



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

March 22, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-344

v.

Township of Livingston (Essex)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s February 26, 2013 Interim Order because the Custodian provided the responsive CD to the Complainant via regular mail and simultaneously submitted certified confirmation of compliance to the GRC within the prescribed time frame.
2. The Custodian’s failure to respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear his burden of proving a lawful denial of access to the requested CD. However, the Custodian timely complied with the Council’s February 26, 2013 Interim Order. 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 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**

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

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2011-344

v.

**Township of Livingston (Essex)²
Custodian of Records**

Records Relevant to Complaint:

October 14, 2011 OPRA request: Inspection of the audio recording of the Township of Livingston (“Township”) open session meeting dated August 1, 2011.

November 28, 2011 OPRA request: Copy of the audio recording of the Township’s open session meeting dated August 1, 2011 in CD audio format.

Request Made: October 14, 2011 and November 28, 2011

Response Made: November 9, 2011 and None

GRC Complaint Filed: November 1, 2011³

Background

At its February 26, 2013 public meeting, the 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, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s two (2) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s two (2) OPRA requests 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 same 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).

¹ No legal representation listed on record.

² Glenn Turtletaub, Custodian of Records. Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner (Riverdale, NJ).

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

2. The Custodian unlawfully denied access to the responsive recording in CD audio format. N.J.S.A. 47:1A-6. Thus, the Custodian must convert and provide the responsive record to the Complainant at the actual cost of reproduction.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

The Council distributed its Interim Order to all parties on February 27, 2013. On March 6, 2013 the Custodian responded to the Council's Interim Order. In his legal certification (with attachments), the Custodian certifies that he previously converted and provided the responsive CD to the Complainant on February 6, 2012. The Custodian certifies that he memorialized providing the CD to the Complainant in a letter dated February 8, 2012. The Custodian certifies he is again forwarding a copy of the CD to the Complainant via regular mail.

Analysis

Compliance

At its February 26, 2013 meeting, the Council ordered the Custodian to:

"...the Custodian must convert and provide the [CD] to the Complainant at the actual cost of reproduction ... The Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if applicable, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director."

The Council disseminated its Order on February 27, 2013. The Custodian responded on March 6, 2013, the fifth (5th) business day after receipt of the Order, providing the responsive CD to the Complainant via regular mail and sending certified confirmation of compliance to the GRC.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Therefore, the Custodian complied with the Council's February 26, 2013 Interim Order because the Custodian provided the responsive CD to the Complainant via regular mail and simultaneously submitted certified confirmation of compliance to the GRC within the prescribed time frame.

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 Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear his burden of proving a lawful denial of access to the requested CD. However, the Custodian timely complied with the Council's February 26, 2013 Interim Order. 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. The Custodian complied with the Council's February 26, 2013 Interim Order because the Custodian provided the responsive CD to the Complainant via regular mail and simultaneously submitted certified confirmation of compliance to the GRC within the prescribed time frame.
2. The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear his burden of proving a lawful denial of access to the requested CD. However, the Custodian timely complied with the Council's February 26, 2013 Interim Order. 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

March 15, 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

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-344

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. The Custodian did not bear his burden of proof that he timely responded to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's two (2) OPRA requests 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 same 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. The Custodian unlawfully denied access to the responsive recording in CD audio format. N.J.S.A. 47:1A-6. Thus, the Custodian must convert and provide the responsive record to the Complainant at the actual cost of reproduction.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th 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. Kohn¹
Complainant

GRC Complaint No. 2011-344

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint:

October 14, 2011 OPRA request: Inspection of the audio recording of the Township of Livingston (“Township”) open session meeting dated August 1, 2011.

November 28, 2011 OPRA request: Copy of the audio recording of the Township’s open session meeting dated August 1, 2011 in CD audio format.

Request Made: October 14, 2011 and November 28, 2011

Response Made: November 9, 2011 and None

Custodian: Glenn Turtletaub

GRC Complaint Filed: November 1, 2011³

Background

November 1, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated October 14, 2011.

The Complainant states that he submitted an OPRA request to the Township on October 14, 2011. The Complainant states that he has not received a response.

