



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

September 25, 2012 Government Records Council Meeting

Baruch B. Blaustein
Complainant

Complaint No. 2011-109

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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 within five (5) business days from receipt of the Council’s Interim Order certified that she informed the Complainant in writing of the amount of the special service charge for converting the requested records into the format requested by the Complainant, and because the Custodian certified that the Custodian has taken no action with respect to purchasing the requested records, the Custodian fully complied with the Council’s July 31, 2012 Interim Order.
2. Although Custodian Lydia R. Silva violated OPRA by failing to (a) respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, (b) make immediate access records; to wit, budgets immediately available to the Complainant, (c) respond to each item contained in the Complainant’s OPRA request, (d) specify a date certain on which the Complainant could expect access to be granted or denied, and (e) provide the Complainant with the requested records in the medium requested, Ms. Silva is no longer in the employ of the Lakewood Board of Education. On July 15, 2012, Arlene Biesiada was appointed to replace Ms. Silva as the Custodian and the evidence of record reveals that Ms. Biesiada fully complied in a timely manner with the Council’s June 31, 2012 Interim Order. As such, it is concluded that Custodian Biesiada’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of September, 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: October 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Baruch B. Blaustein¹
Complainant

GRC Complaint No. 2011-109

v.

Lakewood Board of Education (Ocean)²
Custodian of Records

Records Relevant to Complaint: Copy of the budget for the years 2000 through 2011 in digital format.

Request Made: March 30, 2011

Response Made: April 8, 2011

Custodian: Lydia R. Silva

GRC Complaint Filed: April 11, 2011

Background

July 31, 2012

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because OPRA provides that “[i]mmediate access ordinarily shall be granted to budgets...”, the Custodian unlawfully denied the Complainant access to copies of the budget for the years 2000 through 2011 by not making those records immediately available upon receipt of the Complainant’s OPRA request in violation of N.J.S.A. 47:1A-5.e. and Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (April 2008).

¹ No legal representation listed on record.

² Represented by John E. Croot, Esq., Schwartz Simon Edelstein & Celso LLC (Whippany, NJ).

3. Because the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to specify a date certain on which the Complainant could expect access to be granted or denied, the Custodian's response informing the Complainant of the potential cost was legally insufficient and violated N.J.S.A. 47:1A-5.g., Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
4. Because the Custodian failed to provide the Complainant with the requested budget for the years 2000 through 2011 in the medium requested, the Custodian must disclose said records to the Complainant in the requested medium. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).
5. **If applicable, the Custodian shall calculate the appropriate special service charge in accordance with Paragraph No. 4 and shall make the amount of the charge available to the Complainant in writing within five (5) business days from receipt of the Council's Interim Order. The Complainant shall within three (3) business days from receipt of the amount of the charge deliver to the Custodian either (a) payment in the amount of the said charge, or (b) a statement declining to purchase the records. Upon compliance by the Complainant with (a) above, the Custodian shall within fifteen (15) business days from receipt of the Council's Interim Order disclose to the Complainant the requested records in the appropriate medium with any lawful redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director. Conversely, upon compliance by the Complainant with (b) above, the Custodian shall within ten (10) business days from receipt of the Council's Interim Order provide a certification in accordance with N.J. Court Rule 1:4-4 to the Executive Director acknowledging the Complainant's declination; thereafter, the Custodian shall have no further obligation with respect to disclosure of the records. The Complainant's failure to take any action within the time provided shall be construed the same as (b) above.**

6. Because the Custodian was concerned that the records might be damaged in the process, the Custodian did not violate OPRA when she refused to accommodate the Complainant's request to use his personal scanner to scan the requested records into a digital format.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

August 3, 2012

Council's Interim Order ("Order") distributed to the parties.

August 10, 2012

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards to the GRC the Custodian's certification dated August 10, 2012. The Custodian certifies that she was appointed as the Custodian on July 15, 2012. The Custodian further certifies that on August 10, 2012 she informed the Complainant in writing that all records responsive to his request have been located and are in bound form. The Custodian further certifies that she informed the Complainant that conversion of the records into either hard copy or digital form will require substantial manipulation and therefore the Complainant will incur a special service charge ("SSC") in the amount of \$120.00 for the records in electronic format or \$145.00 for paper copies of the records.³

September 4, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that the certification of compliance is deficient because the Custodian elected to impose a SSC of \$120.00 in order to convert the file into a digital format but provided the Council with no basis for arriving at said charge. The GRC informs Counsel that a SSC questionnaire was sent to the Custodian for completion on June 22, 2012; however, the Custodian failed to return the completed questionnaire to the GRC. The GRC further informs Counsel that if the Custodian does not return the completed SSC questionnaire within three (3) business days, the complaint will proceed to adjudication based only upon the information provided by the Custodian in her certification dated August 10, 2012.

