



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

February 26, 2013 Government Records Council Meeting

Larry A. Kohn  
Complainant

Complaint No. 2011-327

v.

Township of Livingston (Essex)  
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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. Although the Custodian responded to the Complainant’s OPRA request in writing in a timely manner, said response is insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5(i) because he failed to provide a specific anticipated date upon which he would grant access to the responsive records. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009). Moreover, the Custodian’s insufficient response resulted in a “deemed” denial of access to the load tickets. 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). However, the GRC declines to order disclosure of the load tickets previously provided to the Complainant on August 31, 2011.
2. Because the Custodian certified in the Statement of Information that he provided all responsive records as of August 31, 2011 and because the Complainant provided no competent credible evidence to refute this fact, the Custodian bore his burden of proof that he did not produce all of the responsive records. N.J.S.A. 47:1A-6. However, the Custodian still unlawfully denied access to the load tickets because of his insufficient response.
3. The Custodian’s response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(i) because the Custodian failed to provide a date certain on which he would provide the responsive load tickets, thus resulting in an invalid extension and a “deemed” denial of access to those records. *See* Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of those records provided to the Complainant on August 31, 2011 and further determines that the evidence of record supports that the Custodian did not deny access to any additional records.



Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did 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 26<sup>th</sup> Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: February 27, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2013 Council Meeting**

**Larry A. Kohn<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-327**

v.

**Township of Livingston (Essex)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Review of all backup documents supporting the costs for Change Order Nos. 102, 103 and 104.

**Request Made:** June 20, 2011

**Response Made:** June 30, 2011

**Custodian:** Glenn Turteltaub

**GRC Complaint Filed:** October 25, 2011<sup>3</sup>

**Background**

**June 20, 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 e-mail.

**June 30, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request.<sup>4</sup> The Custodian states that the following attached records are responsive to the Complainant's OPRA request:

- Documents provided by Vincentsen, Thompson, Meade, Inc., ("VTM") regarding Change Order Nos. 102, 103 and 104 (28 pages).
- Documents provided by the Township Engineer regarding Change Order Nos. 102, 103 and 104 (17pages).
- Memorandum from the Township Manager to Township Council re: Change No. 102 (3 pages).
- Memorandum from the Township Manager to Township Council re: Change Order No. 103 (2 pages).

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

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner (Riverdale, NJ).

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

<sup>4</sup> The Custodian certifies in the SOI that he received the Complainant's OPRA request on June 21, 2011.

- Memorandum from the Township Manager to Township Council re: Change Order No. 104 (2 pages).

The Custodian states that load tickets have been requested from the VTM and the Engineering Department and will be provided to the Complainant upon receipt if available.

#### **August 31, 2011**

E-mail from the Custodian to the Complainant (with attachments). The Custodian states that attached is a file containing a scanned copy of the load tickets for soil removal provided by the Engineering Department. The Custodian states that he believes all responsive records have now been provided.

#### **September 5, 2011**

Letter from the Complainant to the Custodian (with attachments). The Complainant states that he retrieved additional records from the Township of Livingston (“Township”) on September 2, 2011. The Complainant states that he was able to match manifests with corresponding load tickets except in three (3) instances. The Complainant thus requests that the Custodian advise if any of the load tickets are associated with any of the manifests. The Complainant requests that, as an alternative, the Custodian provide the load tickets that match manifest Nos. 9, 25 and 32.

#### **October 3, 2011**

Letter from the Complainant to the Custodian. The Complainant states that in a letter dated September 5, 2011, the Complainant advised the Custodian that some load tickets were missing from the records provided. The Complainant states that the missing tickets represent 87.64 tons or \$4,031.44 (provided that the Township paid \$46.00 a ton). The Complainant requests that the Custodian advise when the missing tickets will be provided. The Complainant states that he is certain the Township’s internal audit system would have verified that the necessary supporting records were available prior to making any payment to the vendor.

#### **October 14, 2011**

Letter from the Complainant to the Custodian. The Complainant states that this letter confirms that the Complainant reviewed records on this day. The Complainant contends that the Custodian has not provided the missing records; therefore, the OPRA request has not been satisfied.

