



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

January 28, 2014 Government Records Council Meeting

Mary Ann Giblin
Complainant

Complaint Nos. 2012-302, 2012-303
and 2012-304

v.

City of Wildwood (Cape May)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 the instant matters were decided at the December 20, 2013 Council meeting and sent to all parties via e-mail on December 23, 2013. Thus, the deadline to submit a request for reconsideration for this complaint expired after January 8, 2013. Complainant’s request for reconsideration was filed on January 9, 2013 eleven (11) days after receipt of Council’s decision. As such, the Complainant’s request for reconsideration was untimely, N.J.A.C. 5:105-2.10; Luiz v. Sanjurjo, 335 N.J. Super. 279, 281-282 (App. Div. 2000). Furthermore, there are no sufficient reasons or extraordinary circumstances presented which would warrant the Council to relax the filing deadline, and permit reconsideration of the matter. Accordingly, the Council should decline to address the Complainant’s request for reconsideration.

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



Final Decision Rendered by the
Government Records Council
On The 28th Day of January, 2014

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, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Mary Ann Giblin¹
Complainant**

**GRC Complaint Nos. 2012-302,
2012-303 and 2012-304²**

v.

**City of Wildwood (Cape May)³
Custodial Agency**

Records Relevant to Complaint:

September 7, 2012 OPRA Request:

1. Copy [sic] of all bills/invoices and payments (including cash payments) pertaining to the purchase of 3400 Pacific Ave. Wildwood, NJ 08260.
2. Copy of Agreement of Sale entered into by the City of Wildwood[,] NJ for the purchase of 3400 Pacific Ave. Wildwood, NJ 08260.

September 28, 2012 OPRA Request:

Any and all documents concerning the purchase or attempted purchase of 3400 Pacific Ave. Wildwood, NJ 08260, including offers for purchase, agreements, negotiations, correspondence, e-mails, or other papers, including all drafts and all documents to, from or referencing Peter Byron in his official capacity or any other capacity and all studies, including draft [sic] concerning or referencing said property from September 1, 2011.

October 5, 2012 OPRA Request:

Any and all documents concerning the Beach Utility budget, expenses, employer list, payroll, employee structure, description of duties for each member or employee, lists of management members, legal advisory members and any advisory board members.

¹ Represented by Samuel D. Lashman, Esq. (Margate, NJ).

² The GRC consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Colin G. Bell, Esq. of Hankin Sadman & Palladino (Atlantic City).

Custodian of Record: Christopher Wood

Request Received by Custodian on: September 7, 28, and October 5, 2012

Response Made by Custodian: September 14, October 10 and 17, 2012⁴

GRC Complaints Received: November 16, 2012

Background

December 20, 2013 Council Meeting:

At its December 20, 2013 public meeting, the Council considered the December 10, 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, found that:

1. The Custodian complied with the Council's October 29, 2013 Interim Order because he provided responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director within the prescribed time frame.
2. Because both the Custodian and Ms. Pinto certified that the City of Wildwood made the requested documents available for pick-up by the Complainant, her preferred method of delivery, the Custodian did not unlawfully deny access to the requested documents. Moreover, there is no competent, credible evidence in the record to refute the Custodian's and Ms. Pinto's respective certifications. See Wadhams v. Town of Belvidere (Warren) GRC Complaint No. 2010-209.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), provided an insufficient response to the Complainant's September 7 and 28, 2012 OPRA requests pursuant to N.J.S.A. 47:1A-(g) and conducted an insufficient search in response to the Complainant's request. Also, 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 resulted in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The evidence of record, however, does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

⁴ The Custodian provides that October 18, 2012 was an observed holiday.

4. Although the Complainant may not have received the Custodian's October 15, 2012 correspondence tendering the requested documents, the letter was mailed out on October 16, 2012. Accordingly, the documents were produced by the Custodian a month prior to the Complainant filing her November 16, 2012 Denial of Access Complaint ("Complaint"). Since the documents were produced prior to filing of the Complaint, the filing of the same did not bring about a change in the Custodian's conduct, either voluntary or otherwise. Accordingly, the GRC finds that the Complainant was not a prevailing party. See Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)).

