



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

May 28, 2013 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2011-336 and 2011-337

v.

City of Orange (Essex)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant has failed to establish in her request for reconsideration of the Council’s March 22, 2013 Interim Order that: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind conclusion No. 2 referring this complaint to the Office of Administrative Law. Referring this complaint to the Office of Administrative Law will not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the Complainant is in possession of all records regardless of whether the list was incomplete and she obtained the remaining records through another OPRA request. Additionally, the Council should determine whether the original Custodian knowingly and willfully violated OPRA under the totality of the circumstances since she did not bear her burden of proving a timely response or a lawful denial of access to the records responsive to the October 19, 2011 OPRA request. N.J.S.A. 47:1A-6.



3. Regarding Mr. Jeffrey S. Feld, Esq.'s request to intervene on the side of the Complainant, the GRC has reviewed Mr. Feld's submissions. The Council should determine that Mr. Feld not be allowed to intervene. His stated interest of transparency in government and the fact that he represented the Complainant in previous actions against the City of Orange is not sufficiently different from the Complainant's interest and likely will not add "... measurably and constructively to the scope ..." of these complaints. *N.J.A.C. 1:1-16.3(a)*.
4. The original Custodian violated OPRA by failing to bear her burden of proof that she timely responded to the Complainant's October 19, 2011 OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Additionally, the original Custodian unlawfully denied access to the records responsive to the Complainant's October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided all records possessed to the Complainant, even if the record was incomplete or her response was untimely. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 28th Day of May, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 13, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint Nos. 2011-336 and 2011-337

v.

**City of Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

GRC Complaint No. 2011-336: Current lawsuits between the City of Orange (“City”) and West Orange regarding tax delinquency of the City water reservoir property.

GRC Complaint No. 2011-337: Lists of all active lawsuits in which 1) the City is the defendant (with docket numbers); and 2) the City is the plaintiff (with docket numbers).

Request Made: October 19, 2011 and September 26, 2011

Response Made: N/A and October 11, 2011

GRC Complaint Filed: November 7, 2011 and November 10, 2011³

Background

March 22, 2013 Council Meeting:

At its March 22, 2013 public meeting, the Council considered the March 15, 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, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. 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.

¹ No legal representation listed on record.

² Dwight Mitchell, Custodian of Records. Represented by Dan Smith, Esq. (Orange, NJ). The original Custodian or Record was Shinell Smith and Counsel was Marvin T. Braker, Esq. (Orange, NJ).

³ The GRC received the Denial of Access Complaints on said dates.

47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Due to the complexities of this matter and the lack of uncontested and sufficient evidence in the record, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law to determine whether there has been an unlawful denial of access and whether Mr. Feld is entitled to intervene. N.J.S.A. 47:1A-7(e), N.J.A.C. 1:1-16.2(b), *See also Gill v. NJ Department of Banking & Insurance*, 2007-189 (June 2009). Moreover, the OAL shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances.

Procedural History:

On March 26, 2013, the Council distributed its Interim Order to all parties.

Complainant's Reconsideration:

On April 5, 2013, the Complainant requested that the Council reconsider its March 22, 2013 Interim Order based on new evidence⁴ and fraud. The Complainant contends that the GRC erred by concluding that there were contested facts in this complaint warranting a hearing at the Office of Administrative Law ("OAL"). The Complainant contends that the facts are quite clear that the records responsive to both OPRA requests existed and the Custodian and Louis W. Childress, Jr., Esq., Senior Assistant City Attorney, knowingly and willfully violated OPRA.

The Complainant contends that the facts of both complaints support that the original Custodian and Mr. Childress knowingly and willfully delayed access and provided vague responses to the GRC and Complainant.

Regarding GRC Complaint No. 2011-336, the Complainant contends that a search of the New Jersey Courts public access website shows that West Orange v. SCH 1 Block 162, Lot 2 Assessed to the City of Orange, Docket No. F-006452-11, was filed at the Chancery Division on July 27, 2011, nearly three months prior to her October 19, 2011 OPRA request. The Complainant contends that notwithstanding the existence of this litigation, Mr. Childress's memorandum to the Custodian dated October 19, 2011, insinuates that no records exist and would need to be created. The Complainant asserts that this memorandum was the basis for the Custodian's response that no records exist. The Complainant contends that the Custodian's Statement of Information ("SOI") was intentionally vague so as to not alert the GRC to the fact that records did exist at the time of her OPRA request. The Complainant further contends that the Custodian's SOI assertion that records had since been offered to the Complainant but she declined to accept is untrue: the Custodian provided access to the records in response to a separate OPRA request.

