from the Custodian to his January 19, 2010 letter.

January 22, 2010

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he should forward all future correspondence regarding the William Carlos Williams Center for the Performing Arts to the Bergen County Counsel.

January 22, 2010

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

- Complainant’s OPRA request dated January 11, 2010
- Complainant’s OPRA request with an annotation in the bottom margin that the Complainant examined the documents which was signed by the Complainant and dated January 15, 2010⁶
- Letter from the Complainant to the Custodian dated January 19, 2010
- Letter from the Complainant to the Custodian dated January 21, 2010

The Complainant states that he provided his OPRA request to the Custodian on January 11, 2010. The Complainant states that his request sought Submittals, Schedule of Values, Notice to Proceed, Change Orders and correspondence to and from Conquest Industries, LLC. The Complainant further states that on January 19, 2010 and January 21, 2010 the Custodian denied his request for the records and the reason the Custodian gave him for denying his request was that the requested records did not exist.

The Complainant agrees to mediate this complaint

February 8, 2010

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

⁵ The Complainant does not mention the name of the other party to the correspondence.

⁶ The Complainant noted above his signature that “there were many documents missing that were requested that should have been included.”

March 2, 2010

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

March 11, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on March 2, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

March 11, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 11, 2010
- Letter from the Complainant to the Custodian dated January 19, 2010
- Letter from the Complainant to the Custodian dated January 21, 2010
- E-mail from the Custodian to the Complainant dated January 22, 2010

The Custodian certifies that his search for the requested records involved having his secretary locate the William Carlos Williams Center for the Performing Arts construction project file and making it available to an employee who was otherwise unfamiliar with the file so that the Complainant could examine it. The Custodian also certifies that the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable to the requested records.

The Custodian certifies that he received the Complainant’s OPRA request on January 11, 2010. The Custodian also certifies that he responded to the Complainant’s OPRA request verbally on January 11, 2010 by directing his secretary, Eileen Petrosky, to verify the request and thereafter inform the Complainant that the construction project for which the Complainant was seeking the records had not yet begun; therefore, very few records were available for examination. The Custodian further certifies he informed Ms. Petrosky, who was familiar with the type of records requested by the Complainant, to speak with the Complainant to schedule a time when she or a person knowledgeable about the construction project would be in the office to assist the Complainant. The Custodian certified that Ms. Petrosky would not be available to meet with the Complainant until after January 19, 2010. The Custodian further certifies that the Complainant insisted he wanted to examine the records on January 15, 2010, a time when no one familiar with the construction project would be available.⁷ The Custodian certifies that because the Complainant insisted on examining the records on January 15, 2010, the records contained in the William Carlos Williams Center for the Performing Arts construction project file were given to an employee who was unfamiliar with the file, but who would be available on January 15, 2010 to allow the Complainant to examine it.

⁷ The Custodian does not provide a reason as to why he could not meet with the Complainant to allow the Complainant to examine the requested records.

The Custodian certifies that five (5) pages of records were copied and provided to the Complainant; however, the Custodian certifies that he does not know which records were provided to the Complainant.

The Custodian certifies that on January 19, 2010, the Complainant called him to complain that not all of the records that should have been in the file were in the file when the Complainant examined the records on January 15, 2010. The Custodian further certifies that the construction project had not yet started at the time of the Complainant's OPRA request and therefore the Custodian certifies that he informed the Complainant that the Submittals were not in the file. The Custodian certifies that he also told the Complainant that the architect may have some of the requested records but that the architect would not be available until January 20, 2010. The Custodian certifies that he told the Complainant that he would check with the architect on January 20, 2010 to see if the architect knew if any other requested records were available.

