



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

August 28, 2012 Government Records Council Meeting

Lorinda D. Sciara
Complainant

Complaint No. 2011-32

v.

Borough of Woodcliff Lake (Bergen)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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. Mr. Sandve did not respond to the Complainant’s OPRA request. As such, Mr. Sandve’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. Although the D’Amato report is not located at Borough Hall, Mr. Sandve still has the obligation to retrieve said report from Mr. Danser’s office because said report was created in the course of the Borough’s official business pursuant to Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006) and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).
3. Although the D’Amato report is not located in the Complainant’s personnel file, said report is a final report issued regarding a grievance filed by one Borough employee against another, thus the D’Amato report is a personnel record pursuant to N.J.S.A. 47:1A-10.
4. Because there is no evidence in the record to support a conclusion that the Complainant had full knowledge of her legal rights to the confidentiality in the requested D’Amato report pursuant to N.J.S.A. 47:1A-10 and that the Complainant knowingly waived that right to confidentiality, Mr. Sandve did not unlawfully deny the Complainant access to the D’Amato report. See W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958); County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff’d*, 37 N.J. 114 (1962); Country Chevrolet, Inc. v. Township of



N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983); Scibek v. Longette, 339 N.J. Super. 72, 82-84 (App. Div. 2001); Lor-Mar/Toto, Inc. v. 1st Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005); Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006).

5. Mr. Sandve violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to respond to the Complainant's request. Mr. Sandve also had an obligation to retrieve the D'Amato report from Mr. Danser's office because said report was created in the course of the Borough's official business pursuant to Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006) and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). However, the D'Amato report is a personnel record pursuant to N.J.S.A. 47:1A-10; and the Complainant did not knowingly waive her right to confidentiality within said report. Therefore, Mr. Sandve did not unlawfully deny the Complainant access to the D'Amato report. Additionally, the evidence of record does not indicate that the Mr. Sandve's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Mr. Sandve'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 28th Day of August, 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: September 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Lorinda D. Sciara¹
Complainant**

GRC Complaint No. 2011-32

v.

**Borough of Woodcliff Lake (Bergen)²
Custodian of Records**

Records Relevant to Complaint: A copy of the D'Amato report referenced in the court decision of O'Brien v. Borough of Woodcliff Lake and Joanne Howley, No. BER-L-2091-10 (Law Div. January 13, 2011).

Request Made: January 24, 2011

Response Made: January 24, 2011

Custodian: Wolfgang Albrecht³

GRC Complaint Filed: February 4, 2011⁴

Background

January 24, 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.

January 24, 2011

Custodian's Counsel response to the OPRA request. Counsel responds in writing via e-mail to the Complainant's OPRA request on the same business day as receipt of such request. Counsel states that the Complainant should forward her OPRA request to former Business Administrator, Edward Sandve ("Mr. Sandve") who is the acting Custodian on this matter because of a potential conflict of interest. Counsel also states that Mr. Sandve will respond to the Complainant's OPRA request. Counsel further states that the Borough of Woodcliff Lake ("Borough") previously denied requests for the D'Amato report from other requestors. Counsel additionally states that Judge Conte, in his most recent decision in O'Brien v. Borough of Woodcliff Lake and Joanne Howley, No. BER-L-2091-10 (Law Div. January 13, 2011), determined that this record is exempt from access under OPRA, however the determination of the release of this report lies

¹ No legal representation listed on record.

² Represented by Mark Madaio, Esq., of the Law Offices of Mark D. Madaio (Bergenfield, NJ).

³ The Borough Clerk is the Complainant in the instant complaint. Mr. Sandve assumed the role of Custodian at the time of the Complainant's OPRA request and the Statement of Information. Mr. Albrecht is the current Business Administrator and Mr. Sandve is no longer employed with the Borough.

