



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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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

David V. Alvarez  
Complainant

Complaint No. 2011-205

v.

Northwest Bergen County Utilities Authority  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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 Complainant’s e-mail dated May 19, 2011 is not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) because the Complainant failed to clearly invoke the provisions of OPRA. Specifically, the Complainant’s e-mail states that he *will be* or *may be* requesting records, not that he *is* requesting any records. See Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011); Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-259 (Interim Order dated February 28, 2012).
2. The Custodian did not timely respond to the Complainant’s OPRA request. As such, 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).
3. Despite the Custodian’s “deemed” denial and violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian has not unlawfully denied access to the requested records because all records responsive have been provided to the Complainant in their entirety and the Complainant has not challenged said disclosure.
4. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian provided the Complainant with the requested records approximately four (4) months following the date of the Complainant’s request, there is no evidence in the record to suggest that the Custodian’s violation of



OPRA was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> 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**

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

**David V. Alvarez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-205**

v.

**Northwest Bergen County Utilities Authority<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

- May 19, 2011 Request: “Is there a form that Northwest Bergen County Utilities Authority (“Authority”) has for...public information or do I just write a letter requesting the information?”
- May 20, 2011 Request: Inspection of:
  1. Original resolution adopted to pay license incentives to Authority employees.
  2. Any amended resolutions adopted to pay license incentives to Authority employees.
  3. License incentive amount paid to David V. Alvarez each year from inception of incentive program.
  4. Any and all documentation from any employee of the Authority or any official of the Authority regarding the payment of license or stipend payment to employees, such as memo from Superintendent to Executive Director, Commissioner, Administrative Assistant recommending incentive payment to employees, for what incentive is being paid and amount paid.

**Request Made:** May 19, 2011 and May 20, 2011

**Response Made:** September 20, 2011 and October 4, 2011

**Custodian:** Howard Hurwitz

**GRC Complaint Filed:** June 8, 2011<sup>3</sup>

**Background**

**May 19, 2011**

E-mail from Complainant to Madeline Thumudo, Secretary for the Authority. The Complainant asks, “[i]s there a form that [the Authority] has for...public information or do I just write a letter requesting the information?” Additionally, the Complainant states that he “will be requesting” copies of all resolutions regarding license incentive pay

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

<sup>2</sup> Represented by Eric M. Bernstein, Esq. of Eric M. Bernstein & Associates, LLC (Warren, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

from the start date, a detailed amount of each year to include the amount the Complainant was paid, date paid and the license for which compensation was received. Finally, the Complainant states that he “may also be requesting” other incentive information for all other employees for this time period.

**May 20, 2011**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.<sup>4</sup> The Complainant states that he is requesting inspection of said records, and after his review, he will determine if he wishes to obtain any copies of same. The Complainant also asks whether a form is required to request these records, and if so to provide same.

**June 8, 2011**

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

- E-mail from Complainant to Madeline Thumudo dated May 19, 2011
- Complainant’s OPRA request dated May 20, 2011
- Complainant’s Certified Mail receipt dated May 25, 2011

The Complainant states that on May 19, 2011 he requested an OPRA request form and informed the Authority of the records he was requesting. The Complainant states that he was denied both because the Custodian has failed to respond to the request.

The Complainant agrees to mediate this complaint.

**June 14, 2011**

Offer of Mediation sent to both Custodian.

**June 15, 2011**

Letter of representation from Custodian’s Counsel.

**June 16, 2011**

Custodian’s Counsel submits Custodian’s signed Agreement to Mediate.

**June 16, 2011**

Complaint referred to mediation.

**September 13, 2011**

Complaint referred back from mediation.

