



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

Robert B. Quinlan
Complainant

Complaint No. 2011-371

v.

Township of Hillside (Union)
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 failed to timely comply with the Council’s January 29, 2013 Order because on February 14, 2013, the eleventh (11th) business day after receipt of the Council’s Order. Although the Custodian failed to timely comply with the Council’s Order, the preponderance of the evidence reveals that no records responsive to the Complainant’s request exist and the Complainant has failed to provide any evidence to the contrary.
2. The former Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond, in writing to the Complainant’s OPRA request within seven (7) business days. Mayor Menza failed to respond to the former Custodian’s attempt to obtain the records responsive to the Complainant’s request. The current Custodian also failed to timely comply with the Council’s January 29, 2013 Order. However, Mayor Menza informed the Custodian that his office is not in possession of the responsive records. The Custodian certified that she informed the Complainant that Mayor Menza is not in possession of the requested records. Therefore, it is concluded that the former and current Custodian’s actions along with Mayor Menza’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

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: April 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert B. Quinlan¹
Complainant**

GRC Complaint No. 2011-371

v.

**Township of Hillside (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Attendance reports for Temporary Chief Financial Officer, Janice Saponaro (“Ms. Saponaro”), from March 2011 to the present.
2. Attendance reports for Mayor’s Secretary, Ebony Slade, (“Ms. Slade”), from April 2011 to the present.

Request Made: October 17, 2011

Response Made: October 27, 2011

Custodian: Deborah Karlsson³

GRC Complaint Filed: December 12, 2011⁴

Background

At its January 29, 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 her burden of proof that she timely responded to the Complainant’s 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).

¹ No legal representation listed on record.

² Represented by Christine Burgess, Esq. (Montclair, NJ).

³ The Custodian at the time of the OPRA request and Statement of Information was Janet Vlaisavljevic. Ms. Karlsson is the Acting Township Clerk.

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

2. The Custodian shall obtain the attendance reports responsive to the Complainant's request from Mayor Menza and provide those records, with proper redactions, if necessary, to the Complainant. *See Johnson v. Borough of Oceanport (Monmouth)*, GRC Complaint No. 2007-107 (Interim Order July 25, 2007).
3. **The Custodian shall comply with items #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 1:4-4,⁵ to the Executive Director.⁶**
4. The Council defers analysis of whether the Custodian and Mayor Menza 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 January 30, 2013. On February 14, 2013, the eleventh (11th) business day after receipt thereof, the Custodian responded to the Council's Interim Order. The Custodian certifies that she sent a response via letter to the Complainant on February 8, 2013 and encloses a copy of that letter. The Custodian's letter to the Complainant dated February 8, 2013 states that she requested the responsive records from Mayor Menza. The Custodian also states that she was informed by Mayor Menza on February 8, 2013 via memorandum that the records responsive to the Complainant's request are not in his possession, custody or control.

The GRC requested a copy of the Mayor Menza's memorandum to the Custodian on February 14, 2013. The Custodian provided a copy of Mayor Menza's memorandum to the Custodian dated February 8, 2013. Mayor Menza states that the Custodian requested that his office search for the records responsive to the Complainant's OPRA request. Mayor Menza also states that to the best of his knowledge, his office is not in possession of the requested records.

Analysis

Compliance

At its January 29, 2013 the Council ordered the Custodian to obtain the attendance reports responsive to the Complainant's request from Mayor Menza and provide those records, with proper redactions, if necessary, to the Complainant within five (5) business days of receipt of said Order. The Council disseminated its Order on January 30, 2013. Thus, the Custodian's response was due by close of business on February 6, 2013.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the records 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.

Mayor Menza sent a memorandum to the Custodian on February 8, 2013 informing the Custodian that his office was not in possession of the responsive records. Further, the Custodian also informed the Complainant on February 8, 2013 via letter that she requested the responsive records from Mayor Menza and was informed by Mayor Menza that the records responsive are not in his possession.

Therefore, the Custodian failed to timely comply with the Council's January 29, 2013 Order because on February 14, 2013, the eleventh (11th) business day after receipt of the Council's Order. Although the Custodian failed to timely comply with the Council's Order, the preponderance of the evidence reveals that no records responsive to the Complainant's request exist and the Complainant has failed to provide any evidence to the contrary.