Procedural History:

On December 23, 2013, the Council distributed its Final Decision to all parties via email. On January 9, 2014, (11) days after receipt of the December 20, 2013 Final Decision, the GRC received the Complainant's request for reconsideration of the Council's Final Decision. The Complainant moves for reconsideration based on a mistake, extraordinary circumstances and fraud.⁵ On January 10, 2014, Colin G. Bell, Esq. ("Custodian's Counsel") submitted a letter objecting to the Complainant's Request for Reconsideration.

Analysis

The GRC regulations provide that "requests for reconsideration must be *filed* within ten (10) business days following receipt of a Council decision." N.J.A.C. § 5:105-2.10. "[A] paper or pleading is considered as **filed** when delivered to the proper custodian and received by him to be kept on file." Luiz v. Sanjurjo, 335 N.J. Super. 279, 281-282 (App. Div. 2000). The Appellate Division in Sanjurjo acknowledged that dismissing the plaintiff's complaint was the a harsh result. Sanjurjo, 335 N.J. Super. at 282. However, the Appellate Court expressed that "[w]hile the dismissal of plaintiff's complaint [was] unfortunate" . . . "the interests of justice mandated that result." Id.

The instant matters were decided at the December 20, 2013 Council meeting and sent to all parties via e-mail on December 23, 2013. Thus, the deadline to submit a request for reconsideration for this complaint expired after January 8, 2013. Complainant's request for reconsideration was filed on January 9, 2013 eleven (11) days after receipt of Council's decision. As such, the Complainant's request for reconsideration was untimely, N.J.A.C. 5:105-2.10; Luiz v. Sanjurjo, 335 N.J. Super. 279, 281-282 (App. Div. 2000). Furthermore, there are no sufficient reasons or extraordinary circumstances presented which would warrant the Council to relax the filing deadline, and permit reconsideration of the matter. Accordingly, the Council should decline to address the Complainant's request for reconsideration.

⁵ The Complainant does not move for reconsideration of the October 5, 2012 request for Beach Utility records, in GRC Complaint 2012-302.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the instant matters were decided at the December 20, 2013 Council meeting and sent to all parties via e-mail on December 23, 2013. Thus, the deadline to submit a request for reconsideration for this complaint expired after January 8, 2013. Complainant's request for reconsideration was filed on January 9, 2013 eleven (11) days after receipt of Council's decision. As such, the Complainant's request for reconsideration was untimely, N.J.A.C. 5:105-2.10; Luiz v. Sanjurjo, 335 N.J. Super. 279, 281-282 (App. Div. 2000). Furthermore, there are no sufficient reasons or extraordinary circumstances presented which would warrant the Council to relax the filing deadline, and permit reconsideration of the matter. Accordingly, the Council should decline to address the Complainant's request for reconsideration.

Prepared and Approved By: Dawn R. SanFilippo
Senior Counsel

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
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FINAL DECISION

December 20, 2013 Government Records Council Meeting

Mary Ann Giblin
Complainant

Complaint Nos. 2012-302, 2012-303
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v.

City of Wildwood (Cape May)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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:

1. The Custodian complied with the Council’s October 29, 2013 Interim Order because he provided responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director within the prescribed time frame.
2. Because both the Custodian and Ms. Pinto certified that the City of Wildwood made the requested documents available for pick-up by the Complainant, her preferred method of delivery, the Custodian did not unlawfully deny access to the requested documents. Moreover, there is no competent, credible evidence in the record to refute the Custodian’s and Ms. Pinto’s respective certifications. See Wadhams v. Town of Belvidere (Warren) GRC Complaint No. 2010-209.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), provided an insufficient response to the Complainant’s September 7 and 28, 2012 OPRA requests pursuant to N.J.S.A. 47:1A-(g) and conducted an insufficient search in response to the Complainant’s request. Also, 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 resulted in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The evidence of record, however, does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and



deliberate. Therefore, 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.

4. Although the Complainant may not have received the Custodian's October 15, 2012 correspondence tendering the requested documents, the letter was mailed out on October 16, 2012. Accordingly, the documents were produced by the Custodian a month prior to the Complainant filing her November 16, 2012 Denial of Access Complaint ("Complaint"). Since the documents were produced prior to filing of the Complaint, the filing of the same did not bring about a change in the Custodian's conduct, either voluntary or otherwise. Accordingly, the GRC finds that the Complainant was not a prevailing party. See Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)).

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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Mary Ann Giblin¹
Complainant**

**GRC Complaint Nos. 2012-302,
2012-303 and 2012-304²**

v.