⁴ New evidence is that which could not have been provided prior to the Council's decision because it did not exist at the time.

Regarding GRC Complaint No. 2011-337, the Complainant submits as “new evidence” two (2) OPRA requests dated September 27, 2011 and October 21, 2011, and both responses as proof that the City’s Legal Department was aware of the litigation that was not provided to the Complainant. The Complainant contends that Mr. Childress’s omission of certain responsive records/information was not an inadvertent mistake as asserted by the Custodian in the SOI. The Complainant further asserts that the Custodian’s December 5, 2012 certification that the City maintained no running list of litigation implies that it was not standard for the City to maintain such a list at the time of her OPRA request. The Complainant contends that the Custodian’s certification is contrary to a March 19, 2013 letter from Dan S. Smith, Esq., City Attorney, advising that the old administration kept a running list and that Mr. Smith has continued this practice. The Complainant contends that it is clear the Custodian knowingly and willfully provided false information to the GRC.

Analysis

Reconsideration

Parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. *N.J.A.C. 5:105-2.10*. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D’Atria v. D’Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D’Atria, supra*, 242 *N.J. Super.* at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Complainant filed the request for reconsideration of the Council’s March 22, 2013 Interim Order on April 5, 2013, seven (7) business days after the issuance of the Council’s Order.

In support of her request for reconsideration of these two (2) complaints, the Complainant argued that there are no contested facts: the original Custodian and Mr. Childress knowingly and willfully violated OPRA by withholding responsive records and information.

Regarding GRC Complaint No. 2011-336, the Complainant contended that Mr. Childress and the Custodian purposely provided vague and misleading statements regarding the existence of West Orange v. SCH 1 Block 162, Lot 2 Assessed to the City of Orange, Docket No. F-006452-11 (filed at the Chancery Division on July 27, 2011). The Complainant further disputed the Custodian's assertion that the Complainant declined to accept records responsive to her October 19, 2011 OPRA request.

Regarding GRC Complaint No. 2011-337, the Complainant submitted two (2) OPRA requests from September and October 2011, and the City's response. The Complainant contended that this previously unused evidence proves that the City Law Department was aware of certain litigation. The Complainant also provided a letter from Mr. Smith dated March 19, 2013, advising that the City previously had, and continues to keep, a current list of litigation. The Complainant argued that this evidence clearly shows that Mr. Childress and the Custodian knew of the existence of responsive records, but chose to provide vague responses and ultimately a portion of some records.

The Council should reject the Complainant's request for reconsideration. The Complainant's request for reconsideration merely expresses dissatisfaction with the Council's Decision and attempts to reassert arguments already contemplated in the Council's Interim Order. Additionally, regarding the Complainant's "new evidence," the OPRA requests and responses were clearly available during the adjudication process and thus do not constitute new evidence. Although Mr. Smith's recent response is slightly compelling, it is difficult to gauge how far back the City kept a current list since Mr. Smith's tenure with the City started in July 2012 (nearly a year after the subject OPRA requests). Thus, even Mr. Smith's letter fails to settle any facts with certainty. The Council's Decision sending these complaints to OAL for a full hearing to resolve all issues is appropriate for all the reasons stated in its March 22, 2013 Interim Order.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) that the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably in referring these complaint to OAL. See D'Atria, *supra*. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision. Thus, the Complainant's request for reconsideration should be denied. Cummings, *supra*; D'Atria, *supra*; Comcast, *supra*.

However, notwithstanding the previous analysis on the Complainant's request for reconsideration, the Council should abandon its order sending these complaints to the OAL. The evidence indicates that the Complainant is currently in possession of the records at issue herein. Specifically, although the list provided in response to the Complainant's September 26, 2011

OPRA request was incomplete, it was the list that existed at the time of her OPRA request. That some litigation was not included on the list is of no relevance to the Council's Decision. Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(holding that the Council does not have authority over the content of a record).