The Custodian certifies that the contractor was scheduled to start construction on January 18, 2010, but the Custodian certifies that he did not confirm the start date and therefore did not issue an Authorization to Proceed.⁸ The Custodian certifies that after the Complainant told him that construction had started, the Custodian issued the Authorization to Proceed and back-dated it to January 18, 2010. With respect to the records that the Complainant listed in his January 19, 2010 letter as being responsive to his OPRA request, the Custodian certifies the following:

Submittals and Schedule of Values	One (1) Submittal containing the Schedule of Values was in Ms. Petrosky's office as of January 13, 2010 but it was not yet filed in the project file when the Complainant examined the file on January 15, 2010.
Notice to Proceed	The Notice to Proceed was issued on January 20, 2010 and back-dated to January 18, 2010; it was therefore not in the project file when the Complainant examined the file on January 15, 2010.
Change Order	One (1) Change Order dated December 27, 2010, along with all paperwork for allowance deductions, was in a bin in Ms. Petrosky's office.
Correspondence	One (1) piece of correspondence between the contractor and the architect related to the Change Order was also in a bin in Ms. Petrosky's office.

The Custodian certifies that if the Complainant waited until Ms. Petrosky was available to assist him instead of demanding to examine the records on January 15, 2010, Ms. Petrosky would have probably recalled the records that were stored in the bin in her office and disclosed them to the Complainant. The Custodian certifies that after he

⁸ This was one of the records that the Complainant listed in his letter to the Custodian dated January 19, 2010.

received the Complainant's letters dated January 19, 2010 and January 21, 2010, he decided the Complainant was on a mission to discredit the County and it would be better to handle this matter through the County's attorneys.

March 23, 2010⁹

The Complainant's response to the Custodian's SOI. The Complainant asserts that he is familiar with the construction project at the William Carlos Williams Center for the Performing Arts because he was one of fourteen (14) bidders. The Complainant also asserts that he spoke to Ms. Petrosky on January 14, 2010, at which time the Complainant states that Ms. Petrosky said the records were available for inspection and that he should see the receptionist when he arrives on January 15, 2010 to inspect the records. The Complainant contends that Ms. Petrosky told him that the receptionist would be able to direct him to someone that could help him examine the records.

The Complainant asserts that when he and the Custodian spoke over the telephone on January 19, 2010, the Custodian told him that the records responsive to his request do not exist because the construction job had not started. The Complainant contends that after he told the Custodian that he had observed the job in progress the Custodian angrily told him that the County would send him a bill for retrieving the records and it would be costly.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

"[a] custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If 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

⁹ Other correspondence was received from the parties which is not relevant to this complaint or restates the facts/assertions already presented to the GRC.

requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A- 5.g.

OPRA further 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...*(Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ 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 (January 2010).

The Custodian certified that he received the Complainant’s OPRA request on January 11, 2010. The Custodian also certified that he responded to the Complainant’s OPRA request verbally on January 11, 2010, by directing his secretary to verify the

¹⁰ 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.

request and thereafter inform the Complainant that the construction project for which the Complainant was seeking the records had not yet begun; therefore, very few records were available for examination. Although the Custodian responded to the OPRA request within the statutorily mandated seven (7) business day period, the Custodian failed to do so in writing.

The Custodian's failure to respond in *writing* to the Complainant's January 11, 2010 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 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 (January 2010).

The Complainant's OPRA request was clear in part because it specifically identified minutes of the pre-bid meeting that took place on Tuesday, April 21, 2009. However, the balance of the Complainant's request was not clear because the Complainant did not state what the three letter abbreviation, "RFI," represented and he failed to specifically identify which records he wanted to examine in reference to the exterior renovation of stairs and retaining walls to the William Carlos Williams Center for the Performing Arts.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005),¹¹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”¹²

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” Id. at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. Id. at 515-16.

In the instant complaint, although the Custodian could have denied the Complainant’s request as being overly broad pursuant to MAG, *supra*, and its progeny, or by seeking clarification of such request. However, the Custodian herein responded to the request by disclosing the requested records. As such, the Custodian had a duty under N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6., to respond to each request item individually; however, the Custodian failed to do so. In fact, after the records were examined by the Complainant, the Custodian certified that he did not even know which records had been disclosed.

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

OPRA specifically states that a *custodian* “shall promptly comply with a request... [for] a government record.” (Emphasis added.) N.J.S.A. 47:1A-5.g. Additionally, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.”

