



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**September 29, 2015 Government Records Council Meeting**

Stanley George Janson, Sr.  
Complainant

Complaint No. 2014-252

v.

City of Burlington (Burlington)  
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 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 Complainant has failed to establish in his request for reconsideration of the Council’s July 2, 2015, Final Decision that: either 1) the Council's decision is based upon a “palpably incorrect or irrational basis”; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. The Complainant has not presented new facts or legal arguments which would justify a reconsideration. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 September, 2015

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 5, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**September 29, 2015 Council Meeting**

**Stanley George Janson, Sr.<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-252**

**v.**

**City of Burlington (Burlington)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Copies of the salaries, job descriptions, and “starting hours” for the following listed individuals:

- 1) D. Ballard
- 2) C. Turner
- 3) J. Alexander
- 4) J.C. Martin
- 5) J. Lowery
- 6) C. Simcox

**Custodian of Record:** Cindy Crivaro  
**Request Received by Custodian:** May 9, 2014  
**Response Made by Custodian:** June 6, 2014  
**GRC Complaint Received:** July 7, 2014

**Background**

**June 30, 2015 Council Meeting:**

At its June 30, 2015, public meeting, the Council considered the June 23, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i),

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<sup>1</sup> Represented by James Logan, Jr., Esq. (Mount Holly, NJ).

<sup>2</sup> Represented by George R. Saponaro, Esq. (Mount Holly, NJ).

and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian certified that personnel records were searched and that a list of salaries was generated for the requested individuals. The Custodian certified that “this information was made available to the Complainant” on May 13, 2014, and was eventually picked up by the Complainant on June 6, 2014. Therefore, the evidence of record indicates that the records were disclosed to the Complainant on June 6, 2014.
3. The Custodian certified that the requests for the job descriptions of C. Turner, J. Alexander, J.C. Martin, and C. Simcox did not constitute requests for existing records, as there exist no job descriptions for those unclassified positions. The Custodian certified that the job descriptions for D. Ballard and J. Lowery were eventually disclosed to the Complainant when he picked them up on June 6, 2014. Therefore, the Custodian disclosed the existing records for this request and did not unlawfully deny access to the remainder of the request because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Custodian certified that the request for the starting hours of certain named employees did not constitute a request for an existing record and that therefore no search was done. As such, the Custodian did not unlawfully deny access to the request for the “starting hours” of the certain named employees because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to respond in writing to the Complainant’s request within the required seven (7) business days, resulting in a “deemed” denial of the Complainant’s request, the Custodian did disclose all records responsive to the request on June 6, 2014. Further, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

#### Procedural History:

On July 2, 2015, the Council distributed its Final Decision to all parties. On July 21, 2015, the Complainant requested additional time to submit a request for reconsideration. On July 21, 2015, the GRC granted the Complainant’s request for an extension until July 24, 2015.

On July 24, 2015, the Complainant filed a request for reconsideration of the Council's June 23, 2015, Final Decision based on a mistake. The Complainant once again requested that the Council consider the Custodian's failure to respond in writing.<sup>3</sup>

On August 3, 2015, The Custodian submitted objections to the request for reconsideration, arguing that the Complainant had not presented new legal or factual information warranting a reconsideration of the decision.

### Analysis

#### Reconsideration

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

In the matter before the Council, the Complainant filed the request for reconsideration on July 24, 2015, 16 business days from the issuance of the Council's Order.<sup>4</sup>

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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<sup>3</sup> The Complainant's request contained no other substantive legal arguments concerning reconsideration. The Complainant's request primarily contained allegations regarding the City's personnel management.

<sup>4</sup> The Complainant was granted an extension because the GRC staff attorney handling this matter was on vacation during the week of July 13, 2015, when the Complainant first attempted to file his request for reconsideration.

Stanley George Janson, Sr. v. City of Burlington (Burlington), 2014-252 – Supplemental Findings and Recommendations of the Executive Director

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. The Complainant has not presented new facts or legal arguments to justify reconsideration. Thus, the Complainant's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's July 2, 2015, Final Decision that: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. The Complainant has not presented new facts or legal arguments which would justify a reconsideration. Thus, the Complainant's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Husna Kazmir  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

September 22, 2015



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
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Commissioner

**FINAL DECISION**

**June 30, 2015 Government Records Council Meeting**

Stanley George Janson, Sr.  
Complainant

Complaint No. 2014-252

v.

