



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2010-303

v.

Township of Livingston (Essex)
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 entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant has failed to establish in his request for reconsideration of the Council’s March 27, 2012 Final Decision that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to prove that the record the Mayor relied on in her September 20, 2010 speech was responsive to the Complainant’s OPRA request Item No. 1 or that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council’s Final Decision. Thus, the Complainant’s request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Larry A. Kohn¹
Complainant

GRC Complaint No. 2010-303

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Inspection of:

1. Proposals from contracts regarding the new municipal and police building referenced by Mayor Johnson in her speech on September 20, 2010. The applicable time frame is between September 7, 2007 when R-08-192 rejected bids and December 2007 when a contract was awarded.
2. Resolution rejecting the first round of bids for the new municipal and police building. The applicable time frame is the Summer of 2007 to September 4, 2007.
3. Lowest bid rejected for the first round bidding for the new municipal and police building. The anticipated amount of that bid is \$31,559,273 per Mayor Johnson's September 20, 2010 remarks that the bid chosen (\$26, 259,273) saved \$5,300,000.

Request Made: September 27, 2010

Response Made: October 7, 2010

Custodian: Glenn Turteltaub

GRC Complaint Filed: November 16, 2010³

Background

March 27, 2012

Government Records Council's ("Council") Interim Order. At its March 27, 2012 public meeting, the Council considered the March 20, 2012 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 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)

¹ No legal representation listed on record.

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

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

business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The Custodian’s request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the statutorily mandated time frame.

2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant’s OPRA request Item No. 2 although such records were readily available for disclosure. Additionally, the Council declines to order disclosure of the responsive resolutions because the evidence of record indicates that the Custodian provided the Complainant with access to same on December 10, 2010.
3. Regarding the records responsive to the Complainant’s OPRA request Items No. 1 and No. 3, the GRC declines to order disclosure of the responsive records because the Custodian eventually provided same to the Complainant on December 10, 2010, or fifty-one (51) business days after receipt of the Complainant’s OPRA request.
4. The Custodian’s failure to respond in writing to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), the Custodian’s request for an extension of time was invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. by failing to provide responsive resolutions to the Complainant although such records were readily available for disclosure. However, the Custodian did eventually provide access to all responsive records on December 10, 2010, or fifty-one (51) days after receipt of the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian’s untimely responses 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.

April 5, 2012

Council’s Final Decision distributed to the parties.

April 16, 2012

Letter from the Complainant to the GRC. The Complainant requests a stay of the Council’s Final Decision.

Additionally, the Complainant requests that the GRC address two (2) items in its Final Decision. The Complainant first states that in the Final Decision, the Custodian “...

certifies that the Mayor subsequently indicated that her remarks were based on a document provided to her by the Township Manager ..." *Id.* at pg. 3. The Complainant states that he has not received this "document" and the Final Decision makes no determination with regard to its existence. The Complainant asserts that the GRC should have made a determination regarding this "document" as to why the Custodian did not provide same to the Complainant.

The Complainant further states that the Final Decision correctly indicates that the Custodian provided him with the responsive records but fails to identify that the Custodian did not provide same until after the filing of the instant complaint. The Complainant asserts that the GRC should correct this omission.

The Complainant asserts that these two (2) issues should be corrected as it would be in the public interest for the GRC to correct them.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's March 27, 2012 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.12*, parties may file a stay of any decision rendered by the Council. A request for a stay must be in writing, delivered to the Council and served to all parties. Parties must file any objection to the request for a stay from a final decision within ten (10) business days following receipt of the request. The Executive Director may grant a stay from a final decision based on consideration of the request and any objection to the request submitted to the Council. *N.J.A.C. 5:105-2.12(a) - (f)*.

In the matter before the Council, the Complainant filed a request for a stay of the Council's Final Decision dated March 27, 2012 on April 16, 2012. In his stay, the Complainant requested that the GRC correct two (2) issues that he believed should have been addressed by the GRC.