Based on OPRA and the GRC’s holding in *Paff, supra*, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within seven (7) business days after receipt of such request. In this complaint, the Custodian responded on January 11, 2010, the same date he received the request, by directing his secretary to verify the request and thereafter verbally inform the Complainant that the construction project for which the Complainant was seeking the records had not yet begun; therefore, very few records were available for examination.

Accordingly, the Custodian’s response to the Complainant’s OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant’s request individually and provide a specific reason for denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and *Paff, supra*.

The evidence of record reveals that the Custodian’s secretary, Ms. Petrosky, was familiar with the type of records requested by the Complainant; however, in her absence the Custodian allowed someone unfamiliar with the requested records to deliver the records to the Complainant for examination on January 15, 2010. The Custodian certified that five (5) pages of records were copied and delivered to the Complainant but that he did not know which records had been disclosed. The evidence of record reveals that at the time the Complainant examined the records he protested that not all of the records responsive to his request had been produced.

The evidence of record reveals that after examining the requested records, the Complainant telephoned the Custodian to tell the Custodian which records responsive to his request were not made available. The record also reveals the Complainant confirmed said telephone conversation via a letter to the Custodian on that same date. In the letter, the Complainant stated that the following records which should have been readied for examination were not produced on January 15, 2010: Submittals, Schedule of Values, Notice to Proceed, Change Orders and correspondence to and from Conquest Industries, LLC. The Complainant asserted that the Custodian told him that those records did not exist because the construction project had not yet started.

The Custodian certified in his SOI that two (2) of the records listed by the Complainant did exist at the time of the Complainant’s request: a Change Order dated December 27, 2009 and a piece of correspondence between the contractor and the architect related to the Change Order dated December 27, 2009. The Custodian certified

that those records were contained in a bin in his secretary's office and that they would not be put with the project file until the construction job was completed.

Regardless of the type of record storage system adopted by the Custodian, OPRA provides that "...government records shall be readily accessible for inspection, copying, or examination..." N.J.S.A. 47:1A-1. 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.

As such, notwithstanding the fact that the Custodian may have stored a record responsive to the request in an area away from the bulk of like records or in a remote storage area inconvenient to retrieval, the Custodian is required to disclose identifiable government records which are not otherwise exempt from disclosure. The Custodian failed to provide the Complainant access to the Change Order dated December 27, 2009 and the item of correspondence between the contractor and the architect related to the Change Order dated December 27, 2009, which records existed at the time of the Complainant's request; the Custodian did not assert that these records were exempt from disclosure under OPRA. The Custodian therefore failed to bear his burden of proving a lawful denial of access to the requested records. N.J.S.A. 47:1A-6.

Because the Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order, the Custodian must disclose said records to the Complainant. *See* N.J.S.A. 47:1A-6.

The Custodian also certified in the SOI that the Submittal, Schedule of Values and the Notice to Proceed did not exist at the time of the Complainant's request. The Complainant has provided no evidence to refute the Custodian's certification.

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

In the instant complaint, because the Custodian certified in his SOI dated March 11, 2010 that the Submittal, Schedule of Values and Notice to Proceed did not exist at the time of the Complainant's January 11, 2010 OPRA request, and because there is no

credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer, supra. N.J.S.A. 47:1A-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?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in *writing* to the Complainant's January 11, 2010 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 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 (January 2010).
2. The Custodian's January 11, 2010 response to the Complainant's January 11, 2010 OPRA request was legally insufficient because the Custodian failed to designate and respond to each record that was responsive to the Complainant's request individually and provide a specific reason for denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Because the Custodian failed to bear his burden of proving a lawful denial of access to (a) the Change Order dated December 27, 2009 and (b) the correspondence between the contractor and the architect related to the Change Order, the Custodian must disclose said records to the Complainant. *See N.J.S.A. 47:1A-6.*
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹³, to the Executive Director.¹⁴**

¹³ "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."

¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. Because the Custodian certified in his Statement of Information dated March 11, 2010 that the Submittal, Schedule of Values and Notice to Proceed did not exist at the time of the Complainant's January 11, 2010 OPRA request, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

6. 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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 2011