Whether the former and the current Custodian's and Mayor Menza's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

The former Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond, in writing, to the Complainant's OPRA request within seven (7) business days. Mayor

Menza failed to respond to the former Custodian's attempts to obtain the records responsive to the Complainant's request. The current Custodian also failed to timely comply with the Council's January 29, 2013 Order. However, Mayor Menza informed the Custodian that his office is not in possession of the responsive records. Further the preponderance of the evidence reveals that there are no records responsive to the Complainant's request. Therefore, it is concluded that the former and current Custodian's actions along with Mayor Menza's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to timely comply with the Council's January 29, 2013 Order because on February 14, 2013, the eleventh (11th) business day after receipt of the Council's Order. Although the Custodian failed to timely comply with the Council's Order, the preponderance of the evidence reveals that no records responsive to the Complainant's request exist and the Complainant has failed to provide any evidence to the contrary.
2. The former Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond, in writing to the Complainant's OPRA request within seven (7) business days. Mayor Menza failed to respond to the former Custodian's attempt to obtain the records responsive to the Complainant's request. The current Custodian also failed to timely comply with the Council's January 29, 2013 Order. However, Mayor Menza informed the Custodian that his office is not in possession of the responsive records. The Custodian certified that she informed the Complainant that Mayor Menza is not in possession of the requested records. Therefore, it is concluded that the former and current Custodian's actions along with Mayor Menza's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Harlynn A. Lack, Esq.
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

January 29, 2013 Government Records Council Meeting

Robert B. Quinlan
Complainant

Complaint No. 2011-371

v.

Township of Hillside (Union)
Custodian of Record

At the January 29, 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 her burden of proof that she timely responded to the Complainant's 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. The Custodian shall obtain the attendance reports responsive to the Complainant's request from Mayor Menza and provide those records, with proper redactions, if necessary, to the Complainant. See Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order July 25, 2007).
3. **The Custodian shall comply with items #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 records 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 and Mayor Menza 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 29th Day of January, 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: January 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Robert B. Quinlan¹
Complainant**

GRC Complaint No. 2011-371

v.

**Township of Hillside (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Attendance reports for Temporary Chief Financial Officer, Janice Saponaro, (“Ms. Saponaro”), from March 2011 to the present.
2. Attendance reports for Mayor’s Secretary, Ebony Slade, (“Ms. Slade”), from April 2011 to the present.

Request Made: October 17, 2011

Response Made: October 27, 2011

Custodian: Diane Rowe³

GRC Complaint Filed: December 12, 2011⁴

Background

December 12, 2011

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

- Complainant’s OPRA request dated October 17, 2011
- Memorandum from the Custodian to Ms. Saponaro dated October 17, 2011
- Memorandum from Ms. Saponaro to the Custodian dated October 17, 2011
- Memorandum from Deputy Township Clerk, Diane Rowe (“Ms. Rowe”) to Mayor Joseph G. Menza (“Mayor Menza”) dated October 25, 2011

The Complainant states that he filed his OPRA request on October 17, 2011. The Complainant also states that he has not received copies of the requested attendance reports. The Complainant also states that when he inquired to the Custodian about the status of his request he was advised that the Custodian forwarded the OPRA request to Mayor Menza. The Complainant further states that Mayor Menza has not provided copies of the records responsive to the Custodian.

¹ No legal representation listed on record.

² Represented by Christine Burgess, Esq. (Montclair, NJ).

³ The Custodian at the time of the OPRA request and Statement of Information was Janet Vlaisavljevic.

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

The Complainant states that the Custodian provided him with copies of memoranda dated October 17, 2011 and October 25, 2011. The Complainant also states that the memorandum from Ms. Saponaro to the Custodian dated October 17, 2011 states that department heads are to report their time to Mayor Menza. The Complainant further states that Ms. Saponaro also stated that the Custodian already has copies of the attendance reports responsive to request Item No. 1 and will need to complete the OPRA request or contact Mayor Menza for the other attendance reports. The Complainant additionally states that in a memorandum from Ms. Rowe to Mayor Menza dated October 25, 2011 states that the Complainant's request was forwarded to Ms. Saponaro to provide the original responsive attendance reports. The Complainant states that Ms. Rowe also stated in her October 25, 2011 memorandum that although the Clerk's Office does have most of the records responsive to request Item No. 2; such reports are incomplete. The Complainant states that Ms. Rowe further stated in her October 25, 2011 memorandum that the Clerk's Office only has copies of the attendance reports responsive to request Item No. 2 that date back to April 18, 2011. The Complainant additionally states that Ms. Rowe requested a copy of the attendance reports responsive to request Item No. 2 from Mayor Menza.