Applicable case law holds that:

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

To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Regarding the Complainant's first (1st) issue, the Complainant noted that the Custodian certified that the Mayor relied on a document provided by the Township Manager in her speech on September 20, 2010. The Complainant asserted that the GRC should have determined why the Custodian did not provide this record to the Complainant. As the moving party, the Complainant is required to establish that the document the Mayor relied on was a proposal or contract responsive to his OPRA request. D'Atria, *supra*. However, the Complainant did not submit any evidence to this effect. Additionally, there is no evidence in the record to support that this document was responsive to the Complainant's OPRA request. Thus, this portion of the request for reconsideration is denied.

Regarding the Complainant's second (2nd) issue, the Complainant asserted that the GRC should specifically identify the fact that the Custodian did not provide the responsive records until after the filing of the instant Denial of Access Complaint. A review of the Final Decision reveals that it is clear therein that the Custodian did not provide the responsive records until after the filing of the Denial of Access Complaint. In fact, the Council's background portion of the Council's Final Decision makes this point clear. *See Kohn v. Township of Livingston (Essex)*, GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012). Additionally, regardless of whether the Custodian provided the records before or after the filing of this complaint, it is clear that the Custodian's failure to timely respond resulted in a "deemed" denial of access. In the request for reconsideration, the Complainant failed to establish that the addition of this fact would change the substance of the Council's Final Decision in any way. Thus, this portion of the request for reconsideration is denied.

The Complainant failed to submit any new evidence in support of his request for reconsideration. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings*, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably. *See D'Atria*, *supra*. Notably, the Complainant failed to submit any evidence that the record referred to by the Custodian in the certification to which the Complainant refers was responsive to the Complainant's OPRA request Item No. 1. The Complainant further failed to prove that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council's Final Decision.

Therefore, because the Complainant has failed to establish in his request for reconsideration of the Council's March 27, 2012 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to prove that the record the Mayor relied on in her September 20, 2010

speech was responsive to the Complainant's OPRA request Item No. 1 or that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council's Final Decision. Thus, the Complainant's request for reconsideration is denied. Cummings, supra; D'Atria, supra; Comcast, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his request for reconsideration of the Council's March 27, 2012 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to prove that the record the Mayor relied on in her September 20, 2010 speech was responsive to the Complainant's OPRA request Item No. 1 or that specifically identifying that the Complainant did not provide the responsive records until after the filing of the Denial of Access Complaint would change the substance of the Council's Final Decision. Thus, the Complainant's request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
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RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2010-303

v.

Township of Livingston (Essex)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The Custodian’s request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the statutorily mandated time frame.
2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant’s OPRA request Item No. 2 although such records were readily available for disclosure. Additionally, the Council declines to order disclosure of the responsive resolutions because the evidence of record indicates that the Custodian provided the Complainant with access to same on December 10, 2010.
3. Regarding the records responsive to the Complainant’s OPRA request Items No. 1 and No. 3, the GRC declines to order disclosure of the responsive records because the Custodian eventually provided same to the Complainant on December 10, 2010, or fifty-one (51) business days after receipt of the Complainant’s OPRA request.
4. The Custodian’s failure to respond in writing to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order



October 31, 2007), the Custodian's request for an extension of time was invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. by failing to provide responsive resolutions to the Complainant although such records were readily available for disclosure. However, the Custodian did eventually provide access to all responsive records on December 10, 2010, or fifty-one (51) days after receipt of the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian's untimely responses do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2010-303

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Inspection of:

1. Proposals from contracts regarding the new municipal and police building referenced by Mayor Johnson in her speech on September 20, 2010. The applicable time frame is between September 7, 2007 when R-08-192 rejected bids and December 2007 when a contract was awarded.
2. Resolution rejecting the first round of bids for the new municipal and police building. The applicable time frame is the Summer of 2007 to September 4, 2007.
3. Lowest bid rejected for the first round bidding for the new municipal and police building. The anticipated amount of that bid is \$31,559,273 per Mayor Johnson's September 20, 2010 remarks that the bid chosen (\$26, 259,273) saved \$5,300,000.

Request Made: September 27, 2010

Response Made: October 7, 2010

Custodian: Glenn Turteltaub

GRC Complaint Filed: November 16, 2010³

Background

September 27, 2010

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

October 7, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request.⁴ The Custodian requests seven (7) additional days to obtain, review and redact (if necessary) any records responsive to the Complainant's OPRA request. The Custodian states that this extension is needed due to the voluminous nature

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner, Et Al. (Riverdale, NJ).