**City of Wildwood (Cape May)³
Custodial Agency**

Records Relevant to Complaint:

September 7, 2012 OPRA Request:

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2. Copy of Agreement of Sale entered into by the City of Wildwood[,] NJ for the purchase of 3400 Pacific Ave. Wildwood, NJ 08260.

September 28, 2012 OPRA Request:

Any and all documents concerning the purchase or attempted purchase of 3400 Pacific Ave. Wildwood, NJ 08260, including offers for purchase, agreements, negotiations, correspondence, e-mails, or other papers, including all drafts and all documents to, from or referencing Peter Byron in his official capacity or any other capacity and all studies, including draft [sic] concerning or referencing said property from September 1, 2011.

October 5, 2012 OPRA Request:

Any and all documents concerning the Beach Utility budget, expenses, employer list, payroll, employee structure, description of duties for each member or employee, lists of management members, legal advisory members and any advisory board members.

¹ Represented by Samuel D. Lashman, Esq. (Margate, NJ).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Colin G. Bell, Esq. of Hankin Sadman & Palladino (Atlantic City).

Custodian of Record: Christopher Wood

Request Received by Custodian on: September 7, 28, and October 5, 2012

Response Made by Custodian: September 14, October 10 and 17, 2012⁴

GRC Complaints Received: November 16, 2012

Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 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 September 7 and 28, 2012 OPRA requests. N.J.S.A. 47:1A-6. 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 Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Based upon the record before it, the Council cannot determine if the Complainant received the Custodian's October 15, 2012 letter or if she was aware that the responsive documents were tendered. **The Council directs that the Custodian produce records responsive to the September 7 and 28, 2012 OPRA requests to the Complainant within five (5) business days from receipt of the Interim Order with appropriate redactions, if any, 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. The Council will reserve a determination of whether there was an unlawful denial of access of the September 7 and 28, 2012 OPRA requests pending compliance of the Interim Order.**
3. The Custodian timely responded to the Complainant's October 5, 2012 OPRA request and provided all documents responsive to same. In addition, although not required under OPRA, the Custodian responded to requests for information. OPRA requires custodians to produce identifiable documents not otherwise exempt; it does not require the production of general information. MAG Entm't v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App Div. 2005). Moreover, the Custodian certified that because the Beach Utility never operated and was

⁴ The Custodian provides that October 18, 2012 was an observed holiday.

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."

subsequently dissolved, there were no documents responsive to the balance of the requests made by the Complainant. Therefore the Custodian did not deny access of the documents to the Complainant.

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.

Procedural History:

On October 30, 2013, the Council distributed its Interim Order to all parties.

On November 7, 2013, five (5) business days later, the Custodian responded to the Council's Interim Order. The Custodian certified that he provided all 143 pages of documents responsive to the Complainant's OPRA request. The Custodian, in his certification, noted the Council's recognition that the requests underlying complaints 2013-303 and 2013-304 were identical. As such, the Custodian stated that he provided only one (1) copy of the responsive documents.

The Custodian further certified that no documents were withheld or redacted pursuant to an OPRA exemption or privilege. Finally, the Custodian reiterated, from his Statement of Information ("SOI"), that the documents were previously made available to the Complainant on October 15, 2012. In addition, he certified that a complete copy of the records was annexed to the Custodian's SOI. In light of the previous access, the Custodian argues that there was no knowing, willful or unreasonable denial of access in the instant case.

Additional Information:

On November 8, 2013, Samuel Lashman, Esq., Counsel for the Complainant ("Counsel"), submitted a letter to the GRC alleging that the Custodian has not "requested nor provided copies of the documents from the relevant offices of the City of Wildwood ("Wildwood")."

Analysis

Compliance

At its October 29, 2013 meeting, the Council ordered the Custodian to "produce records responsive to the September 7 and 28, 2012 OPRA requests to the Complainant within five (5) business days from receipt of the Interim Order with appropriate redactions, if any, 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. On October 30, 2013, the Council distributed its Interim Order to all parties

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."

providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 7, 2013.⁷

On November 7, 2013, the fifth (5) business day after receipt of the Council's Interim Order, the Custodian provided copies of 143 pages of documents responsive to the Complainant's OPRA requests together with a certification of compliance from the Custodian. Counsel, in his November 8, 2013 letter, appears to argue that the documents produced were merely the documents exchanged in discovery. The Custodian, however, certified that no responsive documents were either withheld or redacted pursuant to an OPRA exemption or privilege. The mere fact that the documents produced in discovery were also responsive to the OPRA request does not support Counsel's contention that the OPRA request was not met.