#### **October 25, 2011**

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

- Complainant’s OPRA request dated June 20, 2011.
- Letter from the Complainant to the Custodian dated September 5, 2011.
- Letter from the Complainant to the Custodian dated October 3, 2011.
- Letter from the Complainant to the Custodian dated October 14, 2011.

The Complainant states that he submitted an OPRA request on June 20, 2011. The Complainant states that the Custodian provided him with most of the responsive records; however, certain other records were not provided. The Complainant contends that these outstanding records are necessary to confirm expenditures made by the Township.

The Complainant does not agree to mediate this complaint.

**November 7, 2011**

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

**November 14, 2011**

E-mail from the Custodian to the GRC. The Custodian requests an extension of five (5) business days to submit the SOI.

**November 14, 2011**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 21, 2011 to submit the SOI.

**November 18, 2011**

E-mail from the Custodian to the GRC. The Custodian requests a second (2<sup>nd</sup>) extension of time to submit the SOI.

**November 21, 2011**

E-mail from the GRC to the Custodian. The GRC grants the Custodian a second (2<sup>nd</sup>) extension of time until November 30, 2011 to submit the SOI.

**November 30, 2011**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 20, 2011 with the Custodian’s notes thereon dated August 31, 2011.
- E-mail from the Custodian to the Complainant dated June 30, 2011 attaching a letter from the Custodian to the Complainant dated June 29, 2011 (with attachments).
- E-mail from the Custodian to the Complainant dated August 31, 2011 attaching a letter from the Custodian to the Complainant dated August 31, 2011 (with attachments).

The Custodian certifies that his search for the requested records involved forwarding the relevant OPRA request to the Township Engineer, Deputy Township Manager and Municipal Building Project Manager. The Custodian certifies that the Township Engineer provided records on June 28, 2011. The Custodian certifies that the Township Engineer subsequently provided waste manifests.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that he received the Complainant's OPRA request on June 21, 2011. The Custodian certifies that he made two (2) responses via e-mail: on June 30, 2011 providing several records and August 31, 2011 providing a 68-page record. The Custodian certifies that the Complainant requested paper copies of the record provided to him on August 31, 2011 and picked up same from the Township on September 2, 2011. The Custodian further certifies that the Complainant inspected a box full of records on October 14, 2011 as part of a meeting addressing several OPRA requests.

The Custodian contends that at issue in this complaint is whether the Custodian provided access to all responsive records. The Custodian certifies that the Complainant acknowledges in the complaint that he received records but believed they were incomplete and that other records existed. The Custodian certifies that all of the responsive records were provided to the Complainant. The Custodian certifies that these records further represent all records obtained from the Township Engineer.

The Custodian asserts that a custodian has no obligation to find missing information or reconcile the content of the records. The Custodian further asserts that a custodian is not obligated to search his files for a record that a requestor thinks should exist, nor must a custodian conduct research or create new records in order to fulfill an OPRA request. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007). The Custodian asserts that this is exactly what the Complainant asked the Custodian to do in his September 5, 2011 and October 3, 2011 correspondence.

The Custodian states that in *Caggiano v. NJ Dept. of Public Safety, Div. of Consumer Affairs*, GRC Complaint No. 2007-69 (September 2007), the Council held that the custodian did not unlawfully deny access to the requested records because the complainant "... has made numerous attempts to reasonably accommodate the ... request but has been rejected ...". *Id.* The Custodian again certifies that he provided to the Complainant all responsive records. The Custodian further asserts that he did not knowingly and willfully violate OPRA under the totality of the circumstances.

#### **December 6, 2011**

Letter from the Complainant to the GRC attaching a Township Clerk's Receipt.<sup>5</sup>

The Complainant states that his request sought supporting documents for Change Order Nos. 102, 103 and 104 that represented an expenditure of more than \$50,000.

The Complainant notes that in the Custodian's June 30, 2011 response, he failed to provide a date certain on which the responsive load tickets would be provided. The Complainant asserts that he received the records on September 2, 2011, which is contrary to the Custodian's assertion that he e-mailed same on August 31, 2011. The Complainant asserts that he confirmed that 90% of the expenses were reflected in the records provided; however, some documents could not be matched up with the expenses.