**September 14, 2011**

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

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<sup>4</sup> The Complainant asks if there is a specific form required to request records under OPRA, but also identifies the records sought under OPRA.  
David V. Alvarez v. Northwest Bergen County Utilities Authority, 2011-205 – Findings and Recommendations of the Executive Director 2

**September 20, 2011**

Letter from Custodian's Counsel to GRC. Counsel states that he has enclosed the following records regarding the Complainant's OPRA request:

1. A copy of the Earnings Statement that the Complainant received every time he renewed a license incentive payment:
  - a. July 10, 1998
  - b. July 2, 1999
  - c. June 30, 2000
  - d. June 22, 2001
  - e. June 21, 2002
  - f. June 13, 2003
  - g. June 25, 2004
  - h. June 17, 2005
  - i. June 23, 2006
  - j. June 15, 2007
  - k. June 11, 2008
  - l. June 26, 2009
  - m. June 18, 2010
2. Resolution recommending a C-3 License Incentive Payment for the Complainant, dated July 11, 1996
3. Memorandum conforming a C-3 License for the Complainant, dated December 4, 1997
4. Resolution recommending a C-3 License Incentive Payment for another employee dated January 13, 1994
5. Resolution recommending a C-3 License Incentive Payment for another employee dated January 12, 1995
6. Resolution recommending a C-3 License Incentive Payment for another employee dated September 5, 2002.

Counsel states these are the only formal actions taken by the Authority as to incentive payments. Additionally, Counsel states that the license incentive payment is established pursuant to a collective bargaining agreement, which covered the Complainant's position when he was an employee of the Authority. Counsel states that the amount of the license and the eligibility for payment are established under said Agreement. Counsel states that these are the only records responsive to the Complainant's May 19, 2011 OPRA request. Further, Counsel states that he is sending a copy of this correspondence with enclosures to the Complainant to resolve this complaint.

**October 4, 2011**

Custodian's SOI with the following attachments:

- E-mail from Complainant to Madeline Thumudo dated May 19, 2011
- Complainant's OPRA request dated May 20, 2011
- Records responsive to the Complainant's request, which are identified below

- Copy of Mason v. City of Hoboken, WL 2202419 (N.J. App. Div. 2008)(unpublished)

The Custodian certifies that the Authority received the Complainant's May 20, 2011 letter request on May 24, 2011. Additionally, the Custodian certifies that the Authority prepared a draft response to the request on May 25, 2011, which was inadvertently never sent to the Complainant.

The Custodian certifies that the following records responsive to the Complainant's request were provided to the Complainant under cover letter dated September 20, 2011:

1. A copy of the Earnings Statement that the Complainant received every time he renewed a license incentive payment:
  - a. July 10, 1998
  - b. July 2, 1999
  - c. June 30, 2000
  - d. June 22, 2001
  - e. June 21, 2002
  - f. June 13, 2003
  - g. June 25, 2004
  - h. June 17, 2005
  - i. June 23, 2006
  - j. June 15, 2007
  - k. June 11, 2008
  - l. June 26, 2009
  - m. June 18, 2010
2. Resolution recommending a C-3 License Incentive Payment for the Complainant, dated July 11, 1996
3. Memorandum conforming a C-3 License for the Complainant, dated December 4, 1997
4. Resolution recommending a C-3 License Incentive Payment for another employee dated January 13, 1994
5. Resolution recommending a C-3 License Incentive Payment for another employee dated January 12, 1995
6. Resolution recommending a C-3 License Incentive Payment for another employee dated September 5, 2002

Additionally, the Custodian certifies that the following records responsive to the Complainant's request are being provided to the Complainant with this instant correspondence:

1. Draft letter in response to the Complainant OPRA request, dated May 25, 2011<sup>5</sup>
2. Complainant's 2009 S3 Public Wastewater license and C4 Collection license
3. Complainant's 2010 S3 Public Wastewater license and C4 Collection license

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<sup>5</sup> The Custodian certifies that this letter was inadvertently never sent and was just located by the Authority. David V. Alvarez v. Northwest Bergen County Utilities Authority, 2011-205 – Findings and Recommendations of the Executive Director 4