⁴ The GRC received the Denial of Access Complaint on said date.

with the Custodian. Counsel suggests that Mr. Sandve contact the Borough's Labor Counsel, Fredrick Danser ("Mr. Danser") for his advice regarding the disclosure of the D'Amato report.⁵

January 28, 2011

Letter from Mr. Danser to Mr. Sandve. Mr. Danser states that he is in receipt of the Complainant's OPRA request. Mr. Danser also states that the Borough previously denied a copy of the D'Amato report because it was exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10 and Fenichel v. City of Ocean City (Cape May), GRC Complaint No. 2009-297, Merino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint No. 2003-110, Allen v. County of Warren, GRC Complaint No. 2003-155 and Serrano v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2007-134. Mr. Danser further states that the D'Amato report is exempt from disclosure pursuant to O'Brien v. Borough of Woodcliff Lake and Joanne Howley, No. BER-L-2091-10 (Law Div. January 13, 2011) where Judge Conte concluded that the D'Amato report is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Mr. Danser additionally states that it would be extremely difficult to justify or rationalize the release of the D'Amato report to the Complainant after the Borough denied release of the said report to a member of the public and such denial was upheld in NJ Superior Court.

Mr. Danser states that part of the reason why the OPRA exemption regarding personnel records exists is to protect the confidentiality of the employees involved, including employees who may have provided statements or otherwise provided information concerning the investigation. Mr. Danser also states that if these privacy protections are violated by an inappropriate release of records, there is potential liability of exposure to the Borough.

February 4, 2011

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

- Complainant's OPRA request dated January 24, 2011
- E-mail from Custodian's Counsel to the Complainant dated January 24, 2011
- Letter from Mr. Danser to Mr. Sandve dated January 28, 2011⁶

The Complainant states that she is currently the Borough Clerk. The Complainant also states that she forwarded her OPRA request to Custodian's Counsel for completion. The Complainant further states that Counsel responded via e-mail on January 24, 2011 and suggested that she forward her request to Mr. Sandve. The Complainant additionally states that Mr. Sandve has not yet responded to her OPRA request.

The Complainant states that Borough conducted a fact finding investigation in the summer of 2008 due to a grievance filed by the receptionist against Mr. Sandve and the Complainant. The Complainant also states on August 1, 2008 the D'Amato report was

⁵ Mr. Sandve did not respond to the Complainant's OPRA request.

⁶ The Complainant includes additional correspondence not relevant to the adjudication of this complaint.

submitted to the Mayor and Council.⁷ The Complainant further states that this report was read in closed session, however there are no minutes or resolutions to go into closed session to review this report. The Complainant additionally states that Borough Attorney, Paul Kaufman (“Mr. Kaufman”) sent a letter to Mr. Sandve, the receptionist and the Complainant indicating that the complaint was investigated, no further action was necessary and the matter was closed.⁸ The Complainant states that the council members reviewed a copy of this report and returned it to Mr. Kaufman, who removed the report from Borough Hall.

The Complainant states that her attorney sent a letter to Mr. Kaufman on September 10, 2010 requesting a copy of the D’Amato report, since it is part of her personnel file.⁹ The Complainant also states she has looked through her personnel file and a copy of the D’Amato report is not in her file. The Complainant further states that Mr. Kaufman sent a letter to the Complainant’s attorney stating that a copy of the D’Amato report is being kept in Mr. Danser’s office because Mr. Danser asserted that no copies of the report should be retained at Borough Hall.

The Complainant states that the Custodian’s Counsel cites to previous denials to the same record in support of their denial. The Complainant also states that in those OPRA requests, the D’Amato report was requested by a member of the public. The Complainant further states that Counsel’s rationale that a copy of this report will not be provided to the Complainant because she is the Borough Clerk is prejudicial. The Complainant states that she is one of the aggrieved parties mentioned in the report. The Complainant also states that although it is the Borough’s obligation to protect an employee’s privacy from outside requestors it does not entitle the Borough to withhold records regarding the Complainant. The Complainant additionally states that in O’Brien v. Borough of Woodcliff Lake and Joanne Howley, No. BER-L-2091-10 (Law Div. January 13, 2011) the Court held that this report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a.¹⁰ The Complainant states that this investigation has been concluded.

The Complainant states that her request is not a request for the D’Amato report to be released to the public. The Complainant also states that this report should be released to her because it should be in her personnel file and is being suppressed for multiple reasons. The Complainant further states had there not been a complaint filed against her, there would be no report. The Complainant additionally states that as the Borough Clerk, she has previously denied other requestor access to the D’Amato report citing the same reasons as Mr. Danser. The Complainant states that a member of the public should not have a copy of this report, but the Complainant is not a member of the public.

The Complainant does not agree to mediate this complaint.

