



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  
Acting Commissioner

**FINAL DECISION**

**May 29, 2012 Government Records Council Meeting**

Jeff Carter  
Complainant  
v.

Complaint No. 2011-74 & 2011-75

Franklin Fire District No. 1 (Somerset)  
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Therefore, the Custodian did not timely respond to the Complainant’s (2) OPRA requests. As such, the Custodian’s failure to respond in writing to the Complainant’s 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 the both 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). However, the GRC declines to order disclosure of the records responsive to the Complainant’s two (2) OPRA requests because the Custodian provided same on February 9, 2011.
2. Because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as “immediate access” records, the GRC declines to determine that oaths of office and candidate petitions are “immediate access” records because said records are not specifically identified under OPRA as such.
3. Although the Custodian’s failure to respond to the Complainant’s two (2) OPRA requests in writing within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., she provided access to the responsive records in their entirety on February 9, 2011. 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, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of May, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 4, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 29, 2012 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-74 & 2011-75<sup>2</sup>**

v.

**Franklin Fire District No. 1 (Somerset)<sup>3</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Complainant's January 20, 2011 OPRA request: Copies of oaths of office for all Franklin Fire District No.1 ("FFD") Commissioners in office from 2000 through 2009.<sup>4</sup>

Complainant's January 21, 2011 OPRA request: Copies of the petitions for all candidates seeking election as FFD Commissioner from 2000 through 2010.<sup>5</sup>

**Request Made:** January 20, 2011 and January 21, 2011

**Response Made:** February 9, 2011

**Custodian:** Melissa Kosensky<sup>6</sup>

**GRC Complaint Filed:** April 4, 2011<sup>7</sup>

**Background**

**January 20, 2011**

Complainant's first (1<sup>st</sup>) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to GRC Complaint No. 2011-75 listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

**January 20, 2011**

E-mail from Ms. Debi Nelson ("Ms. Nelson"), Administrative Aide, to the Custodian. Ms. Nelson acknowledges receipt of the Complainant's first (1<sup>st</sup>) OPRA request and states that she will forward same to the Custodian.

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

<sup>2</sup> Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

<sup>3</sup> Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

<sup>4</sup> This OPRA request is the subject of GRC Complaint No. 2011-75.

<sup>5</sup> This OPRA request is the subject of GRC Complaint No. 2011-74.

<sup>6</sup> The current Custodian of Record is Tim Szyborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

<sup>7</sup> The GRC received the Denial of Access Complaint on said date.

**January 21, 2011**

Complainant's second (2<sup>nd</sup>) OPRA request. The Complainant requests the records relevant to GRC Complaint No. 2011-74 listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

**January 21, 2011**

E-mail from Ms. Nelson to the Complainant. Ms. Nelson acknowledges receipt of the Complainant's second (2<sup>nd</sup>) OPRA request and states that she will forward same to the Custodian.

**January 23, 2011**

E-mail from the Custodian to Ms. Nelson. The Custodian requests that Ms. Nelson convert the records responsive to the Complainant's first (1<sup>st</sup>) OPRA request into .pdf files and send them to her via e-mail.

**January 23, 2011**

E-mail from the Custodian to Ms. Nelson. The Custodian requests that Ms. Nelson convert the records responsive to the Complainant's second (2<sup>nd</sup>) OPRA request into .pdf files and send them to her via e-mail.

**January 25, 2011**

E-mail from Ms. Nelson to the Custodian. Ms. Nelson states that attached are the petitions for 2000 through 2010 in .pdf files in three (3) separate e-mails.

**January 25, 2011**

E-mail from Ms. Nelson to the Custodian. Ms. Nelson states that attached are the oaths of office for 2000 through 2009 in .pdf files in four (4) separate e-mails.

**February 9, 2011**

Custodian's response to the Complainant's first (1<sup>st</sup>) OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fourteenth (14<sup>th</sup>) business day following receipt of such request. The Custodian states that she is forwarding the Complainant the responsive oaths of office in two (2) separate e-mails due to the file size of the attachments.