4. Internal Memorandum from R. Genetelli to H. Hurwitz dated May 17, 2006 regarding Incentive for Trades
5. Internal Memorandum from R. Genetelli to M. Varsolona dated June 6, 2007 regarding Incentive for Trades
6. Internal Memorandum from R. Genetelli to H. Hurwitz dated June 10, 2008 regarding Incentive for Trades
7. Internal Memorandum from R. Genetelli to H. Hurwitz dated June 3, 2009 regarding Incentive for Trades
8. Internal Memorandum from R. Genetelli to H. Hurwitz dated June 9, 2010 regarding Incentive for Trades
9. Internal Memorandum from R. Genetelli to H. Hurwitz dated June 7, 2011 regarding Incentive for Trades

The Custodian certifies that his search for the requested records included reviewing the Complainant's payroll records to ascertain when license incentive payments were made to the Complainant. The Authority located thirteen (13) Earnings Statements, which were provided to the Complainant on September 20, 2011, as well as six (6) internal memoranda regarding incentives for trades, copies which are provided to the Complainant along with this instant correspondence.

The Custodian also certifies that the Authority surveyed the agency's resolutions and other formal actions by the Authority in an effort to locate and resolutions or other documents related to license and/or other incentive payments by the Authority to its employees. The Custodian certifies the search identified the four (4) resolutions which were provided to the Complainant on September 20, 2011. Additionally, the Custodian certifies that the Authority searched the Complainant's personnel file which revealed the December 4, 1997 internal memorandum provided to the Complainant on September 20, 2011 as well as copies of the Complainant's 2009 and 2010 licenses, which were provided with this instant correspondence. The Custodian certifies that these are the only records responsive to the Complainant's OPRA request.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by Records Management Services, the Authority must maintain resolutions permanently and as such, none have been destroyed. Additionally, the Custodian certifies that the Authority does not routinely destroy records and thus none of the earnings statements responsive to the request were intentionally destroyed. However, the Custodian certifies that there was a fire at the Authority in 2005, but the Custodian has no knowledge that any records responsive to the Complainant's OPRA request were destroyed in said fire.

Finally, the Custodian asserts that because the Complainant has been provided with all records responsive to his request, this complaint should be dismissed with prejudice. The Custodian cites to Mason v. City of Hoboken, WL 2202419 (N.J. App. Div. 2008)(unpublished) holding that "the only relief available to a requestor under OPRA is a court order compelling Hoboken to produce the documents." The Custodian contends that because the Complainant has been provided with all records responsive, there is no further basis to adjudicate this complaint.

Pursuant to the GRC regulations (*N.J.A.C. 5:105-2.5(j)*) and the Uniform Mediation Act (*N.J.S.A. 2A:23C-1 et seq.*), the GRC cannot consider any submissions of records or arguments made by either party during mediation.

### Analysis

#### **Whether the Complainant's e-mail dated May 19, 2011 is a valid OPRA request?**

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

1. specific directions and procedures for requesting a record;
2. a statement as to whether prepayment of fees or a deposit is required;
3. the time period within which the public agency is required by [OPRA], to make the record available;
4. a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
5. space for the custodian to list reasons if a request is denied in whole or in part;
6. space for the requestor to sign and date the form;
7. space for the custodian to sign and date the form if the request is fulfilled or denied.” *N.J.S.A. 47:1A-5.f.*

In the Complainant's Denial of Access Complaint, the Complainant states that he submitted an OPRA request on May 19, 2011 seeking any OPRA request forms to complete as well as indicating the records sought. The Complainant states that he did not receive any response.

In *Renna v. County of Union*, 407 *N.J. Super.* 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies' OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. *Id.* In effect, this permits requestors to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

Furthermore, *Renna* holds that “where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the



custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g.” The pertinent section of N.J.S.A. 47:1A-5.g. states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” *Id.*

The Council has previously adjudicated complaints in which the Renna decision has come into play. First, in Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011), the Council held that “the evidence of record indicates that the written request form used by the Complainant clearly invoked OPRA.” Specifically, the complainant submitted an e-mail request in which he referenced OPRA, identified specific records, specified the format in which he wanted the records, as well as the preferred method of delivery. Thus, the complainant’s e-mail request was clearly an OPRA request.