The Complainant does not agree to mediate this complaint.

December 1, 2011

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated October 14, 2011 with the Custodian’s notes thereon.
- E-mail from the Custodian to the Complainant dated November 9, 2011.
- E-mail from the Custodian to the Complainant dated November 21, 2011.

¹ No legal representation listed on record.

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

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

- Letter from the Complainant to the Custodian dated November 24, 2011.⁴

The Custodian certifies that his search for the requested records included retrieving the responsive recording and, in tandem with other employees, preparing a CD for the Complainant to either listen to or receive a copy.

The Custodian also certifies 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 October 17, 2011. The Custodian certifies that he prepared a CD with the recording and necessary software to play the CD. The Custodian certifies that he notified the Complainant on November 9, 2011 that the CD was ready for inspection or retrieval. The Custodian certifies that the Complainant retrieved the CD on November 11, 2011.

The Custodian certifies that the Complainant advised that he was unable to listen to the CD, at which point the Custodian responded on November 21, 2011 stating that the software was on the CD but that the Complainant may schedule an appointment to listen to the recording at the Township's offices. The Custodian certifies that the Complainant did not accept the Custodian's offer; rather, the Complainant filed a new OPRA request on November 28, 2011 seeking the recording in CD audio format. The Custodian certifies that he is currently processing this OPRA request.

The Custodian certifies that during the time period of this OPRA request, the Township was preparing for a Township Volunteer Appreciation reception and Election Day. The Custodian further certifies that the Township recently endured an unprecedented snowstorm on October 31, 2011. The Custodian certifies that the Township was engaged in dealing with significant issues and power outages that forced the Township to rely on generators to conduct business. The Custodian certifies that no computers or nonessential electricity was used during that time.

The Custodian contends that his actions were consistent with OPRA. The Custodian further contends that he did not knowingly and willfully violate OPRA or unreasonably deny access within the totality of the circumstances.

December 6, 2011

Letter from the Complainant to the GRC. The Complainant states that the Custodian did not respond to his OPRA request until the 19th business day after receipt of same.⁵ The Complainant states that this response was also nine (9) business days after the filing of this complaint. The Complainant states that the Custodian never requested an extension of time. The Complainant states that during the statutorily mandated seven (7) business days, neither the Township Volunteer Appreciation reception, Election Day nor the unprecedented storm occurred.

⁴ A note on the letter indicates that same was actually received by the Township on November 21, 2011.

⁵ The Custodian certified that he did not receive the Complainant's first (1st) OPRA request until October 17, 2011; thus, the Custodian actually responded 17 business days after receipt of the request.

The Complainant contends that the Custodian's untimely response is a knowing and willful violation of OPRA and does not conform to the statute's requirements.

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 acknowledges that the Township suffered from a storm; however, many of the OPRA-related issues found within have been consistent since before the storm and have continued since. 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.

December 27, 2011

Complainant's amended Denial of Access Complaint with the following attachments:

- E-mail from the Custodian to the Complainant dated November 9, 2011.
- E-mail from the Custodian to the Complainant dated November 21, 2011.
- Letter from the Complainant to the Custodian dated November 24, 2011.
- Letter from the Complainant to the Custodian dated November 28, 2011.

The Complainant states that he received the responsive CD from the Custodian and could not get it to work. The Complainant states that he sent a letter to the Custodian advising that he believed the CD was blank. The Complainant states that the Custodian responded by e-mail on November 21, 2011 advising that there should have been software on the CD to play the recording but that the Complainant could inspect the recording at the Township offices. The Complainant states that in a letter to the Custodian on November 28, 2011, the Complainant requested the recording in CD audio format. The Complainant states that since that time, he has not received a response.

January 20, 2012

Custodian's legal certification. The Custodian certifies that the Township previously provided the responsive record to the Complainant on November 9, 2011. The Custodian certifies that the Complainant subsequently requested the record in CD audio format.

The Custodian certifies that historically, the Township recorded its meetings on tape cassettes, with which the Complainant has previously been provided. The Custodian certifies that after moving to the new building, meetings are now recorded on the new system and are formatted to play on a computer. The Custodian certifies that to the best of his knowledge, the Township's new recording system does not have conversion

capabilities. The Custodian certifies that this is the first time the Township has ever been asked to convert a recording.