September 5, 2012

E-mail from the Custodian's Counsel to the GRC. Counsel states that the SSC questionnaire was sent by the GRC on June 22, 2012 to Lydia R. Silva, who is no longer employed by the Board. Counsel states that the present Custodian was not appointed until July 5, 2012. Counsel further states that the Custodian is presently on vacation and will return on September 10, 2012, and that he will have the Custodian complete and return the SSC questionnaire at that time.

³ The special service charge for paper copies is not relevant because the Complainant requested the records in digital format.
Baruch B. Blaustein v. Lakewood Board of Education (Ocean), 2011-109 – Supplemental Findings and Recommendations of the Executive Director

September 10, 2012

E-mail from the Custodian’s Counsel to the GRC. Counsel forwards the Custodian’s completed SSC questionnaire. The questionnaire provides as follows:

QUESTION	CUSTODIAN’S RESPONSE
1. What records are requested?	Copies of the Board’s Annual Budgets for the years 2000-2011 in digital format.
2. Give a general nature description and number of the government records requested.	The Complainant requested copies of eleven (11) of the Board’s annual budgets. The Board estimates that the documents responsive to the Complainant’s request amount to approximately 3,000 pages.
3. What is the period of time over which the records extend?	The requested records extend from 2000 to 2011.
4. Are some or all of the records sought archived or in storage?	All of the requested documents are available in the [school] District with the exception of the budget for 2002-2003. The District is currently searching its warehouse to locate a copy of the 2002-2003 budget. Please note that the budget numbers for 2002-2003 are also included within the 2003-2004 Budget, although the supporting documentation would not be.
5. What is the size of the agency (total number of employees)?	Approximately 750 employees.
6. What is the number of employees available to accommodate the records request?	There is a single employee dedicated to the purpose [and] it is not anticipated that more than one individual would be necessary.
7. To what extent do the requested records have to be redacted?	The records do not have to be redacted.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	Because the District has estimated that the documents responsive to the request amount to approximately 3,000 pages, the manipulation of these documents into an electronic format will take a single staff member approximately one full working day to complete. The labor cost associated with the employee providing these services is \$15.00 per hour.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	N/A
10. What is the level of personnel, hourly rate and	N/A

number of hours, if any, required for a government employee to return records to their original storage place?	
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	We are using a single individual to comply with this request. This particular individual is a dedicated copier person who is specifically trained on the machine to be used for this manipulation of records.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Julian Young, Photocopy Technician, at \$15.00 per hour.
13. What is the availability of information technology and copying capabilities?	At this time, a copy machine is available to scan the documents into electronic format.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	The State budget is produced on an antiquated State software package. The District was only able to produce printed copies. The documents would need to be photocopied or scanned into electronic format. Given the volume of documents requested, it is anticipated that this will take approximately eight (8) hours.

September 14, 2012

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards to the GRC a certification from the Custodian dated September 14, 2012, wherein the Custodian certifies that she has not received any communication from the Complainant since she provided the Complainant with the SSC on August 10, 2012 and that the Complainant has taken no further action with respect to purchasing the requested records.

Analysis

Whether the Custodian has complied with the Council's Interim Order dated July 31, 2012?

At its July 31, 2012 public meeting, the Council ordered the Custodian to calculate the SSC for the requested records and make the amount of the charge available to the Complainant in writing within five (5) business days from receipt of the Council's Interim Order.⁴ Thereafter, the actions of the Custodian were made contingent upon the

⁴ UPS Next Day Air® Proof of Delivery revealed that the Custodian received the Council's Order on August 6, 2012 at 9:21 a.m.
Baruch B. Blaustein v. Lakewood Board of Education (Ocean), 2011-109 – Supplemental Findings and Recommendations of the Executive Director 5

response of the Complainant. If within three (3) business days from receipt of the SSC the Complainant paid it, the Custodian had fifteen (15) business days from August 6, 2012 to disclose to the Complainant the requested records with any redactions together with a document index explaining the basis for those redactions and to submit a certification of compliance to the Executive Director. Conversely, if within three (3) business days from receipt of the SSC the Complainant declined to pay the charge, the Custodian had ten (10) business days from August 6, 2012 to provide a certification to the Executive Director acknowledging the Complainant's declination. The Order provided that the Complainant's failure to take any action within the time provided would be considered a declination.