Therefore, the Custodian complied with the Council's October 29, 2013 Interim Order because he provided responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director within the prescribed time frame.

Unlawful Denial of Access

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

In the instant matter, the Complainant filed two (2) OPRA requests, one on September 7 and a second on September 28, 2012, seeking the same records. The Custodian certified in his Statement of Information ("SOI") that his initial search for records did not produce any documents responsive to the Complainant's request. The Custodian provides that in reply to the Complainant's September 28, 2012 request, he inquired if the city solicitor had any documents responsive to the Complainant's requests. The Custodian further certified that the city solicitor subsequently located responsive documents. The Custodian stated that he sent a letter on October 15, 2012 to the Complainant advising her that responsive documents were located and that they were available for pick-up, the Complainant's preferred method of delivery.

On November 8, 2013, in response to a question posed by the Government Records Council ("GRC") the Custodian provided clarification regarding the October 15, 2012 letter to the Complainant. Hope Pinto, the clerk typist for the City of Wildwood ("Wildwood"), certified that she personally mailed the October 15, 2013 letter to the Complainant. Certification of Hope Pinto dated November 8, 2013 at ¶ 7 ("Pinto Certif"). Ms. Pinto avers that it is her "custom and practice" to note on the file copy of all correspondence of the date and method of conveyance. Pinto Certif, ¶ 4. Moreover, she certified that she examined her file copy of the October 15, 2013 letter and identified her handwritten notation "mailed 10/16/12 HP." Ms. Pinto provided that "HP" validates that she personally mailed the letter to Ms. Giblin on October 16, 2012. Id. at ¶¶ 6, 7.

⁷ State Offices were closed on Tuesday, November 5, 2013 due to Election Day.

Although the Complainant certified that she never received the Custodian's October 15, 2012 letter, both the Custodian and Ms. Pinto certified to the mailing of same. Further, the certifications of the Custodian and Ms. Pinto were corroborated by the copy of the October 15, 2013 letter which contained Ms. Pinto's handwritten notations and was appended to the SOI.

Notwithstanding the fact that the production was untimely, and deemed a denial, the Council finds that the Custodian tendered and thus produced the documents to the Complainant by way of his October 15, 2012 letter. In addition, the Custodian certified in his SOI that when he served the Complainant with a copy of the SOI, he attached another copy of the requested documents. Finally, the Custodian complied with the Council Interim Order and provided a third set of the documents. Thus, the Council finds that there was no unlawful denial.

Therefore, because both the Custodian and Ms. Pinto certified that Wildwood made the requested documents available for pick-up by the Complainant, her preferred method of delivery, the Custodian did not unlawfully deny access to the requested documents. Moreover, there is no competent, credible evidence in the record to refute the Custodian's and Ms. Pinto's respective certifications. See Wadhams v. Town of Belvidere (Warren) GRC Complaint No. 2010-209.

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 "... [i]f 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; 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)), (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)).

The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), provided an insufficient response to the Complainant's September 7 and 28, 2012 OPRA requests pursuant to N.J.S.A. 47:1A-(g) and conducted an insufficient search in response to the Complainant's

request. Also, 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 resulted in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The evidence of record, however, does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Board & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." Buckhannon, 532 U.S. at 603 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties," but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 605, 609.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. Mason, 196 N.J. at 72, (citing Teeters, 387 N.J. Mary Ann Giblin v. City of Wildwood (Ocean) 2012-302; 2012-303 & 2012-304 – Findings and Recommendations of the Executive Director 6

Super. at 429); *see, e.g., Baer v. Klagholz*, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002)). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” Mason, 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