**February 9, 2011**

Custodian's response to the Complainant's second (2<sup>nd</sup>) OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the thirteenth (13<sup>th</sup>) business day following receipt of such request. The Custodian states that she is forwarding the responsive petitions in two (2) e-mails due to the file size of the attachments.<sup>8</sup>

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<sup>8</sup> The Custodian actually sent the petitions to the Complainant in three (3) separate e-mails.  
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#### **April 4, 2011**

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

- Complainant’s first (1<sup>st</sup>) OPRA request dated January 20, 2011.
- E-mail from Ms. Nelson to the Complainant dated January 20, 2011.
- Complainant’s second (2<sup>nd</sup>) OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Complainant dated January 21, 2011.
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching oaths of office from 2000-2005).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching oaths of office from 2006-2009).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching petitions from 2000-2003).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching petitions from 2004-2007).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching petitions from 2008-2010).

#### Complainant’s January 20, 2011 OPRA request:

The Complainant states that he submitted his first (1<sup>st</sup>) OPRA request seeking “oaths of office for all Commissioners ... from 2000 through 2009” to the FFD via e-mail on January 20, 2011. The Complainant states that Ms. Nelson acknowledged receipt of said request on the same day via e-mail and stated that she would forward the OPRA request to the Custodian. The Complainant states that the Custodian forwarded the responsive records to him via e-mail on February 9, 2011.

#### Complainant’s January 21, 2011 OPRA request:

The Complainant states that he submitted his second (2<sup>nd</sup>) OPRA request seeking “petitions for all candidates seeking election ... from 2000 to 2010” to the FFD via e-mail on January 21, 2011. The Complainant states that Ms. Nelson acknowledged receipt of said request on the same day via e-mail and stated that she would forward the OPRA request to the Custodian. The Complainant states that the Custodian forwarded the responsive records to him via e-mail on February 9, 2011.

The Complainant states that the Custodian failed to timely respond to the Complainant’s two (2) OPRA requests. The Complainant contends that even though the Custodian had the opportunity to consult with Mr. William T. Cooper, III, Esq. (“Mr. Cooper”), previous FFD Counsel, she still failed to adhere to the statutorily mandated time frame. The Complainant contends that the Custodian’s actions are intentional and deliberate. The Complainant contends that the Custodian’s handling of these OPRA requests in conjunction with several others not at issue herein clearly establishes a pattern of violations that amounts to a knowing and willful violation of OPRA under the totality of the circumstances.

The Complainant requests the following:

1. A determination that the Custodian violated OPRA by failing to respond to the Complainant's OPRA request within the statutorily mandated time frame.
2. A determination that the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

**May 6, 2011**

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

**May 9, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel states that the FFD recently retained him on April 15, 2011. Counsel requests an extension of fifteen (15) business days to submit the SOI. Counsel states that this extension is necessary to allow Counsel to familiarize himself with the complaint and obtain a sworn statement from the Custodian.

**May 11, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 2, 2011 to submit the SOI for the reasons stated by Counsel.

**June 2, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until June 9, 2011 to submit the SOI because the Custodian is currently unavailable for personal reasons.

**June 2, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC states that given the circumstances, it will grant Counsel an extension of time until June 9, 2011 to submit the SOI.

**June 9, 2011**

Custodian's SOI with the following attachments:

- Complainant's first (1<sup>st</sup>) OPRA request dated January 20, 2011.
- E-mail from Ms. Nelson to the Complainant dated January 20, 2011.
- Complainant's second (2<sup>nd</sup>) OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Complainant dated January 21, 2011.
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching Oaths of Office from 2000-2005).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching Oaths of Office from 2006-2009).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching petitions from 2000-2003).
- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching petitions from 2004-2007).

- E-mail from the Custodian to the Complainant dated February 9, 2011 (attaching petitions from 2008-2010).