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

⁴ The Custodian noted on the request form that as of this date, the OPRA request was "in progress."

of the responsive records and the fact that the retrieval of records will be delayed due to the relocation of the municipal offices.

October 27, 2010

Letter from the Complainant to the Custodian. The Complainant requests that the Custodian advise as to the status of his OPRA request.

November 16, 2010

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

- Complainant’s OPRA request dated September 27, 2010.
- Letter from the Custodian to the Complainant dated October 7, 2010.
- Letter from the Complainant to the Custodian dated October 27, 2010.

The Complainant states that he submitted an OPRA request to the Township of Livingston (“Township”) on September 27, 2010. The Complainant states that the Custodian responded in writing on October 7, 2010 requesting an additional seven (7) days to respond to the Complainant’s OPRA request.

The Complainant states that after not receiving any further communications from the Township, he sent a letter to the Custodian on October 27, 2010 requesting a status update of his OPRA request.

The Complainant does not agree to mediate this complaint.

November 26, 2010

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

December 2, 2010

E-mail from the Custodian to the GRC. The Custodian states that he received the GRC’s request for an SOI on November 29, 2010. The Custodian states that he assumes that the deadline to submit same is December 6, 2010. The Custodian states that he will contact the GRC if additional time to complete the SOI is needed.

December 6, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until December 8, 2010 to submit the SOI.

December 7, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until December 8, 2010 to submit the SOI.

December 7, 2010

E-mail from the Custodian to the GRC. The Custodian states that he erred in requesting an extension of time until December 8, 2010 and actually wanted to request an extension of time until December 17, 2010.

December 8, 2010

E-mail from the GRC to the Custodian. The GRC states that the SOI for this complaint is now due on December 17, 2010.

December 17, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 27, 2010 with the Custodian's note thereon.
- Letter from the Custodian to the Complainant dated October 7, 2010.

The Custodian certifies that although request Items No. 1 and No. 3 were invalid because they sought documents that formed the basis of the Mayor's speech at the grand opening of the new municipal and police building, the Custodian conducted research to determine which records were responsive to these two request items. The Custodian certifies that his search for the requested records included speaking with the Mayor, e-mailing the Township Manager's office and speaking with the Project Manager in an attempt to ascertain the basis for the number quoted by the Mayor. The Custodian certifies that he also sent memoranda to Township departments and verbally inquired with personnel believed to have knowledge of what records were responsive. The Custodian certifies that the Mayor subsequently indicated that her remarks were based on a document provided to her by the Township Manager; thus, the Custodian sent e-mails to the Township Manager and spoke with the Township Manager's assistant.

The Custodian certifies that after these efforts failed to yield responsive records, the Township located and obtained all proposals received for the new municipal building to include those received in the first and second rounds of bidding, as well as during the negotiation phase. The Custodian certifies that the Complainant was notified that all proposals were available and the Complainant reviewed same on December 10, 2010.

The Custodian certifies that regarding request Item No. 2, he quickly located the responsive resolutions. The Custodian certifies that pursuant to the Complainant's past preferences, the resolutions were not immediately provided to the Complainant until all other responsive records were obtained and made available.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on September 27, 2010. The Custodian certifies that he responded on October 7, 2010 requesting an extension of time to respond based on the voluminous nature of the records and the Township's relocation of its municipal offices. The Custodian certifies that the Complainant reviewed the following responsive records on December 10, 2010:

- All bids received in connection with Project No. 2002005 (thousands of pages).
- Resolution R-07-192 dated September 4, 2007 (1 page).

- Resolution R-07-214 dated October 15, 2007 (1 page).

The Custodian states that OPRA imposes no obligation on a custodian to conduct research in order to properly respond to an OPRA request. The Custodian states that the Complainant's OPRA request Items No. 1 and No. 3 forced the Custodian to conduct research in order to locate proposals from 2007 that contained information referenced by the Mayor or containing specific dollar amounts. The Custodian contends that the effort the Township expended to locate responsive records shows that the Township went above and beyond the provisions of OPRA to locate and provide responsive records.