⁷ Upon review, O’Brien v. Borough of Woodcliff Lake and Joanne Howley, No. BER-L-2091-10 (Law Div. January 13, 2011), reveals that the Borough hired James J. Damato, Esq., to conduct an investigation of a grievance by one (1) employee against another.

⁸ The Complainant does not state when Counsel sent this letter, nor does she include a copy of it in her Denial of Access Complaint.

⁹ The Complainant’s attorney did not file an OPRA request for this report. Further, the Complainant’s attorney is not acting as her attorney regarding her Denial of Access Complaint. The Complainant included a copy of this letter along with her Denial of Access Complaint.

¹⁰ The Complainant includes a copy of this decision along with her Denial of Access Complaint.

February 17, 2011

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

February 28, 2011

Mr. Sandve’s SOI with the following attachments:

- Complainant’s OPRA request dated January 24, 2011
- E-mail from Custodian’s Counsel to the Complainant dated January 24, 2011
- Letter from Mr. Danser to Mr. Sandve dated January 28, 2011¹¹

Mr. Sandve certifies that he did not search for the D’Amato report because although it is a Borough record, same is not located on Borough property,. Mr. Sandve also certifies that this report is kept at Custodian Counsel’s office at the advice of Mr. Danser.

Mr. Sandve further certifies that this report has not been destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services. Mr. Sandve additionally certifies that this report, if in the possession of the Borough would be six (6) years after termination of employment.

Mr. Sandve argues that provided that the report is available and is not in storage or archived, a custodian shall grant access to a government record or deny access as soon as possible, but not later than seven (7) business days after receiving the request. Mr. Sandve certifies that he did not respond to the Complainant’s request. Mr. Sandve also certifies that the requested record, although a public record, could not be provided to the Complainant since it is not on file in the Borough Hall.

June 3, 2011

Letter from the Complainant to the GRC. The Complainant states that in the discovery process for the receptionist’s most recent lawsuit, the D’Amato report will be released to the receptionist’s attorney. The Complainant also states that she is now the only one mentioned in the report that has not seen or read a copy of the report.

October 20, 2011

Letter from the Complainant to the GRC. The Complainant states that on July 21, 2011 she went to the Law Firm of Pfund & McDonnell, P.C. which is the law firm assigned by the Joint Insurance Firm to represent the Borough in a pending lawsuit against the Borough.¹² The Complainant also states that the Law Firm allowed her to read the D’Amato report, but would not let her have a copy of it. The Complainant further states that if she wants a copy of the report, she would have to hire a lawyer and go through her own discovery process to obtain a copy of it.

¹¹ The Custodian includes additional correspondence not relevant to the adjudication of this complaint. The Custodian attached a copy of the Complainant’s Denial of Access Complaint.

¹² This pending lawsuit against the Borough is not relevant to the adjudication of this complaint.

Analysis

Whether Mr. Sandve timely responded to the Complainant's OPRA request?

OPRA provides that:

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

Further, OPRA provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹³ 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, Custodian's Counsel responded to the Complainant's OPRA request on the same business day as receipt of such request. Counsel stated that Mr. Sandve will be responding to the Complainant's OPRA request because of a potential conflict of interest. Mr. Sandve certified in his SOI submitted to the GRC that he never responded to the Complainant's OPRA request.

Therefore, Mr. Sandve did not respond to the Complainant's OPRA request. As such, Mr. Sandve's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of

¹³ 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.

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 Mr. Sandve had the obligation to retrieve the D’Amato report responsive to the Complainant’s OPRA request if such report was located off-site?

Mr. Sandve certified in the SOI that the D’Amato report could not be provided to the Complainant because it is not on file in the Borough Hall, although it is a public record. The Complainant stated in her Denial of Access Complaint that a copy of this report is not in her personnel file. The Complainant further asserted that Mr. Kaufman sent a letter to the Complainant’s attorney stating that a copy of the D’Amato report is maintained at Mr. Danser’s office because Mr. Danser asserted that no copies of this report should be kept at Borough Hall.

In Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006), the Council determined that electronic correspondence stored in a government official’s personal e-mail account was a government record subject to disclosure when used for Borough business. The Council found that “the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA.”

In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) the motion judge in the Law Division, interpreting Bent v. Township of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) held that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Appellate Division held that the motion judge interpreted Bent, *supra* too broadly. The Appellate Division stated,”

“We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because...the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply...relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA....We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.”