The GRC finds that although the Complainant may not have received the Custodian's October 15, 2012 correspondence tendering the requested documents, the letter was mailed out on October 16, 2012. Accordingly, the documents were produced by the Custodian a month prior to the Complainant filing her November 16, 2012 Denial of Access Complaint (“Complaint”). Since the Council finds that the documents were produced prior to filing of the Complaint, the filing of the same did not bring about a change in the Custodian's conduct, either voluntary or otherwise. Accordingly, the GRC finds that the Complainant was not a prevailing party. See Mason, 196 N.J. at 71 (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 29, 2013 Interim Order because he provided responsive records to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director within the prescribed time frame.
2. Because both the Custodian and Ms. Pinto certified that the City of Wildwood made the requested documents available for pick-up by the Complainant, her preferred method of delivery, the Custodian did not unlawfully deny access to the requested documents. Moreover, there is no competent, credible evidence in the record to refute the Custodian's and Ms. Pinto's respective certifications. See Wadhams v. Town of Belvidere (Warren) GRC Complaint No. 2010-209.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), provided an insufficient response to the Complainant's September 7 and 28, 2012 OPRA requests pursuant to N.J.S.A. 47:1A-(g) and conducted an insufficient search in response to the Complainant's request. Also, 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 resulted in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). The evidence of record, however, does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.
4. Although the Complainant may not have received the Custodian's October 15, 2012 correspondence tendering the requested documents, the letter was mailed out on October 16, 2012. Accordingly, the documents were produced by the Custodian a month prior to the Complainant filing her November 16, 2012 Denial of Access Complaint ("Complaint"). Since the documents were produced prior to filing of the Complaint, the filing of the same did not bring about a change in the Custodian's conduct, either voluntary or otherwise. Accordingly, the GRC finds that the Complainant was not a prevailing party. See Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)).

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

December 10, 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

October 29, 2013 Government Records Council Meeting

Mary Ann Giblin
Complainant

Complaint Nos. 2012-302, 2012-303
and 2012-304

v.

City of Wildwood (Cape May)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 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 September 7 and 28, 2012 OPRA requests. N.J.S.A. 47:1A-6. 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 Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Based upon the record before it, the Council cannot determine if the Complainant received the Custodian’s October 15, 2012 letter or if she was aware that the responsive documents were tendered. **The Council directs that the Custodian produce records responsive to the September 7 and 28, 2012 OPRA requests to the Complainant within five (5) business days from receipt of the Interim Order with appropriate redactions, if any, 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. The Council will reserve a determination of whether there was an unlawful denial of access of the September 7 and 28, 2012 OPRA requests pending compliance of the Interim Order.**
3. The Custodian timely responded to the Complainant’s October 5, 2012 OPRA request and provided all documents responsive to same. In addition, although not required under OPRA, the Custodian responded to requests for information. OPRA requires

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.”

custodians to produce identifiable documents not otherwise exempt; it does not require the production of general information. MAG Entm't v. Div. of Alcoholic Beverage, 375 N.J. Super. 534, 546 (App Div. 2005). Moreover, the Custodian certified that because the Beach Utility never operated and was subsequently dissolved, there were no documents responsive to the balance of the requests made by the Complainant. Therefore the Custodian did not deny access of the documents to the Complainant.

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 29th Day of October, 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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Mary Ann Giblin¹
Complainant**

**GRC Complaint Nos. 2012-302,
2012-303 and 2012-304²**

v.

**City of Wildwood (Cape May)³
Custodial Agency**

Records Relevant to Complaint:

September 7, 2012 OPRA Request:

1. Copy [sic] of all bills/invoices and payments (including cash payments) pertaining to the purchase of 3400 Pacific Ave. Wildwood, NJ 08260.
2. Copy of Agreement of Sale entered into by the City of Wildwood[,] NJ for the purchase of 3400 Pacific Ave. Wildwood, NJ 08260.

September 28, 2012 OPRA Request:

Any and all documents concerning the purchase or attempted purchase of 3400 Pacific Ave. Wildwood, NJ 08260, including offers for purchase, agreements, negotiations, correspondence, e-mails, or other papers, including all drafts and all documents to, from or referencing Peter Byron in his official capacity or any other capacity and all studies, including draft [sic] concerning or referencing said property from September 1, 2011.

October 5, 2012 OPRA Request:

Any and all documents concerning the Beach Utility budget, expenses, employer list, payroll, employee structure, description of duties for each member or employee, lists of management members, legal advisory members and any advisory board members.

Custodian of Record: Christopher Wood

Request Received by Custodian on: September 7, 28, and October 5, 2012

Response Made by Custodian: September 7, October 10 and 17, 2012⁴

GRC Complaints Received: November 16, 2012

¹ Represented by Samuel D. Lashman, Esq. (Margate, NJ).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Colin G. Bell, Esq. of Hankin Sadman & Palladino (Atlantic City).