On August 10, 2012, the Custodian delivered to the GRC certified confirmation that on August 10, 2012 she informed the Complainant in writing that all records responsive to his request have been located and that conversion of the records into digital format would require substantial manipulation. The Custodian further certified that she informed the Complainant that a SSC in the amount of \$120.00 would be assessed for the record conversion.

The GRC asked the Custodian to return the completed SSC questionnaire which was provided to former Custodian Silva on June 22, 2012. The Custodian returned the completed questionnaire on September 10, 2012. The GRC examined the questionnaire and determined that the Custodian intends to use the services of one (1) employee to manipulate approximately 3,000 pages of bound paper records and convert the records into a digital format as requested by the Complainant. The GRC further determined from examining the questionnaire that the conversion would necessitate eight (8) hours of work by the employee, who is a photocopy technician employed to perform such services at the rate of \$15.00 per hour. As such, the SSC of \$120.00 for conversion of the records into the requested format is not unreasonable.

The evidence of record reveals that the Custodian informed the Complainant in writing of the amount of the SSC on August 10, 2012. Therefore, the Complainant had three (3) business days from August 10, 2012 to either pay the amount of the SSC in return for the requested records or decline to purchase the records. On September 14, 2012, the Custodian delivered to the GRC a certification dated September 14, 2012, wherein the Custodian certified that she has not received any communication from the Complainant with respect to purchasing the requested records.

Therefore, because the Custodian within five (5) business days from receipt of the Council's Interim Order certified that she informed the Complainant in writing of the amount of the SSC for converting the requested records into the format requested by the Complainant, and because the Custodian certified that the Custodian has taken no action with respect to purchasing the requested records, the Custodian fully complied with the Council's July 31, 2012 Interim Order.

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 matter before the Council, although Custodian Lydia R. Silva violated OPRA by failing to (a) respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, (b) make immediate access records; to wit, budgets immediately available to the Complainant, (c) respond to each item contained in the Complainant’s OPRA request, (d) specify a date certain on which the Complainant could expect access to be granted or denied, and (e) provide the Complainant with the requested records in the medium requested, Ms. Silva is no longer in the employ of the Lakewood Board of Education. On July 15, 2012, Arlene Biesiada was appointed to replace Ms. Silva as the Custodian and the evidence of record reveals that Ms. Biesiada fully complied in a timely manner with the Council’s June 31, 2012 Interim Order. As such, it is concluded that Custodian Biesiada’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian within five (5) business days from receipt of the Council's Interim Order certified that she informed the Complainant in writing of the amount of the special service charge for converting the requested records into the format requested by the Complainant, and because the Custodian certified that the Custodian has taken no action with respect to purchasing the requested records, the Custodian fully complied with the Council's July 31, 2012 Interim Order.

2. Although Custodian Lydia R. Silva violated OPRA by failing to (a) respond in writing to the Complainant's OPRA request within the statutorily mandated time frame, (b) make immediate access records; to wit, budgets immediately available to the Complainant, (c) respond to each item contained in the Complainant's OPRA request, (d) specify a date certain on which the Complainant could expect access to be granted or denied, and (e) provide the Complainant with the requested records in the medium requested, Ms. Silva is no longer in the employ of the Lakewood Board of Education. On July 15, 2012, Arlene Biesiada was appointed to replace Ms. Silva as the Custodian and the evidence of record reveals that Ms. Biesiada fully complied in a timely manner with the Council's June 31, 2012 Interim Order. As such, it is concluded that Custodian Biesiada's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Baruch B. Blaustein
Complainant

Complaint No. 2011-109

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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).
2. Because OPRA provides that “[i]mmediate access ordinarily shall be granted to budgets...”, the Custodian unlawfully denied the Complainant access to copies of the budget for the years 2000 through 2011 by not making those records immediately available upon receipt of the Complainant’s OPRA request in violation of N.J.S.A. 47:1A-5.e. and Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (April 2008).
3. Because the Custodian failed to respond to each item contained in the Complainant’s OPRA request, and failed to specify a date certain on which the Complainant could expect access to be granted or denied, the Custodian’s response informing the Complainant of the potential cost was legally insufficient and violated N.J.S.A. 47:1A-5.g., Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
4. Because the Custodian failed to provide the Complainant with the requested budget for the years 2000 through 2011 in the medium requested, the Custodian must disclose said records to the Complainant in the requested medium. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is



reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).