The Custodian certifies that her search for the requested records included readily locating the responsive records.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.

Complainant's January 20, 2011 OPRA request:

The Custodian certifies that Ms. Nelson received the Complainant's first (1<sup>st</sup>) OPRA request on January 20, 2011. The Custodian certifies that she was out of state for training from January 21, 2011 until January 27, 2011. The Custodian certifies that she did not request an extension of time because she believed she would be able to respond to the Complainant's OPRA request within the statutorily mandated time frame. The Custodian certifies that she was unable to provide access to the records in a short amount of time because she was engaged in responding to multiple OPRA requests. The Custodian certifies that she provided access to the responsive records in two (2) e-mails on February 9, 2011, or six (6) business days beyond the statutorily mandated time frame.

Complainant's January 21, 2011 OPRA request:

The Custodian certifies that Ms. Nelson received the Complainant's second (2<sup>nd</sup>) OPRA request on January 21, 2011. The Custodian certifies that she was out of state for training from January 21, 2011 until January 27, 2011. The Custodian certifies that she did not request an extension of time because she believed she would be able to respond to the Complainant's OPRA request within the statutorily mandated time frame. The Custodian certifies that she was unable to provide access to the records in a short amount of time because she was engaged in responding to multiple OPRA requests. The Custodian certifies that she provided access to the responsive records in three (3) e-mails on February 9, 2011, or seven (7) business days beyond the statutorily mandated time frame.

The Custodian certifies that she was an elected official for the FFD on a one (1) year term and did not maintain office hours. The Custodian certifies that as an elected official, she was required to utilize limited free time in order to properly respond to OPRA requests filed on almost a daily basis. The Custodian further certifies that she did not have the luxury of any full-time or part-time office hours to respond to OPRA requests. The Custodian certifies that from January 10, 2011 through January 21, 2011, the FFD received 22 OPRA requests for various records, or an average of two (2) OPRA requests per business day. The Custodian notes that prior to this point, the FFD routinely received between three (3) and five (5) OPRA requests on an annual basis. The Custodian certifies that although the task of sufficiently responding to multiple OPRA requests became almost impossible, she attempted to ensure that either she or the FFD's legal counsel requested extensions of time to respond.

The Custodian certifies that her failure to respond in a timely manner to both OPRA requests was an oversight. The Custodian certifies that there is no information contained within the responsive records that could reasonably convey that the FFD attempted to intentionally delay or circumvent the disclosure of said records.

The Custodian asserts that her actions were not deliberate and do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances. The Custodian further contends that if the Complainant wanted to resolve these issues, he could have contacted the FFD and the responsive records would have been provided to him.

### **July 7, 2011**

Letter from the Complainant to the GRC with the following attachments:<sup>9</sup>

- Memorandum of the Custodian dated March 11, 2010.
- Voucher dated March 16, 2010.
- E-mail from Ms. Nelson to the Custodian dated August 4, 2010.
- E-mail from the Custodian to Ms. Nelson dated August 4, 2010.
- Complainant's first (1<sup>st</sup>) OPRA request dated January 20, 2011.
- E-mail from Ms. Nelson to the Custodian (undated).
- Complainant's second (2<sup>nd</sup>) OPRA request dated January 21, 2011.
- E-mail from Ms. Nelson to the Custodian (undated).
- E-mail from the Custodian to Ms. Nelson dated January 23, 2011.
- E-mail from the Custodian to Ms. Nelson dated January 23, 2011.
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching oaths of office from 2000-2002).
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching oaths of office from 2003-2005).
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching oaths of office from 2006-2008).
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching oaths of office from 2009-2010).
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching petitions from 2000-2003).
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching petitions from 2004-2007).
- E-mail from Ms. Nelson to the Custodian dated January 25, 2011 (attaching petitions from 2008-2010).
- Fire Department Safety Officers Association Certificate of Participation ("Certificate") dated January 23, 2011 to January 26, 2011.
- Voucher dated February 1, 2011.