Meyers, *supra* and Burnett, *supra* are similar to the instant complaint. Mr. Sandve certified in the SOI that the D’Amato report could not be provided to the Complainant because said report is not located at Borough Hall, although a public record. The Complainant asserted in her Denial of Access Complaint that Mr. Kaufman removed the D’Amato report from Borough Hall. The Complainant also asserted that Mr. Kaufman sent a letter to the Complainant’s attorney stating that a copy of the D’Amato report is maintained at Mr. Danser’s office because Mr. Danser asserted that no copies of this report should be kept at Borough Hall. Similar to the settlement agreements in Burnett, *supra*, the D’Amato report was created in the course of the Borough’s official

business. Mr. Sandve's certification that the D'Amato report could not be provided because it was not located at Borough Hall impedes the public's access to this report.

Therefore, although the D'Amato report is not located at Borough Hall, Mr. Sandve still has the obligation to retrieve said report from Mr. Danser's office because said report was created in the course of the Borough's official business pursuant to Meyers, supra and Burnett, supra.

Whether the D'Amato report is a personnel record under OPRA and if so, whether the Complainant waived her right to confidentiality under OPRA to said report?

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 also provides that:

"Notwithstanding the provisions of [OPRA] ... the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access[;]" N.J.S.A. 47:1A-10.

OPRA further provides that:

"personnel or pension records of any individual shall be accessible ... when authorized by an individual in interest ..." N.J.S.A. 47:1A-10.

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 Complainant stated in her Denial of Access Complaint that the Borough conducted a fact finding investigation in the summer of 2008 due to a grievance filed by the receptionist against Mr. Sandve and the Complainant. The Complainant further stated that on August 1, 2008, the D’Amato report was submitted to the Mayor and Council. The Complainant contended that the D’Amato report should be released to her because said report should be located in her personnel file and is being suppressed. Further, in a letter from Mr. Danser to Mr. Sandve dated January 28, 2011, Mr. Danser stated that the Borough previously denied another requestor a copy of the D’Amato report because it was exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10.

Although the D’Amato report is not located in the Complainant’s personnel file, said report is a final report issued regarding a grievance filed by one Borough employee against another, thus the D’Amato report is a personnel record pursuant to N.J.S.A. 47:1A-10.

Since the D’Amato report is a personnel record, the issue now before the Council is whether the Complainant waived her right to confidentiality under OPRA to the D’Amato report.

In McGee v. Township of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011) the Council addressed the issue of whether the complainant waived the right of confidentiality afforded to personnel records under N.J.S.A. 47:1A-10 and thus entitled to disclosure of her personnel records. The Council held that:

“because there is no evidence in the record to support a conclusion that the [c]omplainant had full knowledge of her legal rights to confidentiality in the e-mails requested afforded pursuant to N.J.S.A. 47:1A-10 and intended to surrender such rights when she signed and submitted the OPRA request form, the Council’s September 30, 2009 Decision and Order remains undisturbed.”¹⁴

Waiver is the voluntary and intentional relinquishment of a known right. W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958). An effective waiver requires a party to have full knowledge of his legal rights and intend to surrender those rights. *Id.* at 153. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. *See Merchs. Indem. Corp. of N.Y. v. Eggleston*, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff’d*, 37 N.J. 114 (1962). The party waiving a known right

¹⁴ The Council’s September 30, 2009 decision denied the complainant’s request for reconsideration. The complainant asserted that because Barbara Wolfe was not an employee with the Township when the e-mails in question were created, the Township waived its right to the attorney-client privilege and the advisory, consultative and deliberative exemption, as well as any confidentiality given to personnel discussions among Township officials.

must do so clearly, unequivocally, and decisively. Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983).

In Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006), the Appellate Division determined that an attorney hired by a municipality, who was required by the Township's ordinance to obtain a Certificate of Ethical Conduct from the New Jersey Office of Attorney Ethics in order to continue his employment, waived his right to confidentiality of the attendant ethics history report under N.J. Ct. R. 1:20-9 when he voluntarily completed the Authorization and Release form which permitted the release of his personal disciplinary records to the Township. *Id.* at 579-80. The Appellate Division therefore reversed the trial court's grant of summary judgment in favor of the Township clerk and remanded the matter to the trial court for further consideration. *Id.*

Similar to McGee, *supra*, there is no evidence in the record to indicate that the Complainant knew of her rights to confidentiality in the D'Amato report pursuant to N.J.S.A. 47:1A-10. Further, there is no evidence in the record that she intentionally waived that right to confidentiality of her personnel records.