The Complainant states that he attempted to contact the Custodian on September 5, 2011 and October 3, 2011 to correct the issue. The Complainant states that after reviewing additional records on October 14, 2011, he notified the Custodian that the

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<sup>5</sup> The Complainant attached additional documents that are not relevant to the instant complaint.  
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subject OPRA request was not satisfied. The Complainant states that the Custodian never responded and further failed to provide any further comments on this issue until the filing of the SOI.

The Complainant contends that he did not ask the Custodian to do research, reconcile records or create same. The Complainant asserts that he believes the Custodian is required to determine that the records being provided are responsive to an OPRA request. The Complainant contends that the Custodian's response was compounded by the box of records he was allowed to inspect on October 14, 2011. The Complainant asserts that box provided was in response to another OPRA request for different types of records marginally involving the change orders. The Complainant asserts that he had no expectation that the missing records would be contained in this box. The Complainant asserts that the box was large and had no identifiable folders in it; thus, the Complainant was presented with many records and was directed to search for the responsive records. The Complainant contends that the Custodian did not satisfy his duties under OPRA simply by making the Township's records available for the Complainant to review on his own.

#### **December 12, 2011**

Letter from the Complainant to the GRC. The Complainant states that he recently filed multiple complaints against the Custodian. The Complainant asserts that all complaints taken as a group show a clear pattern of noncompliance with OPRA. The Complainant contends that although the Custodian is a lawyer by training, has long worked as the Township's custodian of record, and has testified that he is fully knowledgeable as to the requirements of OPRA, the Custodian has frequently violated same.

The Complainant contends that the Custodian's SOI contained issues that were not relevant to facts presented. The Complainant acknowledges that there could have been complications due to Hurricane Irene; however, the Custodian was committing similar violations well before the storm. The Complainant asserts that he has given the Custodian multiple chances to correct and resolve issues, but he has failed to do so.

The Complainant thus requests that the GRC group all 10 complaints together and, under the totality of the circumstances, determine that the Custodian knowingly and willfully violated OPRA.

#### **Analysis**

#### **Whether the Custodian's response to the Complainant's OPRA request was sufficient?**

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* ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request ... *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).<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).

Additionally, OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but a custodian must provide a specific date when he/she will respond. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i). In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to his request on the seventh (7<sup>th</sup>) business day following receipt of such request in which the custodian requested an extension of time to fulfill said request but

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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.



failed to notify the complainant of when the requested records would be provided. The Council held that the custodian's response was insufficient:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5(i)., the Custodian's written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA ...” *Id.*

In the instant complaint, the Custodian responded in writing within the prescribed time frame granting access to some records and further advising that load tickets would be provided upon receipt from VT.M. However, the Custodian failed to provide the Complainant with a date certain on which he would respond. Thus, the Custodian's response is insufficient under OPRA because he failed to provide a date certain on which he would grant or deny the Complainant access to the requested records. N.J.S.A. 47:1A-5(i). Moreover, the Custodian's failure to respond sufficiently resulted in a “deemed” denial of access to the load tickets pursuant to Kelley, *supra*, because the Custodian's response extending the time frame to comply was invalid.

Therefore, although the Custodian responded to the Complainant's OPRA request in writing in a timely manner, said response is insufficient pursuant to Hardwick, *supra*, and N.J.S.A. 47:1A-5(i). because he failed to provide a specific anticipated date upon which he would grant access to the responsive records. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009). Moreover, the Custodian's insufficient response resulted in a “deemed” denial of access to the load tickets. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, *supra*. However, the GRC declines to order disclosure of the load tickets because these records were provided to the Complainant on August 31, 2011.

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Complainant filed the instant complaint arguing that he believed the Custodian failed to provide certain load tickets. The Complainant asserted that as many as three (3) load tickets could be at issue because the Complainant acknowledged in the Denial of Access Complaint that he could not match tickets with Nos. 9, 25 and 32. The Complainant attached these manifests and three (3) load tickets that he thought might correspond with the manifests, but could not verify same.

Conversely, the Custodian advised the Complainant on August 31, 2011 that all responsive records were provided. The Custodian further certified to this in the SOI. The Custodian argued that the Complainant was essentially asking him to search his files for a record that a requestor thinks should exist, nor must a custodian conduct research or create new records in order to fulfill an OPRA request. The Custodian argued that a custodian is not obligated to perform these actions pursuant to Donato, supra.