5. **If applicable, the Custodian shall calculate the appropriate special service charge in accordance with Paragraph No. 4 and shall make the amount of the charge available to the Complainant in writing within five (5) business days from receipt of the Council's Interim Order. The Complainant shall within three (3) business days from receipt of the amount of the charge deliver to the Custodian either (a) payment in the amount of the said charge, or (b) a statement declining to purchase the records. Upon compliance by the Complainant with (a) above, the Custodian shall within fifteen (15) business days from receipt of the Council's Interim Order disclose to the Complainant the requested records in the appropriate medium with any lawful redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4¹ to the Executive Director. Conversely, upon compliance by the Complainant with (b) above, the Custodian shall within ten (10) business days from receipt of the Council's Interim Order provide a certification in accordance with N.J. Court Rule 1:4-4 to the Executive Director acknowledging the Complainant's declination; thereafter, the Custodian shall have no further obligation with respect to disclosure of the records. The Complainant's failure to take any action within the time provided shall be construed the same as (b) above.**
6. Because the Custodian was concerned that the records might be damaged in the process, the Custodian did not violate OPRA when she refused to accommodate the Complainant's request to use his personal scanner to scan the requested records into a digital format.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 2012

Robin Berg Tabakin, Chair
Government Records Council

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."

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 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Baruch B. Blaustein¹
Complainant

GRC Complaint No. 2011-109

v.

Lakewood Board of Education (Ocean)²
Custodian of Records

Records Relevant to Complaint: Copy of the budget for the years 2000 through 2011 in digital format.

Request Made: March 30, 2011

Response Made: April 8, 2011

Custodian: Lydia R. Silva

GRC Complaint Filed: April 11, 2011

Background

March 30, 2011

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. The Complainant indicates that the preferred method of delivery is in digital format via e-mail.

April 4, 2011

Custodian's response to the OPRA request. The Custodian responds verbally via telephone to the Complainant's OPRA response on the third (3rd) business day following receipt of such request. The Custodian states that she placed a telephone call to the Complainant informing him of the "potential cost" for the records and that the Complainant told the Custodian to put the request on hold.³

April 6, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with no attachments.

The Complainant states that he provided his OPRA request to the Custodian on or about March 31, 2012; however, because he did not make a copy he can neither state the

¹ No legal representation listed on record.

² Represented by Michael Inzelbuch, Esq. (Lakewood, NJ).

³ Although the Custodian did not make it clear, the "potential cost" appears to be the total amount it will cost to convert the records to a digital format.

date with certainty nor attach a copy of the request to his Denial of Access Complaint. The Complainant states that he was told that the Lakewood Board of Education (“Board”) does not have the records he requested in digital format and that they can disclose hard copies to him but it will cost him over \$100.00 to obtain the copies.⁴ The Complainant states that he asked the Custodian if he could bring his own scanner to the Custodian’s office and scan the copies. The Complainant states that the Custodian told him that he could not scan the copies because she was concerned that the records might be damaged in the process.

The Complainant states that on April 8, 2011, the Custodian informed him that copies of the requested records were ready to be paid for and picked up. The Complainant states that he made another request to personally scan the records but that the Custodian told him that she made copies for him before the OPRA deadline date and was not further obligated to oblige him. The Complainant states that after the Custodian made the copies he could no longer see any reason why he was not allowed to scan them since he would be scanning copies instead of originals. The Complainant states that by scanning copies instead of originals there is no longer an issue of potential damage to the originals.

The Complainant states that he believes the Board does have digital copies of the requested records but that they want him to pay to have his OPRA request fulfilled. The Complainant said he asked the Custodian to give him a written response to his OPRA request but the Custodian refused to do so.

The Complainant does not agree to mediate this complaint.

April 12, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the Complainant stated that he cannot produce a copy of the OPRA request that formed the basis of this complaint. The GRC asks the Custodian to send a copy of said OPRA request if the Custodian has the document or to submit a certification to the GRC stating that the Custodian has not received such request.⁵

April 15, 2011

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

April 15, 2011

Custodian’s SOI attaching the Complainant’s OPRA request dated March 30, 2011.