The Custodian further asserts that between the date of the Complainant's OPRA request and production of the responsive records on December 10, 2010, the Township was dealing with several issues. The Custodian asserts that first, Township operations were substantially disrupted as it was moving its offices from a temporary location to the new municipal building. The Custodian asserts that the Complainant submitted his OPRA request during this moving period. The Custodian next asserts that the Township was also dealing with three (3) additional complaints before the GRC, one of which the Complainant withdrew after the filing of the SOI.⁵ The Custodian finally asserts that the Township was also responsible for responding to two (2) OPRA requests the Complainant filed on November 22, 2010 that sought the same records at issue in this complaint.

The Custodian contends that the Complainant's position in this complaint is that the Custodian did not sufficiently update the Complainant as to the status of the request at issue. The Custodian contends that his October 7, 2010 written response represented a sufficient response under OPRA. The Custodian further argues that he did not intentionally or deliberately deny the Complainant access to any of the responsive records.

The Custodian notes that the resolutions responsive to Item No. 2 were easily located and ready for review pending identification of all other responsive records. The Custodian reiterates that withholding the resolutions is consistent with the Complainant's preferred practice and instructions over the past ten (10) years. The Custodian asserts that because the Complainant's OPRA requests typically seek multiple records, the Custodian waited until all records were available to contact the Complainant. The Custodian asserts that this practice is an accommodation to the Complainant to avoid multiple trips to the Clerk's Office. The Custodian contends that the request at issue herein was handled in this way; however, the Complainant still filed a complaint alleging that the Custodian knowingly and willfully violated OPRA. The Custodian states that he will discontinue this process accordingly.⁶

The Custodian contends that the breadth and intensity of the Complainant's OPRA requests have virtually monopolized the time of the Custodian and one part-time staffer hired specifically to handle the Complainant's OPRA requests, to the detriment of

⁵ Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-234 (October 2010).

⁶ The Custodian notes that eight (8) days after the filing of this complaint, the Complainant submitted another OPRA request for identical records and insisted that the request be considered a new OPRA request although he acknowledged the duplication of the request at issue herein.

the Township and its 28,000 citizens. The Custodian asserts that the Township would welcome the opportunity to have the GRC review the hundreds of OPRA requests submitted by the Complainant and resulting tens of thousands of pages of records generated in response to such requests. The Custodian further contends that the Complainant's OPRA requests are also substantially disrupting other Township officials such as the Township Manager, Comptroller, CFO, the Engineering Department and others. The Custodian contends that the Complainant's documented history of inundating the Township with OPRA requests provides clear proof of the Complainant's abuse of the intent of OPRA.

The Custodian asserts that the GRC should know the extent to which the Township has complied with the Complainant's excessive amount of comprehensive OPRA requests. The Custodian asserts that the Township, including himself and all affected departments and staff members, makes a concerted effort to provide all responsive records in accordance with OPRA. The Custodian asserts that a review of the responses and voluminous amount of records provided to the Complainant clearly proves that the Township is trying in good faith to comply with the Complainant's OPRA requests. The Custodian further asserts that this is made even clearer as the Township has hired a part time employee and has used hours of attorney time in responding exclusively to the Complainant's many OPRA requests.

The Custodian requests that the GRC direct the Township how it can best respond to the Complainant's regular OPRA requests without disrupting the Township's operations.

December 18, 2010

Letter from the Complainant to the GRC. The Complainant disputes that his OPRA request was overly broad. The Complainant contends that the Custodian rightly acknowledged that the Township went beyond the requirements of OPRA. The Complainant contends that the Township's response simply should have comprised one (1) specific bid from the first round of bidding for a specific construction project and one (1) specific resolution.

The Complainant further disputes the Custodian's assertion that his October 7, 2010 letter response was sufficient. The Complainant notes that the Custodian clearly sought an extension of seven (7) business days and failed to respond in the ensuing 25 business days before the Complainant filed this complaint. The Complainant further contends that the Custodian failed to provide an explanation for his failure to respond within the extended time frame or at any time prior to the filing of this complaint.