Thus, the crux of this complaint is whether the Custodian unlawfully denied access to records that the Complainant contends exist.

In order for the Complainant to successfully refute the Custodian’s SOI certification, the Complainant had to provide competent, credible evidence sufficient to overcome the Custodian’s certification that all records responsive to the request were provided to the Complainant. The Complainant submitted three (3) manifests along with three (3) load tickets that he believed did not match the manifests. The Complainant argued that he believed these documents proved that there were other records that the Custodian failed to provide him. The Custodian attached to the SOI all manifests and tickets sent to the Complainant.

In comparing the majority of the tickets provided and those submitted by the Complainant, it is clear that a load ticket number is imputed on each manifest. However, in the case of the three (3) manifests in question, two (2) had no number and one (1) had a number that appears to have been altered. Thus, it is not entirely clear whether that manifest matches with one of the load tickets.

Based on the forgoing, the Complainant failed to submit sufficient evidence refuting the Custodian’s SOI certification that all records were provided. Specifically, two (2) of the three (3) manifests have no ticket numbers on them and the third (3<sup>rd</sup>)

manifest has a number that may or may not match one of the tickets. The mere fact that certain manifests have no corresponding ticket numbers and another has a ticket number that may or may not match with one of the load tickets provided to the Complainant does not rise to the level of competent, credible evidence that establishes by a preponderance of the evidence that the Custodian failed to provide the Complainant all responsive records that exist. Thus, the manifests and tickets provided to the GRC by the Complainant do not amount to competent, credible evidence refuting the Custodian's certification that he provided all responsive records as of August 31, 2011.

Therefore, because the Custodian certified in the SOI that he provided all responsive records as of August 31, 2011 and because the Complainant provided no competent credible evidence to refute this fact, the Custodian bore his burden of proof that he did not produce all of the responsive records. N.J.S.A. 47:1A-6. However, the Custodian still unlawfully denied access to the load tickets because of his insufficient response.

Finally, the Complainant submitted a letter to the GRC on December 12, 2011 requesting that the GRC combine a number of complaints filed against the Custodian and determine that, under the totality of the circumstances, the Custodian knowingly and willfully violated OPRA. The consolidation of complaints is solely at the discretion of GRC. In this instance and upon review of all complaints submitted by the Complainant, same will not be consolidated based on the number of complex and the complexity of the issues therein.

**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 Larry A. Kohn v. Township of Livingston (Essex), 2011-327 – Findings and Recommendations of the Executive Director

Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(i), because the Custodian failed to provide a date certain on which he would provide the responsive load tickets, thus resulting in an invalid extension and a "deemed" denial of access to those records. *See Kelley, supra*. However, the GRC declines to order disclosure of those records provided to the Complainant on August 31, 2011 and further determines that the evidence of record supports that the Custodian did not deny access to any additional records. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did 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. Although the Custodian responded to the Complainant's OPRA request in writing in a timely manner, said response is insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5(i) because he failed to provide a specific anticipated date upon which he would grant access to the responsive records. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009). Moreover, the Custodian's insufficient response resulted in a "deemed" denial of access to the load tickets. 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). However, the GRC declines to order disclosure of the load tickets previously provided to the Complainant on August 31, 2011.
2. Because the Custodian certified in the Statement of Information that he provided all responsive records as of August 31, 2011 and because the Complainant provided no competent credible evidence to refute this fact, the Custodian bore his burden of proof that he did not produce all of the responsive records. N.J.S.A. 47:1A-6. However, the Custodian still unlawfully denied access to the load tickets because of his insufficient response.
3. The Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5(i) because the Custodian failed to provide a date certain on which he would provide the responsive load tickets,

thus resulting in an invalid extension and a “deemed” denial of access to those records. *See Kelley v. Township of Rockaway*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of those records provided to the Complainant on August 31, 2011 and further determines that the evidence of record supports that the Custodian did not deny access to any additional records. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions did 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: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013<sup>7</sup>

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<sup>7</sup> This complaint was originally prepared for the Council’s January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.