The Custodian certifies that her search for the requested records involved spending two (2) hours and fifty (50) minutes in the Board’s warehouse looking for said records. The Custodian also certifies that the records that may have been responsive to the request were not destroyed to her knowledge because they must be retained as a

⁴ The Complainant did not state the date he was given this message, the name of the person who delivered the message to him or the means by which the message was conveyed.

⁵ The Custodian did not respond to the GRC’s correspondence.

permanent record in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that she received the Complainant's OPRA request on March 30, 2011. The Custodian further certifies that she determined that the records responsive to the Complainant's request were all budget documents from the year 1999-2000 through the year 2011-2012.⁶ The Custodian certifies that on April 4, 2011 she placed a telephone call to the Complainant and informed him of the potential cost for the records at which time the Custodian certifies that the Complainant told her to put the request "on hold."

The Custodian certifies that thereafter she made copies of all of the records responsive to the Complainant's request except for the records during the year 2003-2004 because those records could not be located. The Custodian certifies that the records totaled 2,926 pages. The Custodian further certifies that the records in unredacted form were subsequently made available to the Complainant for pick up on April 8, 2011, but that the Complainant refused to take possession of the records at that time.⁷

January 25, 2012

Telephone call from the Complainant to the GRC. The Complainant asks the GRC if he can add other records to his March 30, 2011 OPRA request.

January 25, 2012

E-mail from the GRC to the Complainant. The GRC informs the Complainant that he cannot add other records to his previous OPRA request and that if he wants to request additional records from the Custodian he will have to file another OPRA request.

January 26, 2012

E-mail from the Complainant to the GRC. The Complainant informs the GRC that he never received a copy of the Custodian's submission to the GRC in response to his complaint and asks the GRC if the Custodian submitted a response to the complaint.

January 27, 2012

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the Complainant advised the GRC that he never received a copy of the SOI from the Custodian. The GRC further informs the Custodian that she certified that she provided a copy of the SOI to the Complainant at the time she submitted the SOI to the GRC. The GRC tells the Custodian to send a copy of the SOI to the Complainant immediately and to copy the GRC with the transmittal letter or otherwise provide the GRC with proof that a copy of the SOI was sent to the Complainant.⁸

⁶ The Custodian does not explain why she determined that 2012 records were responsive to the Complainant's request given the fact that the Complainant's OPRA request was dated March 30, 2011.

⁷ The Custodian does not explain the means by which the Complainant was notified that the requested records had been made available.

⁸ The Custodian did not respond to the GRC's correspondence.

February 14, 2012

E-mail from the GRC to the Complainant. The GRC asks the Complainant to advise the GRC if the Custodian had not yet forwarded a copy of the SOI to the Complainant as per the GRC's instructions in its e-mail to the Custodian dated January 27, 2012.

February 24, 2012

E-mail from the Complainant to the GRC. The Complainant informs the GRC that the Custodian did not forward to him a copy of the SOI as instructed to do so by the GRC and asks the GRC to send him a copy from its file. The Complainant asks the GRC if sanctions can be imposed against the Custodian for not sending the Complainant a copy of the SOI and for ignoring the GRC's instructions.

February 24, 2012

E-mail from the GRC to the Complainant. The GRC sends the Complainant a copy of the GRC's copy of the Custodian's SOI. The GRC informs the Complainant that there is a provision in OPRA that provides for penalties against a custodian under certain circumstances.

February 24, 2012

E-mail from the GRC to the Custodian. The GRC returns the undated signature page from the SOI and asks the Custodian to date it and return it to the GRC. The GRC also asks the Custodian to clarify some discrepancies in the SOI. The GRC informs the Custodian that the GRC cannot understand why the Custodian would make the records available to the Complainant on April 8, 2011 if the Complainant told the Custodian on April 4, 2011 to hold the request in abeyance. The GRC also asks the Custodian to inform the GRC of the dollar amount of the "potential cost" for converting the records that she referred to in her April 4, 2011 response to the Complaint's OPRA request.

February 28, 2012

Letter from the Custodian to the GRC. The Custodian states that she is replying to the GRC's e-mail inquiry to the Custodian dated February 24, 2012. The Custodian delivers to the GRC the dated signature page from the SOI. The Custodian also informs the GRC that in clarification of SOI item number 8, she placed a telephone call to the Complainant on April 4, 2011, to inform him of the potential cost of having the 2000 through 2011 budgets copied into digital format. The Custodian states that the Complainant told her at that time that he wanted the digital request put on hold. The Custodian informs the GRC that in clarification of SOI item number 12, on April 8, 2011, copies of the budget from 1999 through 2011, with the exception of the 2003-2004 budget, were made available for a 3:30 p.m. pick up by the Complainant. The Custodian states that copies of the budget were made because the Complainant told her on April 4, 2011 that he wanted the digital copies put on hold. The Custodian states that the Complainant refused to pick up the copies.