Moreover, the original Custodian certified in the SOI that she offered to the Complainant the records responsive to the October 19, 2011 OPRA request, but the Complainant declined to accept same. The Complainant confirmed in her reconsideration paperwork that she declined the records because she was already in possession of same. Thus, the Council would not have ordered disclosure in this instance because a duplication of compliance would be unnecessary. However, the Custodian's initial failure to provide records responsive to the October 19, 2011 OPRA request was a violation of OPRA. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Even if the records were maintained by another department, third party vendor or location, the Custodian was still required to obtain and provide those records. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005) and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012).

Therefore, the Council should rescind conclusion No. 2 referring this complaint to OAL. Referring this complaint to OAL will not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the Complainant is in possession of all records regardless of whether the list was incomplete and she obtained the remaining records through another OPRA request. Additionally, the Council should determine whether the original Custodian knowingly and willfully violated OPRA under the totality of the circumstances since she did not bear her burden of proving a timely response or a lawful denial of access to the records responsive to the October 19, 2011 OPRA request. N.J.S.A. 47:1A-6.

Regarding Mr. Jeffrey S. Feld, Esq.'s request to intervene on the side of the Complainant, the GRC has reviewed Mr. Feld's submissions. The Council should determine that Mr. Feld not be allowed to intervene. His stated interest of transparency in government and the fact that he represented the Complainant in previous actions against the City is not sufficiently different from the Complainant's interest and likely will not add "... measurably and constructively to the scope ..." of these complaints. N.J.A.C. 1:1-16.3(a).

Knowing & Willful

OPRA states that:

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

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

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

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

The original Custodian violated OPRA by failing to bear her burden of proof that she timely responded to the Complainant’s October 19, 2011 OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Additionally, the original Custodian unlawfully denied access to the records responsive to the Complainant’s October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided all records possessed to the Complainant, even if the record was incomplete or the Custodian’s response untimely. Additionally, the evidence of record does not indicate that the original Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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. The Complainant has failed to establish in her request for reconsideration of the Council’s March 22, 2013 Interim Order that: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence, and has failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant failed to present any evidence which was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision. Thus, the Complainant’s request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council should rescind conclusion No. 2 referring this complaint to the Office of Administrative Law. Referring this complaint to the Office of Administrative Law will not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the Complainant is in possession of all records regardless of whether the list was incomplete and she obtained the remaining records through another OPRA request. Additionally, the Council should determine whether the original Custodian knowingly and willfully violated OPRA under the totality of the circumstances since she did not bear her burden of proving a timely response or a lawful denial of access to the records responsive to the October 19, 2011 OPRA request. N.J.S.A. 47:1A-6.
3. Regarding Mr. Jeffrey S. Feld, Esq.'s request to intervene on the side of the Complainant, the GRC has reviewed Mr. Feld's submissions. The Council should determine that Mr. Feld not be allowed to intervene. His stated interest of transparency in government and the fact that he represented the Complainant in previous actions against the City of Orange is not sufficiently different from the Complainant's interest and likely will not add "... measurably and constructively to the scope ..." of these complaints. *N.J.A.C. 1:1-16.3(a)*.
4. The original Custodian violated OPRA by failing to bear her burden of proof that she timely responded to the Complainant's October 19, 2011 OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Additionally, the original Custodian unlawfully denied access to the records responsive to the Complainant's October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided all records possessed to the Complainant, even if the record was incomplete or her response was untimely. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Brandon D. Minde, Esq.
Executive Director

May 21, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint Nos. 2011-336 and 2011-337

v.

City of Orange (Essex)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. 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).
2. Due to the complexities of this matter and the lack of uncontested and sufficient evidence in the record, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law to determine whether there has been an unlawful denial of access and whether Mr. Feld is entitled to intervene. N.J.S.A. 47:1A-7(e), N.J.A.C. 1:1-16.2(b), *See also Gill v. NJ Department of Banking & Insurance*, 2007-189 (June 2009). Moreover, the OAL shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 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: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2011-336 and 2011-337

v.