The Custodian certifies that, although he believed they were under no obligation to do so, he attempted to fulfill the Complainant's OPRA request. The Custodian certifies that on several occasions, he met with the Court Administrator in an attempt to determine whether the new system could convert audio recordings into CD audio files. The Custodian certifies that he now believes that the Township can provide a CD audio recording, but that the task will be time consuming. The Custodian certifies that it could take more than 15 minutes to make a CD and could extend to multiple CDs. The Custodian certifies that he does not know the exact amount of time needed to convert the recording because the Township has never done this.

January 20, 2012

Letter from the Complainant to the GRC. The Complainant asserts that although the Custodian accuses the Complainant of never responding to his November 21, 2011 e-mail, the Complainant's November 28, 2011 letter was that response. The Complainant further asserts that although the Custodian certifies in the SOI that the Township was formulating a reply to his November 28, 2011 OPRA request, the Custodian never provided same.

The Complainant further contends that the Custodian is not clear in his January 20, 2012 certification as to whether the Township can produce a CD in the requested format. The Complainant contends that the certification is a prime example of the difficulty he experiences in attempting to obtain access to government records.

Analysis

Whether the Custodian timely responded to the Complainant's two (2) OPRA requests?

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).⁶ 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).

The Custodian certified in the SOI that he received the Complainant's first (1st) OPRA request on October 17, 2011 and responded on November 9, 2011, or 17 business days after receipt of same. Additionally, there is no evidence in the record indicating that the Custodian responded in writing to the Complainant's second (2nd) OPRA request. Therefore, both OPRA requests are "deemed" denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's two (2) OPRA requests 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 same pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, *supra*.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

⁶ 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.

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 initially filed this complaint after not receiving a response from the Custodian. Subsequent to the filing of the complaint, the Custodian responded providing the Complainant with the responsive recording on CD with software to play the CD. The Complainant subsequently contacted the Custodian advising that he could not play the CD, at which time the Custodian advised that the Complainant may schedule an appointment to listen to the CD at the Township offices.

The Complainant subsequently submitted a second (2nd) OPRA request seeking a copy of the same recording on a CD as an audio file. The Custodian did not respond to this request, but certified to the GRC on January 20, 2012 that he attempted to fulfill the Complainant’s OPRA request. Specifically, the Custodian certified that he spoke with the Court Administrator to determine whether the new recording system utilized by the Township could convert recordings into CD audio files. The Custodian further certified that he believed the Township can provide the record, but that the amount of time and materials needed is currently unknown. At current, there is no evidence to indicate that the Custodian has converted the record into an audio file and provided same to the Complainant.

The GRC first notes that although the Custodian’s failure to respond to the Complainant’s first (1st) OPRA request resulted in a “deemed” denial, the Complainant received the record on November 11, 2011. Thus, the GRC declines to address whether the Custodian unlawfully denied access to this recording.

Regarding the Complainant’s second (2nd) OPRA request, OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. The Custodian herein never asserted that the responsive record was exempt from disclosure under OPRA. In fact, the Custodian acknowledged that he believed the Township would be able to provide the record in the format requested by the Complainant. However, there is no evidence to indicate that the Custodian converted the record and provided same to the Complainant. Therefore, the Custodian has unlawfully denied access to the recording responsive to the Complainant’s second (2nd) OPRA request.

Therefore, the Custodian unlawfully denied access to the responsive recording in CD audio format. N.J.S.A. 47:1A-6. Thus, the Custodian must convert and provide the responsive record to the Complainant at the actual cost of reproduction.

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 complaints 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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's two (2) OPRA requests 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 same 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. The Custodian unlawfully denied access to the responsive recording in CD audio format. N.J.S.A. 47:1A-6. Thus, the Custodian must convert and provide the responsive record to the Complainant at the actual cost of reproduction.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold

Larry A. Kohn v. Township of Livingston (Essex), 2011-344 – Findings and Recommendations of the Executive Director 7

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁹

delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁹ 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.