The Custodian states that the copies of the requested records comprised 2,926 pages at a cost of \$0.05 per page for a total cost of \$146.30. The Custodian states that "the Business Administrator at the time of the request is no longer employed by the

[Board], so I am unable to provide you with the ‘potential cost’ that Mr. Blaustein may or may not have been told on April 4, 2011.”

June 22, 2012

E-mail from the GRC to the Custodian. The GRC informs the Custodian that she clarified and supplemented her SOI with the content of her February 28, 2012 letter, therefore the content of that letter must be put in the form of a certification and returned to the GRC. The Custodian is informed that she need only prepare a certification incorporating her February 28, 2012 letter.

The GRC also informs the Custodian that the GRC still requires clarification of the “potential cost” of digitalizing the records. The GRC provides the Custodian with a Special Service Charge Questionnaire and requests that the Custodian complete and return the questionnaire to the GRC if employees of the Board intended to digitalize the record. The GRC tells the Custodian that if a professional service was going to convert the records the GRC will need a copy of the professional service’s estimate to digitalize the requested record. The GRC tells the Custodian to submit her certification to the GRC within five (5) business days.⁹

June 22, 2012

E-mail from the Custodian’s Counsel to the GRC. Counsel, having been copied on the GRC’s e-mail to the Custodian dated June 22, 2012, informs the GRC that they no longer represent the Custodian. Counsel further informs the GRC that the GRC should contact the Custodian’s new Counsel, Steven Edelstein, Esq.

June 22, 2012

E-mail from the GRC to Steven Edelstein, Esq. The GRC forwards the e-mail from the GRC to the Custodian dated June 22, 2012 to Mr. Edelstein and asks him to please notify the GRC with his contact information.¹⁰

Analysis

Whether the Custodian properly responded to the Complainant’s March 30, 2011 OPRA request?

OPRA provides that:

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

OPRA also provides that:

⁹ The Custodian did not respond to the GRC’s correspondence.

¹⁰ Mr. Edelstein did not respond to the GRC’s correspondence.

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

OPRA 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* ... 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....The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (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 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.¹¹ 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 evidence of record reveals that the Complainant filed his OPRA request on March 30, 2011 seeking copies of the budget for the years 2000 through 2011 in digital format. The Custodian certified that she verbally responded to the request via telephone on April 4, 2011, which was the third (3rd) business day following receipt of the request. There is no dispute between the parties that anything other than a verbal response was delivered from the Custodian to the Complainant. As such, the Custodian has failed to respond to the Complainant’s OPRA request *in writing*

¹¹ 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.

within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Accordingly, 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.

Further, the Complainant sought copies of the budget for the years 2000 through 2011 in digital format and pursuant to N.J.S.A. 47:1A-5.e., "[i]mmediate access ordinarily shall be granted to budgets..."

In Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (April 2008), the complainant requested Catapult Learning's proposal detailing the budget; however, the custodian did not disclose the requested record until approximately six (6) months after receipt of the Complainant's OPRA request. The Council found that the custodian violated N.J.S.A. 47:1A-5.e. by not providing the complainant with immediate access to the requested pages of Catapult Learning's proposal detailing the budget.

Therefore, because OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets...", the Custodian unlawfully denied the Complainant access to copies of the budget for the years 2000 through 2011 by not making those records immediately available upon receipt of the Complainant's OPRA request in violation of N.J.S.A. 47:1A-5.e. and Fisher, supra.

Furthermore, when the Custodian did respond, she certified that she placed a telephone call to the Complainant "informing him of [the] potential cost." The Custodian failed to respond to each request item individually or provide the Complainant with a date certain as to when the Custodian would either grant access or deny access to the requested records.

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 specifically states that a custodian "shall indicate the specific basis [for denial of access]..." N.J.S.A. 47:1A-5.g. Further, 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...OPRA request...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." (Emphasis added.)