Similarly, in Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-259 (Interim Order dated February 28, 2012), the Council held that “...the Complainant’s e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.” Specifically, the complainant submitted an e-mail request in which he referenced OPRA, identified specific records, as well as the preferred method of delivery. Again, the complainant’s e-mail request was clearly an OPRA request.

In the instant complaint, the Complainant’s May 19, 2011 e-mail asks, “[i]s there a form that Northwest Bergen County Utilities Authority has for...public information or do I just write a letter requesting the information?” Additionally, the Complainant states that he “will be requesting” copies of all resolutions regarding license incentive pay from the start date, a detailed amount of each year to include the amount the Complainant was paid, date paid and the license for which compensation was received. Finally, the Complainant states that he “may also be requesting” other incentive information for all other employees for this time period.

The Complainant’s May 19, 2011 e-mail is not the type of non-form request imagined in the Renna decision, or the type of non-form request the Council accepted in either of the Wolosky complaints described above. The Complainant failed to clearly articulate that he was making a records request under OPRA. Rather, the Complainant asked whether a form is required or whether he can simply submit a letter request. More importantly, the Complainant stated that he *will be* or *may be* requesting records, not that he *is* requesting any records.

Therefore, the Complainant’s e-mail dated May 19, 2011 is not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) because the Complainant failed to clearly invoke the provisions of OPRA. Specifically, the Complainant’s e-mail states that he *will be* or *may be* requesting records, not that he *is* requesting any records. See Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011); Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-259 (Interim Order dated February 28, 2012).

## Whether the Custodian timely responded to the Complainant's May 20, 2011 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.<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Custodian certified that he received the Complainant's May 20, 2011 OPRA request on May 24, 2011. Additionally, the Custodian certified that a draft response was prepared on May 25, 2011 but inadvertently never sent to the Complainant. The Custodian did not provide any records to the Complainant until September 20, 2011 and October 4, 2011, approximately four (4) months following the Complainant's OPRA request.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting

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<sup>6</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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.

### **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.

Although 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 resulted 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 did ultimately disclose all records responsive to the Complainant’s request on either September 20, 2011 or October 4, 2011. The Complainant has not challenged the records provided.

Therefore, despite the Custodian’s “deemed” denial and violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian has not unlawfully denied access to the requested records because all records responsive have been provided to the Complainant in their entirety and the Complainant has not challenged said disclosure.

**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.

In this instant complaint, it took the Custodian approximately four (4) months to respond to the Complainant’s May 20, 2011 OPRA request. The Custodian certifies that a response to said request was prepared on May 25, 2011 but was inadvertently never sent to the Complainant. Thus, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of the request.

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).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian provided the Complainant with the requested records approximately four (4) months following the date of the Complainant’s request, there is no evidence in the record to suggest that the Custodian’s violation of OPRA was intentional or deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's e-mail dated May 19, 2011 is not a valid OPRA request pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) because the Complainant failed to clearly invoke the provisions of OPRA. Specifically, the Complainant's e-mail states that he *will be or may be* requesting records, not that he *is* requesting any records. See Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011); Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-259 (Interim Order dated February 28, 2012).
2. The Custodian did not timely respond to the Complainant's OPRA request. As such, 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).
3. Despite the Custodian's "deemed" denial and violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian has not unlawfully denied access to the requested records because all records responsive have been provided to the Complainant in their entirety and the Complainant has not challenged said disclosure.
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with the requested records approximately four (4) months following the date of the Complainant's request, there is no evidence in the record to suggest that the Custodian's violation of OPRA was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Dara L. Barry  
Communications Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 2012