The Complainant argues that because the Mayor is not producing the records responsive to request Item No. 2, the Custodian is unable to comply with his OPRA request.

The Complainant does not agree to mediate this complaint.

December 28, 2011⁵

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated October 17, 2011
- Memorandum from the Custodian to Ms. Saponaro dated October 17, 2011
- Memorandum from Ms. Saponaro to the Custodian dated October 17, 2011
- Memorandum from Ms. Rowe to Mayor Menza dated October 25, 2011
- Memorandum from Ms. Rowe to Mayor Menza and Ms. Saponaro dated October 27, 2011.⁶

The Custodian certifies that upon receipt of the Complainant's request, she forwarded a copy of the request to Ms. Saponaro on October 17, 2011. The Custodian also certifies that she does not have physical custody of the original attendance reports responsive to the Complainant's request. The Custodian further certifies that the Clerk's Office does periodically receive copies of attendance reports, but the originals are maintained by Ms. Saponaro and Mayor Menza.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

⁶ The Custodian also includes a memorandum dated April 6, 2011 from Mayor Menza to all the Department Heads stating that original attendance sheets are to be reported to the Chief Financial Officer and a copy should be forwarded to the Clerk's Office for record keeping purposes.

The Custodian also certifies that Ms. Saponaro informed the Custodian via memorandum on October 17, 2011 that Mayor Menza's office maintained the attendance reports responsive to the OPRA request. The Custodian further certifies that Ms. Rowe forwarded a copy of the Complainant's request to Mayor Menza and Ms. Saponaro on October 25, 2011, in an attempt to obtain copies of the requested attendance reports.

The Custodian certifies that Mayor Menza and Ms. Saponaro failed to timely provide the attendance reports responsive to the Custodian. The Custodian also certifies that on October 27, 2011 she verbally responded via telephone to the Complainant's request and obtained an extension of time until November 7, 2011. The Custodian further certifies that Ms. Rowe sent a memorandum to Mayor Menza and Ms. Saponaro on October 27, 2011 in an attempt to obtain the records responsive to the Complainant's request and also informed them of the extension of time until November 7, 2011.

The Custodian certifies that copies of certain attendance reports in her possession are incomplete. The Custodian argues that although she maintains some copies of the attendance reports responsive to the request, due to the sensitive nature of these personnel records, she is reluctant to release copies of these records when she does not maintain the originals and has no means to confirm whether the copies are accurate and complete. The Custodian also argues that she cannot be held responsible for the failure to provide the records responsive when the Clerk's Office does not maintain physical custody of said records. The Custodian also argues that she cannot be held responsible when another employee obstructs access so as long as the Custodian can prove attempts were made to gain access to said records. The Custodian further argues that she took all appropriate actions to gain access to the attendance reports and thus has discharged her responsibilities under OPRA.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

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

Further, OPRA provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). As also prescribed under N.J.S.A. 47:1A-5(i), a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ 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 Complainant filed his OPRA request with the Township of Hillside ("Township") on October 17, 2011. The Custodian certified in the SOI that she verbally responded to the Complainant's OPRA request via telephone on October 27, 2011 and obtained an extension of time from the Complainant until November 7, 2011. Further, the Custodian submitted no evidence that she responded to the Complainant's request in writing within the extended time frame. Therefore, the Custodian failed to timely respond, in writing, to the Complainant's OPRA request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's 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*.

Whether the Custodian unlawfully denied access to the requested attendance reports?

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*

⁷ 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.

kept on file ... or that has been received in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA also states that:

“[n]otwithstanding the provisions of [OPRA]...the personnel or pension records of any individual in the possession of a public agency...shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll record, length of service, date and separation and the reason therefor, and the amount and type of any pension received shall be a government record...” N.J.S.A. 47:1A-10.