⁴ The Custodian provides that October 18, 2012 was an observed holiday.

Mary Ann Giblin v. City of Wildwood (Ocean) 2012-302; 2012-303 & 2012-304 – Findings and Recommendations of the Executive Director

Background⁵

Request and Response:

September 7, 2012 OPRA Request:

On September 7, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 14, 2012, five (5) business days after receipt of the request, the Custodian’s staff responded, in writing, that Wildwood did not have any documents responsive to Complainant’s request.

September 28, 2012 OPRA Request:

On September 28, 2012, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On October 10, 2012, eight (8) business days after receipt of the request, the Custodian responded that Wildwood did not have any records, but that he was waiting for a reply from the solicitor. The Custodian stated that he would contact the Complainant once he received a response from the solicitor, but provided no date certain on which he would respond. By letter dated October 15, 2012, the Custodian advised the Complainant that he received additional records from the solicitor. The Custodian stated that the copy cost of the documents was \$9.41 and that they could be picked up at the Complainant’s convenience.

October 5, 2012 OPRA Request:

On October 5, 2012, the Complainant submitted an OPRA request to the Custodian seeking the above-referenced records. On October 17, 2012, seven (7) business days after receipt of the request, the Custodian responded to the Complainant by providing all documents responsive to said request.

Denial of Access Complaint:

On November 16, 2012, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council (“GRC”).

The Complainant states that the Custodian denied access to her September 7, 2012 OPRA request advising that no responsive documents were made, maintained or kept on file. The Complainant states that on October 10, 2012, the Custodian replied in writing to her September 28, 2012 OPRA request that the City of Wildwood (“Wildwood”) did not maintain responsive records, but that the Custodian was waiting to see if Wildwood’s solicitor had any records. The Complainant further alleges that on November 16, 2012, the filing date of these complaints, she had not received any records or additional responses from the Custodian.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.
Mary Ann Giblin v. City of Wildwood (Ocean) 2012-302; 2012-303 & 2012-304 – Findings and Recommendations of the Executive Director

The Complainant asserts that with respect her October 5, 2012 request she did not receive any records responsive to the Beach Utility budget or expenses, the employee list, payroll, employee structure, description of duties for each member or employee, or the list of management members. The Complainant provided that, in response to her request for “Legal advisory members,” she received “Resolution #278A-7-12, Contract entered into by the City with Mary D’Arey Bittner re: Special Counsel-Beach Utility.” In connection with her request for “Advisory Board Members,” the Complainant stated that she received two resolutions. The Complainant further alleges that the Custodian failed to provide any explanation for his refusal to provide records responsive to her OPRA request.

Statements of Information:

On May 13 and June 17, 2013, the Custodian filed Statements of Information (“SOI”).

September 7, 2012 OPRA Request:

The Custodian certifies that he received the Complainant’s OPRA request on September 7, 2012. The Custodian provides that his search for responsive documents included inquiring about the existence of records with all municipal departments. He further certifies that none of the departments had any responsive documents. Finally, the Custodian states that he responded in writing within the statutorily mandated time frame advising the Complainant that no records were “kept, made or maintained on file.”

September 28, 2012 OPRA Request:

The Custodian certifies that he received the Complainant’s OPRA request on September 28, 2012. Further, the Custodian attests that on October 10, 2012, seven (7) business days after the September 28, 2012 request, he advised the Complainant that Wildwood did not have any documents responsive to her request, but that he was still waiting to hear back from the Wildwood solicitor to ascertain if the solicitor had any responsive documents. The Custodian advised the Complainant that he would respond again as soon as possible but did not provide a date certain on which he would follow-up. The Custodian states that he responded on October 15, 2012, advising that the City solicitor had located records responsive to her request. The Custodian certifies that he granted access to the records via pick-up pending payment of copy cost. The Custodian states that the Complainant failed to retrieve the documents, which remain available for pick-up at this time.