The Complainant disputes the Custodian's certification in the SOI. The Complainant contends that the Custodian established a lack of credibility supported by the evidence submitted herein for the GRC's review.

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<sup>9</sup> The Complainant submitted additional documents that are not relevant to the instant complaint.  
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The Complainant notes that the Custodian certified that her elected position was unpaid; however, she submitted a voucher for a \$5,000 “Commissioner’s fee” to the FFD on March 16, 2010. The Complainant argues that the Custodian was also issued a smartphone enabling her to effectively use e-mail from any location. *See* Memorandum of the Custodian dated March 11, 2010.

The Complainant further disputes the Custodian’s certification that she was at an out of state training event from January 21, 2011 to January 27, 2011 because the training was only from January 23, 2011 to January 26, 2011. *See* Certificate *and* Voucher dated February 1, 2011. The Complainant notes that even if he were to concede that the Custodian was away from January 23, 2011 to January 26, 2011, the attached evidence indicates that she was still able to e-mail Ms. Nelson on January 23, 2011 requesting that the responsive records be sent to her.

The Complainant contends that the attached evidence further proves that the Custodian could have easily responded to the Complainant within the statutorily mandated time frame. The Complainant states that the Custodian e-mailed Ms. Nelson on January 23, 2011 requesting that Ms. Nelson convert the responsive records into .pdf files and e-mail them to her. The Complainant states that Ms. Nelson sent four (4) e-mails attaching oaths of office and three (3) e-mails attaching petitions to the Custodian on January 25, 2011. The Complainant contends that there is no disputing that the Custodian had the ability to send and receive e-mails through her smartphone while out of state. The Complainant further asserts that these e-mails prove that the Custodian had the records in her possession on the third (3<sup>rd</sup>) and second (2<sup>nd</sup>) business days after receipt of the Complainant’s two (2) OPRA requests respectively. The Complainant further asserts that even if the Custodian was out of state until January 26, 2011, the Custodian had ample time to forward the responsive records to the Complainant.

The Complainant further disputes that the Custodian was personally overburdened with tracking and responding to the FFD’s OPRA requests. The Complainant states that the FFD employs Ms. Nelson to perform such duties and has done so since OPRA’s inception. The Complainant notes that an e-mail from Ms. Nelson to the Custodian dated August 4, 2010 proves that Ms. Nelson was handling the tracking of OPRA requests and gathering of records at least as early as August 2010. The Complainant requests that the GRC obtain a legal certification from the FFD on how their administrative aide processes OPRA requests.

The Complainant disputes the Custodian’s certification that the records indicate that the FFD has no reason to intentionally delay access or circumvent OPRA. The Complainant argues that the Custodian was also up for election at the time the Complainant submitted the two (2) relevant OPRA requests. The Complainant contends that the Custodian is not best suited to make this type of determination simply because she is the Custodian and was a candidate running for re-election in February 2011. The Complainant contends that the Custodian had a direct interest in delaying or denying access to any responsive records that may be adverse to her campaign.

The Complainant also disputes the Custodian’s assertion that the Complainant should have contacted or visited the FFD to check on the status of his OPRA requests.

The Complainant argues that he is under no obligation to check on the status of his requests.

The Complainant requests that the GRC take judicial notice of the long held legal principal of “false in one, false in all” that the New Jersey Supreme Court held in State v. Ernst, 32 N.J. 560 (1960) and invalidate the Custodian’s certifications in this complaint and all others filed against her.<sup>10</sup> The Complainant contends that the attached evidence factually and completely contradicts the Custodian’s SOI certifications. The Complainant contends that the evidence clearly shows that the Custodian was in possession of the responsive records well before actually providing same on February 9, 2011.