A custodian also has an obligation to provide the requestor with an anticipated deadline date upon which the requested records will be provided. In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the

custodian provided the complainant with a written response to the complainant's OPRA request, wherein the custodian requested an extension of time to respond to said request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council subsequently held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

In the instant complaint, the Custodian's response not only failed to address each item contained in the Complainant's OPRA request but also failed to specify a date certain on which the Complainant could expect access to be granted or denied. The Custodian in her SOI certified that she responded to the Complainant's March 30, 2011 OPRA request by verbally responding on April 4, 2011, informing the Complainant of the potential cost. Moreover, the Custodian later equivocated about this response by stating "...I am unable to provide you with the 'potential cost' that Mr. Blaustein *may or may not have been told* on April 4, 2011." (Emphasis added.)¹²

Therefore, because the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to specify a date certain on which the Complainant could expect access to be granted or denied, the Custodian's response informing the Complainant of the potential cost was legally insufficient and violated N.J.S.A. 47:1A-5.g., Paff, supra, and Hardwick, supra.

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:

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary

¹² The Custodian made this statement in her letter to the GRC dated February 28, 2012. Despite the GRC's instructions to the Custodian to certify this statement or to incorporate the February 28, 2012 letter within a certification, the Custodian failed and refused to do so.

business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further provides that:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. *If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.* If a request is for a record...[that] require[es] a substantial amount of manipulation...the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

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 her SOI dated April 15, 2011 that she verbally responded to the Complainant’s OPRA request on April 4, 2011 by placing a telephone call to the Complainant and informing him of the potential cost to convert the records to a digital format. The Custodian certified that the Complainant then told her to put the request on hold. The Custodian later equivocated on the substance of her response because when she was asked by the GRC to provide the GRC with the dollar amount of the potential cost for converting the records, the Custodian stated in a letter to the GRC dated February 28, 2012 that she was unable to provide the GRC with the potential cost that she may or may not have told the Complainant on April 4, 2011.

The Complainant makes no reference in his complaint to the April 4, 2011 telephone conversation with the Custodian or the potential cost for the Custodian to convert the records to a digital format. The Complainant only mentions the April 8, 2011 conversation with the Custodian wherein he states that he was told that the Board does

not have the requested records in digital format but that they can disclose hard copies to him at a cost of over \$100.00.

Because the Complainant does not make reference in his complaint to any mention by the Custodian of a potential cost to provide the requested records in digital format; and because the Custodian could not provide the GRC with the dollar amount she certified that she provided to the Complainant as the potential cost for converting the requested records to a digital format; and because there is nothing in writing to support the Custodian's contention that she provided the Complainant with a potential cost for converting the requested records to a digital format; and because the Custodian, upon reflection, stated that she may or may not have provided the Complainant with the potential cost for converting said records; it appears that the Custodian may not have provided the Complainant with the potential cost for converting the requested records to a digital format.

There is no dispute between the parties that the Custodian offered to make copies of the requested records available for pick up by the Complainant. Moreover, the Custodian certified that 2,926 pages of the requested records were copied and made ready for pick up by the Complainant upon his payment of the copying charges. Further, the Complainant in his Denial of Access Complaint did not contradict the Custodian's certification.¹³ However, the Complainant did not request copies of the records that he could pick up; he requested records in digital format sent to him via e-mail.

Pursuant to N.J.S.A. 47:1A-5.d., the Custodian has an affirmative duty to provide a copy of a record in the medium requested unless the agency does not maintain the record in such a medium, in which case the Custodian is required to either convert the record to the requested medium or provide a copy in another meaningful medium. Specifically, OPRA provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.”
N.J.S.A. 47:1A-5.d.

The GRC interprets the last sentence to mean a medium which is meaningful to the requestor since all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. See Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011). In this instance, a copy of the requested records is not meaningful to the Complainant. The Complainant sought a digital copy that was capable of being sent to him via e-mail.

¹³ In the Custodian's letter to the GRC dated February 28, 2012, the Custodian stated that the total amount the Complainant was charged for the copies was \$146.30. This reveals that the Custodian properly charged the Complainant the statutorily prescribed fee of \$0.05 per page. See N.J.S.A. 47:1A-5.b.
Baruch B. Blaustein v. Lakewood Board of Education (Ocean), 2011-109 – Findings and Recommendations of the Executive Director 10

In Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), where the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a format that was conducive to such delivery, the Council decided:

“...in this complaint, if the Custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail.”

Similarly in the instant complaint, the Complainant asked the Custodian to disclose the requested records in digital format via e-mail; therefore, the Custodian must convert the records to such a format in order to provide them to the Complainant electronically via e-mail.

If the records require a substantial amount of manipulation, the Custodian may charge pursuant to N.J.S.A. 47:1A-5.d., “...in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency...” Further, in accord with N.J.S.A. 47:1A-5.c “...[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred.”