October 5, 2012 OPRA Request:

The Custodian certifies that he received the Complainant’s OPRA request on October 5, 2013. The Custodian avers that on October 17, 2013, seven (7) business days later, he responded in writing to the Complainant and provided all responsive records. The Custodian further certifies that although the Complainant acknowledges she asked for “information on the newly created Beach Utility” and that her request sought “‘any and all’ information ‘concerning,’” the Beach Utility, the Custodian still provided all documents within his custody that he could ascertain were responsive to the Complainant’s request. The Custodian further added that the

Complainant picked up the records in person and was again advised that no additional records existed.

Additional Information:

On July 12, 2013, the Complainant replied to the Custodian's May 13, 2013 SOI. She certified that she never received the Custodian's October 15, 2012 letter. Moreover, she states that she presented herself at the clerk's office several times after October 15, 2012 to pick-up records which were the subject of other OPRA requests and was not advised that documents responsive to her September 28, 2012 request were available.

Analysis⁶

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

September 7 and September 28, 2012 OPRA Requests:

Here, the Complainant submitted two (2) OPRA requests for the same documents: the first, on September 7, 2012, and the second, on September 28, 2012. In response to the Complainant's September 7, 2012 request, the Custodian responded in writing on September 14, 2012 that Wildwood did not have any responsive documents. However on October 5, 2012, the Custodian, in response to the Complainant's September 28, 2012 request seeking the same documents, provided in writing that Wildwood did not have any documents responsive to the request, but that he was waiting for a response from counsel and would get back to the Complainant shortly. The Custodian failed to provide a date certain to the Complainant by which he would reply.

On October 15, 2012, the Custodian advised the Complainant that Wildwood's solicitor had located documents responsive to the Complainant's September 28, 2012 OPRA request. The Custodian further provided that the documents were available and ready for pick-up (the Complainant's preferred method of retrieval).

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁷ 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.

Mary Ann Giblin v. City of Wildwood (Ocean) 2012-302; 2012-303 & 2012-304 – Findings and Recommendations of the Executive Director

In his SOI, the Custodian certifies that he had made an inquiry to all relevant municipal departments, including the finance office, solicitor and the commissioners, and that “[i]nitially, no one indicated possession of any documents responsive to the request.” The Custodian further certifies that the solicitor thereafter provided the Custodian with documents responsive to the Complainant’s request.

On July 12, 2012, the Complainant replied with a certification denying having received the October 15, 2012 letter from Wildwood, or having been informed orally that the responsive documents were available on one of her subsequent trips to the clerk’s office.

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA demand. A government record, in turn, includes documents which may be in the possession, custody or control of a public agency’s employees or contractors. Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (records maintained by a consultant are considered government records pursuant to 47:1A-1.1). Furthermore, the definition of a government record is not restricted by the location of the record. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127. In Meyers, the Council held that “the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to [] OPRA” in the requisite time period. Id.; N.J.S.A. 47:1A-5(i).

A custodian has the obligation to search for and produce records in the custody and control of not only the Custodian, but of third party contractors as well. Meyers, GRC 2005-127. Although the Custodian responded to the Complainant within seven (7) business days explaining that the Custodian was waiting for a response from its solicitor, the Custodian failed to provide the Complainant with a date certain within which a reply would be made. The failure to provide a date certain for a subsequent response and to respond within a given time frame violated N.J.S.A. 47:1A:5(i).

Furthermore, OPRA provides that “[i]mmediate *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.*” N.J.S.A. 47:1A-5(e) (emphasis added). For all other records OPRA provides that “[u]nless a shorter timer period is otherwise authorized . . . a custodian . . . shall grant access to a government record or deny a request for access to a government record . . . not later than seven (7) business days after receiving the request.” N.J.S.A. 47:1A-5(i).

Here, the Custodian failed to provide the requested documents or seek an extension within the requisite time periods. The Custodian failed to provide documents responsive to the September 7, 2012 request. Thereafter, on September 28, 2012, the Complainant made another OPRA request for the identical documents. The Custodian initially responded that no responsive documents existed. However, on October 15, 2012, eleven (11) days after the request, the Custodian provided that responsive documents did exist and were available for pick-up by the Complainant.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's September 7 and 28, 2012 OPRA requests. N.J.S.A. 47:1A-6. 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 Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11.