The Complainant contends that he showed patience and cooperation by sending a letter to the Custodian on October 27, 2010 requesting a status update on the subject OPRA request. The Complainant notes that he received no response and waited another two (2) weeks before filing a complaint. The Complainant notes that the Custodian failed to acknowledge the October 27, 2010 correspondence in the SOI, but indicated that his October 7, 2010 response was sufficient. The Complainant contends that he received no

additional correspondence following the Custodian's request for an extension of time and no status update, thus this complaint resulted.⁷

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

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

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA 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.⁸ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Custodian responded to the Complainant in writing on the eighth (8th) business day after receipt of the Complainant's OPRA request requesting an extension of seven (7) business days to respond to same, and failed to grant access, deny access or request clarification of the request at issue herein by that extended

⁷ The Complainant further asserted that although OPRA does not require a requestor to state his/her reason for submitting an OPRA request, the Complainant submitted his duplicate OPRA request because of a concern that the Township would withhold the responsive records until the conclusion of this complaint's adjudication.

⁸ 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.

date. Moreover, the Custodian's request for an extension of time is invalid because he failed to respond in writing requesting same within the statutorily mandated time frame. See Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. The Custodian's request for an extension of time is also invalid pursuant to Hardwick because the Custodian failed to request same in writing within the statutorily mandated time frame.

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

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

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

The Custodian certified in the SOI that he quickly located the resolutions responsive to the Complainant's OPRA request Item No. 2 but withheld disclosure pending the compilation of the records responsive to request Items No. 1 and No. 3. The Custodian further noted that he withheld access to the responsive resolutions in accordance with the Complainant's preferred practice over the last ten (10) years.

The GRC must determine whether the Custodian was required to produce the resolutions available for disclosure at the time of his response or whether the Custodian was not obligated to provide the resolutions until after compiling the remaining records.

OPRA mandates that “government records *shall be readily accessible for inspection, copying, or examination* by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be *construed in favor of the public's right of access.*” (Emphasis added.) N.J.S.A. 47:1A-1. Moreover, OPRA provides that a custodian must respond to an OPRA request in writing granting or denying 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. The Council has expanded on the response options available to a custodian to include requesting clarification and seeking an extension of time. See Kelley, supra.

Here, the Custodian certified in the SOI that he quickly located the responsive resolutions; however, the Custodian failed to provide copies of those resolutions responsive to the Complainant’s OPRA request Item No. 2 which were available pursuant to OPRA’s mandate to make government records “readily accessible for inspection, copying or examination.” N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-1. Further, the Custodian’s withholding of the responsive resolutions which were available for disclosure at the time of the Custodian’s initial response until the Custodian obtained all other responsive records placed an unnecessary limitation on “... the public's right of access.” N.J.S.A. 47:1A-1.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.i by failing to provide to the Complainant copies of the available records responsive to the Complainant’s OPRA request Item No. 2 although such records were readily available for disclosure. Additionally, the Council declines to order disclosure of the responsive resolutions because the evidence of record indicates that the Custodian provided the Complainant with access to same on December 10, 2010.

Regarding the records responsive to the Complainant’s OPRA request Items No. 1 and No. 3, the GRC declines to order disclosure of the responsive records because the Custodian eventually provided same to the Complainant on December 10, 2010, or fifty-one (51) business days after receipt of the Complainant’s OPRA request.

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).

The Custodian’s failure to respond in writing to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*, the Custodian’s request for an extension of time was invalid pursuant to Hardwick, and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. by failing to provide responsive resolutions to the Complainant although such records were readily available for disclosure. However, the Custodian did eventually provide access to all responsive records on December 10, 2010, or fifty-one (51) days after receipt of the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian’s untimely responses do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

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

pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the statutorily mandated time frame.

2. The Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide to the Complainant copies of the available records responsive to the Complainant's OPRA request Item No. 2 although such records were readily available for disclosure. Additionally, the Council declines to order disclosure of the responsive resolutions because the evidence of record indicates that the Custodian provided the Complainant with access to same on December 10, 2010.
3. Regarding the records responsive to the Complainant's OPRA request Items No. 1 and No. 3, the GRC declines to order disclosure of the responsive records because the Custodian eventually provided same to the Complainant on December 10, 2010, or fifty-one (51) business days after receipt of the Complainant's OPRA request.
4. The Custodian's failure to respond in writing to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), the Custodian's request for an extension of time was invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. by failing to provide responsive resolutions to the Complainant although such records were readily available for disclosure. However, the Custodian did eventually provide access to all responsive records on December 10, 2010, or fifty-one (51) days after receipt of the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian's untimely responses 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.

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Executive Director

March 20, 2012