**City of Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

GRC Complaint No. 2011-336: Current lawsuits between the City of Orange (“City”) and West Orange regarding tax delinquency of the City water reservoir property.

GRC Complaint No. 2011-337: Lists of all active lawsuits in which 1) the City is the defendant (with docket numbers); and 2) the City is the plaintiff (with docket numbers).

Request Made: October 19, 2011 and September 26, 2011

Response Made: N/A and October 11, 2011

GRC Complaint Filed: November 7, 2011 and November 10, 2011³

Background

GRC Complaint No. 2011-336

The Complainant submitted an OPRA request to the City on October 19, 2011. Mr. Louis W. Childress, Jr., Esq. (“Mr. Childress”), Senior Assistant City Attorney, sent a memorandum to the Custodian on October 19, 2011 advising that the Custodian could disclose any complaints that were filed by West Orange. Mr. Childress further advised the Custodian that the Complainant’s request appeared to require the City to create a record that was not already a public record. The Custodian responded on an unknown date advising the Complainant that no records responsive exist.

The Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) on November 7, 2011. In said complaint, the Complainant contends that the Custodian’s response that no records exist is erroneous. The Complainant contends that the City was engaged in litigation with West Orange. *See* West Orange v. SCH 1 Block 162, Lot 2

¹ No legal representation listed on record.

² Shinell Smith, Custodian of Records. Represented by Marvin T. Braker, Esq. (Orange, NJ).

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

Assessed to the City of Orange, Docket No. F-006452-11. The Complainant contends that the City filed a counterclaim against West Orange.

The Custodian filed her Statement of Information (“SOI”) on November 28, 2011. In the SOI, the Custodian certifies that at the time of the Complainant’s OPRA request, the City did not have access to nor maintained any responsive records. The Custodian certifies that she has since contacted the Complainant to provide the responsive records; however, the Complainant will not accept same.

GRC Complaint No. 2011-337

The Complainant submitted an OPRA request to the City on September 26, 2011. The Custodian responded on October 11, 2011 providing a typed list of lawsuits “as of September 23, 2011.”

The Complainant filed his Denial of Access Complaint with the GRC on November 10, 2011. In said complaint, the Complainant contends that the City withheld information regarding at least the following three (3) lawsuits, which she was alerted to through other sources:

1. City of Orange v. Joseph Di Vincenzo Jr., Docket No. ESX-L-2927-11
2. West Orange v. SCH 1 Block 162, Lot 2 Assessed to the City of Orange, Docket No. F-006452-11
3. City of Orange v. CYFA Corp., (citation omitted).

The Complainant contends that there may be several other lawsuits in existence of which she is unaware, but that this OPRA request was to illicit such information. The Complainant contends that the City provided incomplete lists and at no point advised her of this fact.

The Custodian filed her SOI on November 28, 2011; however, same included no factual or legal arguments. Included in the SOI was a memorandum from Mr. Childress to the Custodian wherein Mr. Childress identifies the three (3) lawsuits at issue and notes that they were not included on the list provided to the Complainant. Mr. Childress further noted that he was satisfied that the Custodian provided him with sufficient evidence to indicate that records regarding these three (3) lawsuits were provided to the Complainant on an unknown date. On December 5, 2012, the Custodian provided a legal certification to the GRC in which she certified that there was, at that time, no list of open litigation for the City.

In response to both complaints, Mr. Jeffrey S. Feld, Esq., (“Mr. Feld”) sent a letter to the GRC on December 13, 2012 requesting to intervene. Mr. Feld noted that he has been the plaintiff or plaintiff’s counsel in eight other prerogative writ actions against the City. Mr. Feld stated that although he is not representing the Complainant in this matter, he too seeks transparency from the City and has an interest in the outcome of this matter.

On December 18, 2012, the City responded arguing that Mr. Feld should not be allowed to intervene in this complaint because Mr. Feld’s suits and claims are without merit, as three of

his claims against the City have already been dismissed by Judge Coleman and Judge Kennedy and affirmed by the Appellate Courts.