The Complainant thus reiterates that he requests the GRC determine that the Custodian violated OPRA by failing to respond in a timely manner and that the Custodian knowingly and willfully violated OPRA. The Complainant additionally requests that the GRC determine, as a matter of public policy, that an elected official’s oath of office and candidate petitions are equivalent to an “immediate access record” as defined in N.J.S.A. 47:1A-5.e.

#### **August 19, 2011**

E-mail from the Custodian’s Counsel to the GRC. Counsel objects to the Complainant’s July 7, 2011 submission. Counsel asserts that the GRC’s regulations do not permit a complainant to submit reply papers. Counsel thus requests that the GRC not consider the Complainant’s submission.

### **Analysis**

#### **Whether the Custodian timely responded to the Complainant’s OPRA request?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA 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

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<sup>10</sup> The Complainant filed seven (7) additional complaints with the GRC against the Custodian.  
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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 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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>11</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Custodian failed to respond to the Complainant’s two (2) OPRA requests until the thirteenth (13<sup>th</sup>) and fourteenth (14<sup>th</sup>) business days respectively. However, the Custodian did provide the Complainant access to all responsive records on February 9, 2011.

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<sup>11</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Therefore, the Custodian did not timely respond to the Complainant's (2) OPRA requests. As such, the Custodian's failure to respond in writing to the Complainant's 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 the both OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. However, the GRC declines to order disclosure of the records responsive to the Complainant's two (2) OPRA requests because the Custodian provided same to the Complainant on February 9, 2011.

### **Whether oaths of office and candidate petitions are "immediate access" records as defined under OPRA?**

OPRA provides that:

*"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information."* (Emphasis added.) N.J.S.A. 47:1A-5.e.

In a letter to the GRC dated July 7, 2011, the Complainant requested that the GRC determine that oaths of office and candidate petitions be considered "immediate access" records under OPRA.

When construing the meaning of a statute, the court must first consider the plain meaning of the words in the provision. Burns v. Belafsky, 166 N.J. 466, 473, 766 A.2d 1095 (2001)(citing State v. Hoffman, 149 N.J. 564, 578, 695 A.2d 236 (1997)). Unless the legislative intent instructs otherwise, the words and language at issue must be given their plain and ordinary meaning. *Ibid.* (citing Merin v. Maglaki, 126 N.J. 430, 434-35, 599 A.2d 1256 (1992)). When "... the statutory language is clear and unambiguous, and susceptible to only one interpretation, courts should apply the statute as written without resort to extrinsic interpretive aids." State v. Hodde, 181 N.J. 375, 379 (2004)(quoting In re Passaic County Utils. Auth., 164 N.J. 270, 299 (2000)).

Here, OPRA provides that "immediate access ordinarily shall be granted ..." to certain specific types of government records. N.J.S.A. 47:1A-5.e. A review of this provision of OPRA reveals that oaths of office and candidate petitions are not specifically identified as "immediate access" records. Thus, the GRC must adhere to the clear and unambiguous language of N.J.S.A. 47:1A-5.e. and recognize only those specific records identified as immediate access records.

Therefore, because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that oaths of office and candidate petitions are "immediate access" records because said records are not specifically identified under OPRA as such.

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

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the 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).

Although the Custodian’s failure to respond to the Complainant’s two (2) OPRA requests in writing within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., she provided access to the responsive records in their entirety on February 9, 2011. 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, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Therefore, the Custodian did not timely respond to the Complainant's (2) OPRA requests. As such, the Custodian's failure to respond in writing to the Complainant's 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 the both 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). However, the GRC declines to order disclosure of the records responsive to the Complainant's two (2) OPRA requests because the Custodian provided same on February 9, 2011.
2. Because the language of N.J.S.A. 47:1A-5.e. is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that oaths of office and candidate petitions are "immediate access" records because said records are not specifically identified under OPRA as such.
3. Although the Custodian's failure to respond to the Complainant's two (2) OPRA requests in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., she provided access to the responsive records in their entirety on February 9, 2011. 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 22, 2012