October 5, 2012 OPRA Request:

On October 5, 2012, the Complainant requested any and all documents concerning the Beach Utility budget, expenses, employer list, payroll, employee structure, description of duties for each member or employee, lists of management members, legal advisory members and any advisory board members. The Custodian certifies that on October 17, 2012, seven (7) business days from receipt of the October 5, 2012 request, he responded in writing to the Complainant. The Custodian further certifies that although the Complainant herself acknowledges she asked for "information on the newly created Beach Utility" and that her request sought "any and all information 'concerning'" the Beach Utility, the Custodian still provided all documents within his custody that he could ascertain were responsive to the Complainant's request.

In addition, the Custodian certifies that at the time of the request it was his understanding that "the Beach Utility had not adopted a budget, incurred any expenses, or developed an employee structure or issued a payroll." The Custodian certified that the "Beach Utility only existed on [] paper and it was never 'up and running' before the ordinance creating it was repealed." The Custodian verifies that the Complainant picked up the documents in person and was again advised that there were no additional documents responsive to her request.

The Custodian certifies that he provided all documents which were responsive to the Complaint's October 5, 2012 OPRA request within seven (7) business days. Further, the Complainant has not provided documentary proof to the contrary or otherwise challenged the Custodian's assertion. Therefore, the Custodian bore his burden of proof that he timely responded to the Complainant's October 5, 2012 request. N.J.S.A. 47:1A-6.

Unlawful Denial of Access

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

September 7 and 28, 2012 OPRA Requests:

On October 5, 2012, five (5) business days from receipt of the Complainant's September 28, 2012 OPRA request, the Custodian advised the Complainant that he did not have any documents responsive to her request. In addition, the Custodian provided that the September 7,

2012 OPRA request sought the same documents as the September 28, 2012 OPRA request. Thereafter, on October 15, 2012 the Custodian advised the Complainant that Wildwood's solicitor had located documents responsive to the Complainant's September 28, 2012 request. The Custodian certifies that he instructed the Complainant that the documents were available and ready for pick-up (the Complainant's preferred method of retrieval).

In response to the Custodian's May 13, 2013 SOI, the Complainant certifies that she did not receive the Custodian's October 15, 2012 letter, nor has she received any documents responsive to her September 7 or 28, 2012 requests. Based upon the record before it, the Council cannot determine if the Complainant received the Custodian's October 15, 2012 letter or if she was aware that the responsive documents were tendered.

The Council directs that the Custodian produce records responsive to the September 7 and 28, 2012 OPRA requests to the Complainant within five (5) business days from receipt of the Interim Order with appropriate redactions, if any, 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. The Council will reserve a determination of whether there was an unlawful denial of access of the September 7 and 28, 2012 OPRA requests pending compliance of the Interim Order.

October 5, 2012 Request:

Here, the Custodian timely responded to the Complainant's October 5, 2012 request and provided all documents responsive to same. In addition, although not required pursuant to OPRA, the Custodian responded to requests for information. OPRA requires custodians to produce identifiable documents not otherwise exempt; it does not require the production of general information. MAG, 375 N.J. Super. at 546. Moreover, the Custodian certified that because the Beach Utility never operated and was subsequently dissolved, there were no documents responsive to the balance of the requests made by the Complaint. Therefore the Custodian did not deny access of the documents to the Complainant.

Knowing & Willful

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 September 7 and 28, 2012 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA

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."

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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 Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Based upon the record before it, the Council cannot determine if the Complainant received the Custodian’s October 15, 2012 letter or if she was aware that the responsive documents were tendered. **The Council directs that the Custodian produce records responsive to the September 7 and 28, 2012 OPRA requests to the Complainant within five (5) business days from receipt of the Interim Order with appropriate redactions, if any, 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 1:4-4,⁹ to the Executive Director. The Council will reserve a determination of whether there was an unlawful denial of access of the September 7 and 28, 2012 OPRA requests pending compliance of the Interim Order.**
3. The Custodian timely responded to the Complainant’s October 5, 2012 OPRA request and provided all documents responsive to same. In addition, although not required under OPRA, the Custodian responded to requests for information. OPRA requires custodians to produce identifiable documents not otherwise exempt; it does not require the production of general information. MAG Entm’t v. Div. of Alcoholic Beverage, 375 N.J. Super. 534, 546 (App Div. 2005). Moreover, the Custodian certified that because the Beach Utility never operated and was subsequently dissolved, there were no documents responsive to the balance of the requests made by the Complaint. Therefore the Custodian did not deny access of the documents to the Complainant.
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: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

October 22, 2013

⁹ “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.”

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