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

In the instant complaint, the Complainant requested attendance reports for Ms. Saponaro from March 2011 to the present in response to request Item No. 1 and attendance reports for Ms. Slade from April 2011 to the present in response to request Item No. 2. The Custodian certified in the SOI that upon receipt of the request, she forwarded a copy of the request to Ms. Saponaro on October 17, 2011. The Custodian also certified that Ms. Saponaro informed the Custodian on October 17, 2011 via memorandum that the Mayor Menza’s office has the attendance reports responsive to the request. The Custodian further certifies that Ms. Saponaro also informed her that the Custodian has copies of the attendance reports responsive to request Item No. 1. The Custodian also certified in the SOI that while she does periodically receive copies of attendance reports, the originals are maintained by Ms. Saponaro and Mayor Menza. The Custodian additionally certified that copies of the responsive attendance reports in her possession are incomplete.

The Custodian also certified in the SOI that Ms. Rowe forwarded a copy of the Complainant’s request to Mayor Menza and Ms. Saponaro on October 25, 2011 to attempt to obtain copies of the requested attendance reports. The Custodian further certified that Mayor Menza and Ms. Saponaro failed to timely provide the attendance reports responsive. The Custodian further certified in the SOI that Ms. Rowe sent another memorandum on October 27, 2011 to Mayor Menza and Ms. Saponaro stating that the Complainant agreed to an extension of time until November 7, 2011 and again requested copies of the responsive attendance reports. The Custodian argued in the SOI

that she cannot be held responsible when another employee obstructs access so long as she can prove attempts were made to gain access to said records.

The Council has previously held that attendance reports are disclosable pursuant to N.J.S.A. 47:1A-10. See Burdick v. Franklin Township Board of Education, GRC Complaint No. 2007-74 (Interim Order October 31, 2007) and Weimer v. Township of Middletown (Monmouth), GRC Complaint No. 2004-22 (August 2005). The Custodian attempted to obtain the attendance reports responsive to the Complainant's request from Mayor Menza and Ms. Saponaro, multiple times.

In Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order July 25, 2007), the complainant requested various e-mails belonging to Councilman Hugh Sharkey regarding Borough business. The custodian sent a memorandum to the Councilman and inquired whether any records responsive to the request exist. The custodian timely responded to the complainant's request stating that she received no response to her inquiry from the Councilman. The Council held that the custodian did not knowingly and willfully violate OPRA because the custodian made an effort to obtain the records responsive to the complainant's request. However, the Council also held that because the Councilman failed to respond to the custodian's efforts to obtain the records responsive, "it is possible that [the] Councilman's actions were intentional and deliberate, with knowledge of wrongfulness...[a]s such this complaint should be referred to the Office of Administrative law for a determination of whether [the] Councilman knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances." In addition, the Council, ordered the custodian to obtain the records responsive to the complainant's request from the Councilman within five (5) business days from receipt of the Council's Interim Order.

The facts in Johnson, *supra* are similar to the instant complaint. The Custodian initially forwarded the Complainant's request to Ms. Saponaro upon receipt thereof. Ms. Saponaro promptly informed the Custodian that Mayor Menza's office maintains the attendance reports responsive to the request. Further, Ms. Rowe attempted twice to obtain the records responsive from Mayor Menza; however there is no evidence in the record to show that Mayor Menza responded to Ms. Rowe's requests.

Therefore, the Custodian shall obtain the attendance reports responsive to the Complainant's request from Mayor Menza and provide those records, with proper redactions, if necessary, to the Complainant. See Johnson, *supra*.

Whether the Custodian's and Mayor Menza'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 and Mayor Menza 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 her burden of proof that she timely responded to the Complainant's 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. The Custodian shall obtain the attendance reports responsive to the Complainant's request from Mayor Menza and provide those records, with proper redactions, if necessary, to the Complainant. See Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order July 25, 2007).
3. **The Custodian shall comply with items #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 1:4-4,⁸ to the Executive Director.⁹**
4. The Council defers analysis of whether the Custodian and Mayor Menza 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the records 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.