Therefore, because there is no evidence in the record to support a conclusion that the Complainant had full knowledge of her legal rights to the confidentiality in the requested D'Amato report pursuant to N.J.S.A. 47:1A-10 and that the Complainant knowingly waived that right to confidentiality, Mr. Sandve did not unlawfully deny the Complainant access to the D'Amato report. *See* W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958); County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff'd*, 37 N.J. 114 (1962); Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983); Scibek v. Longette, 339 N.J. Super. 72, 82-84 (App. Div. 2001); Lor-Mar/Toto, Inc. v. 1st Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005); Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006).

The Council notes that the Complainant asserted in her Denial of Access Complaint that a copy of the D'Amato report was not part of her personnel file. The Complainant also asserted that Mr. Kaufman removed this report from Borough Hall. The Complainant further asserted that Mr. Kaufman sent a letter to the Complainant's attorney stating that a copy of the D'Amato report is being kept in Mr. Danser's office because no copies of the report should be retained at Borough Hall. However, pursuant to N.J.S.A. 47:1A-7.b., which delineates the GRC's powers and duties, the Council does not have the authority to regulate the manner in which an agency maintains its files or which records an agency must maintain. *See* Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must

maintain); Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008)(the GRC does not have the authority to determine whether an agency correctly followed their records retention policy.).

The Council also notes that the Complainant asserted in her Denial of Access Complaint that the D’Amato report was read in closed session, however there were no minutes or resolutions to enter into closed session to review this report. However, the Council has no authority over OPMA pursuant to N.J.S.A. 10:4-14 and N.J.S.A. 47:1A-7.b.

Whether Mr. Sandve’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

Mr. Sandve violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., by failing to respond to the Complainant’s request. Mr. Sandve also had an obligation to retrieve the D’Amato report from Mr. Danser’s office because said report was created in the course

of the Borough's official business pursuant to Meyers, *supra* and Burnett, *supra*. However, the D'Amato report is a personnel record pursuant to N.J.S.A. 47:1A-10; and the Complainant did not knowingly waive her right to confidentiality within said report. Therefore, Mr. Sandve did not unlawfully deny the Complainant access to the D'Amato report. Additionally, the evidence of record does not indicate that the Mr. Sandve's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Mr. Sandve'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. Mr. Sandve did not respond to the Complainant's OPRA request. As such, Mr. Sandve'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. Although the D'Amato report is not located at Borough Hall, Mr. Sandve still has the obligation to retrieve said report from Mr. Danser's office because said report was created in the course of the Borough's official business pursuant to Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006) and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).
3. Although the D'Amato report is not located in the Complainant's personnel file, said report is a final report issued regarding a grievance filed by one Borough employee against another, thus the D'Amato report is a personnel record pursuant to N.J.S.A. 47:1A-10.
4. Because there is no evidence in the record to support a conclusion that the Complainant had full knowledge of her legal rights to the confidentiality in the requested D'Amato report pursuant to N.J.S.A. 47:1A-10 and that the Complainant knowingly waived that right to confidentiality, Mr. Sandve did not unlawfully deny the Complainant access to the D'Amato report. *See* W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958); County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff'd*, 37 N.J. 114 (1962); Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983); Scibek v. Longette, 339 N.J. Super. 72, 82-84 (App. Div. 2001); Lor-Mar/Toto, Inc. v. 1st Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005); Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006).

5. Mr. Sandve violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to respond to the Complainant's request. Mr. Sandve also had an obligation to retrieve the D'Amato report from Mr. Danser's office because said report was created in the course of the Borough's official business pursuant to Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006) and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). However, the D'Amato report is a personnel record pursuant to N.J.S.A. 47:1A-10; and the Complainant did not knowingly waive her right to confidentiality within said report. Therefore, Mr. Sandve did not unlawfully deny the Complainant access to the D'Amato report. Additionally, the evidence of record does not indicate that the Mr. Sandve's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Mr. Sandve'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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012