Analysis⁴

Timeliness

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).⁵ 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 GRC Complaint No. 2011-336, the Custodian failed to submit any evidence regarding her response to the Complainant's October 19, 2011 OPRA request. Thus, the Custodian failed to bear the required burden of proof under N.J.S.A. 47:1A-6 that she provided a written response to the Complainant's request within the statutorily mandated seven (7) business days. Accordingly, the Custodian's failure to respond in writing to the Complainant's OPRA request results in a "deemed" denial.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. 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, supra.

Unlawful Denial of Access

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.

⁴ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁵ 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. Katalin Gordon v. City of Orange (Essex), 2011-336 – Findings and Recommendations of the Executive Director

Furthermore, “OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [(“APA”)].” N.J.S.A. 47:1A-7(e).

The APA provides that:

“The agency head may rule upon the motion to intervene or may reserve decision for action by a judge after the case has been filed with the Office of Administrative Law.” *N.J.A.C. 1:1-16.2(b)*.

In addition, the APA states that:

“Any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.” *N.J.A.C. 1:1-16.1(a)*.

In these complaints, the Complainant argues that she was unlawfully denied access to the requested current lawsuits and lists of lawsuits. However, the Custodian has certified in the SOIs that 1) the City did not have access to nor maintained any responsive current lawsuit; and 2) that the City does not regularly maintain such a record and that a list of open litigation against the City would have to be created. Accordingly, the Custodian contends that *at the time of the Complainant's request*, records responsive to the Complainant's OPRA requests did not exist.

A review of the evidence of record herein provides that contested facts exist for which the GRC is unable to make a determination. Specifically, the Custodian certified in her SOI relevant to GRC Complaint No. 2011-336 that she maintained no records at the time of the OPRA request relevant to GRC Complaint No. 2011-336; however, Mr. Childress acknowledged that a lawsuit was pending between the City and West Orange on October 11, 2011, eight (8) days before the Complainant submitted her OPRA request. *See* GRC Complaint No. 2011-337. Additionally, Mr. Childress advised the Custodian in a memo dated October 19, 2011 to discuss responsive records, yet the Custodian subsequently responded on an unknown date stating no records exist. Moreover, the Custodian certified in the SOI for GRC Complaint No. 2011-337 that no list existed, yet she provided the Complainant with one in a timely manner, though incomplete.

Regarding Mr. Feld's request to intervene, he submitted a letter to the GRC on December 17, 2012 stating that he too has several prerogative writ actions against the City. In arguing that the City has a history of continuous OPRA violations, Mr. Feld asserts that he should be allowed to intervene in this matter because the City's actions inhibit transparency and prevent debates on public issues from being uninhibited, robust, and wide-open.

On December 24, 2012, the City responded arguing that Mr. Feld should not be allowed to intervene in this matter because his arguments are without merit and that all of his suits and claims against the City are a drain on the City's resources.

In the instant matter there exist contested facts regarding whether or not responsive records actually existed at the time of the Complainant's OPRA requests. Further complicating this dispute is the issue of whether Mr. Feld's interests in the outcome of these contested complaints entitles him to status as an intervenor, as the validity of his arguments would be best addressed by a full hearing. Moreover, the parties' submissions lack the degree of competency necessary to qualify as evidence that the GRC would deem sufficient to formulate a recommendation. As such, the issues of whether the Custodian unlawfully denied the requested records and whether Mr. Feld is entitled to intervene will be afforded all due process rights.

Therefore, due to the complexities of this matter and the lack of uncontested and sufficient evidence in the record, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law ("OAL") to determine whether there has been an unlawful denial of access and whether Mr. Feld is entitled to intervene. N.J.S.A. 47:1A-7(e), N.J.A.C. 1:1-16.2(b), *See also Gill v. NJ Department of Banking & Insurance*, 2007-189 (June 2009). Moreover, the OAL shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's October 19, 2011 OPRA request. N.J.S.A. 47:1A-6. 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).
2. Due to the complexities of this matter and the lack of uncontested and sufficient evidence in the record, the GRC will exercise its discretion by referring this matter to the Office of Administrative Law to determine whether there has been an unlawful denial of access and whether Mr. Feld is entitled to intervene. N.J.S.A. 47:1A-7(e), N.J.A.C. 1:1-16.2(b), *See also Gill v. NJ Department of Banking & Insurance*, 2007-189 (June 2009). Moreover, the OAL shall also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013