Accordingly, because the Custodian failed to provide the Complainant with the requested budget for the years 2000 through 2011 in the medium requested, the Custodian must disclose said records to the Complainant in the requested medium. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d., Paff, *supra*, and Wolosky, *supra*.

The Complainant stated that he asked the Custodian if he could bring his own scanner to the Board’s office and scan the copies but was told that he could not scan the copies because the Board was concerned that the records might be damaged in the process.

In Hascup v. Waldwick Township Board of Education, GRC Complaint No. 2005-192 (April 2007), the complainant sought records showing expenditures from Board monies obtained as a result of a 2002 referendum. One of issues the Council addressed was whether the custodian violated OPRA by refusing to allow the complainant to bring her personal photocopier to the custodian’s office and make her own copies of the requested records. In finding that the custodian did not violate OPRA, the Council cited Moore v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962), wherein the New Jersey Supreme Court determined that the plaintiffs

were not permitted to copy records on their personal copiers because doing so would risk damaging the custodian's records. The Council then rendered its opinion that:

“...where a custodian believes that the safety, integrity or confidentiality of a document requested pursuant to OPRA may be compromised, or where the custodian has concerns regarding the impact that use of a personal photocopier might have upon any aspect of the operations of the custodian's office, a custodian may, consistent with OPRA, refuse to permit the use of a personal photocopier by a requestor.”

To properly use a photocopier, the operator must introduce the original document to the device in such a way that the photocopier is capable of scanning the image. The photocopier then reproduces the image on another piece of paper. A scanner works in much the same way. The operator must insert the original into the scanner or otherwise move the scanner over the original. Simply stated, the scanner then converts the image into a format capable of being stored on electronic or magnetic media. The scanning process, therefore, is so substantially similar to the photocopying process that the Council's determination in Hascup that a custodian may refuse to permit the use of a personal photocopier by a requestor is equally applicable to similar devices such as scanners.

Therefore, because the Custodian was concerned that the records might be damaged in the process, the Custodian did not violate OPRA when she refused to accommodate the Complainant's request to use his personal scanner to scan the requested records into a digital format.

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 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets...", the Custodian unlawfully denied the Complainant access to copies of the budget for the years 2000 through 2011 by not making those

records immediately available upon receipt of the Complainant's OPRA request in violation of N.J.S.A. 47:1A-5.e. and Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (April 2008).

3. Because the Custodian failed to respond to each item contained in the Complainant's OPRA request, and failed to specify a date certain on which the Complainant could expect access to be granted or denied, the Custodian's response informing the Complainant of the potential cost was legally insufficient and violated N.J.S.A. 47:1A-5.g., Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
4. Because the Custodian failed to provide the Complainant with the requested budget for the years 2000 through 2011 in the medium requested, the Custodian must disclose said records to the Complainant in the requested medium. If the records require a substantial amount of manipulation, the Custodian shall calculate in addition to the actual cost of duplicating the records, a special service charge cost which is reasonable and based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service actually incurred by the agency for converting the records relevant to the complaint into the requested medium, or another meaningful medium, and thereafter provide the Complainant with an opportunity to review and object to the charge pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).
5. **If applicable, the Custodian shall calculate the appropriate special service charge in accordance with Paragraph No. 4 and shall make the amount of the charge available to the Complainant in writing within five (5) business days from receipt of the Council's Interim Order. The Complainant shall within three (3) business days from receipt of the amount of the charge deliver to the Custodian either (a) payment in the amount of the said charge, or (b) a statement declining to purchase the records. Upon compliance by the Complainant with (a) above, the Custodian shall within fifteen (15) business days from receipt of the Council's Interim Order disclose to the Complainant the requested records in the appropriate medium with any lawful redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4¹⁴ to the Executive Director. Conversely, upon compliance by the Complainant with (b) above, the Custodian shall within ten (10) business days from receipt of the Council's Interim Order provide a certification in accordance with**

¹⁴ "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."

N.J. Court Rule 1:4-4 to the Executive Director acknowledging the Complainant's declination; thereafter, the Custodian shall have no further obligation with respect to disclosure of the records. The Complainant's failure to take any action within the time provided shall be construed the same as (b) above.

6. Because the Custodian was concerned that the records might be damaged in the process, the Custodian did not violate OPRA when she refused to accommodate the Complainant's request to use his personal scanner to scan the requested records into a digital format.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012