City of Burlington (Burlington)  
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian certified that personnel records were searched and a list of salaries was generated for the requested individuals. The Custodian certified that “this information was made available to the Complainant” on May 13, 2014, and the records were eventually picked up by the Complainant on June 6, 2014. Therefore, the evidence of record indicates that the records were disclosed to the Complainant on June 6, 2014.
3. The Custodian certified that the requests for the job descriptions of C. Turner, J. Alexander, J.C. Martin and C. Simcox did not constitute requests for existing records, as there exist no job descriptions for those unclassified positions. The Custodian certified that the job descriptions for D. Ballard and J. Lowery were eventually disclosed to the Complainant when he picked them up on June 6, 2014. Therefore, the Custodian disclosed the existing records for this request, and did not unlawfully deny access to the remainder of the request because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).



4. The Custodian certified that the request for the starting hours of certain named employees did not constitute a request for an existing record and that therefore no search was done. As such, the Custodian did not unlawfully deny access to the request for the “starting hours” of the certain named employees because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to respond in writing to the Complainant’s request within the required seven (7) business days, resulting in a “deemed” denial of the Complainant’s request, the Custodian did disclose all records responsive to the request on June 6, 2014. Further, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of June, 2015

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: July 2, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 30, 2015 Council Meeting**

**Stanley George Janson, Sr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-252**

v.

**City of Burlington<sup>2</sup>  
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**Records Relevant to Complaint:** Copies of the salaries, job descriptions, and “starting hours” for the following listed individuals:

- 1) D. Ballard
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- 4) J.C. Martin
- 5) J. Lowery
- 6) C. Simcox

**Custodian of Record:** Cindy Crivaro  
**Request Received by Custodian:** May 9, 2014  
**Response Made by Custodian:** June 6, 2014  
**GRC Complaint Received:** July 7, 2014

**Background<sup>3</sup>**

**Request and Response:**

On May 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Custodian certified that she spoke to the Complainant by phone regarding the request on May 13, 2014, and May 21, 2014. On June 6, 2014, the Custodian disclosed to the Complainant records responsive to the request.

**Denial of Access Complaint:**

On July 1, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on May 21, 2014, he

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<sup>1</sup> Represented by James Logan, Jr., Esq. (Mount Holly, NJ).

<sup>2</sup> Represented by George R. Saponaro, Esq. (Mount Holly, NJ).

<sup>3</sup> 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.

contacted the Custodian about his request. The Complainant stated that the Custodian informed him that she had contacted the City's Counsel regarding his request. On May 23, 2014, Counsel for the Complainant sent a letter to the Custodian regarding the requested records. The Complainant stated that the Custodian "wrote down something concerning Job Postings when they were hired" on May 21, 2014. The Complainant argued that he was denied access to the requested records, as the Custodian failed to respond within the statutorily-mandated seven-day time frame.

### Statement of Information:

On August 8, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on May 9, 2014. The Custodian certified that on May 13, 2014, she "explained" to the Complainant that some of the requested material had been supplied and was ready for pick up but that she required additional time to research further. The Custodian also noted to the Complainant that some of the requested information could possibly be found in the City's Municipal Code on the City website. The Custodian certified that the Complainant indicated no problem with her request for additional time but stated that he would prefer to wait to pick up all of the information when it was ready.

On May 21, 2014, the Custodian certified that she spoke with the Complainant and informed him that there was nothing further to provide regarding the requested job descriptions. Per the suggestion of the City's attorney, the Custodian asked the Complainant if a copy of the job postings from the web would be acceptable, and if so, she would resubmit the request for copies of those postings. The Custodian certified that the Deputy Municipal Clerk contacted the Complainant on June 6, 2014, and provided the requested records.

### Analysis

#### 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).<sup>4</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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian failed to respond in writing to the Complainant's May 9, 2014, OPRA request. On May 13, 2014, when the Custodian advised the Complainant that additional

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<sup>4</sup> 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.

time was required to search for Complainant's request, she did so orally. Notably, all of the Custodian's communications with the Complainant were oral.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **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.

Request for salaries of the following listed individuals: D. Ballard, C. Turner, J. Alexander, J.C. Martin, J. Lowery, and C. Simcox:

The Custodian certified that personnel records were searched and a list of salaries was generated for the requested individuals. The Custodian certified that "this information was made available to the Complainant" on May 13, 2014, and was eventually picked up by the Complainant on June 6, 2014. Therefore, the evidence of record indicates that the records were disclosed to the Complainant on June 6, 2014.

Request for job descriptions for the following listed individuals: D. Ballard, C. Turner, J. Alexander, J.C. Martin, J. Lowery, and C. Simcox:

The Custodian certified that personnel records, e-mails, the New Jersey Civil Service Commission's ("Civil Service") website, and the City of Burlington's Municipal Code were searched for job descriptions for the individual employees named in the request. The Custodian certified that job descriptions for D. Ballard and J. Lowery were made available to the Complainant on May 13, 2014, and that the records were eventually disclosed to the Complainant on June 6, 2014.

The Custodian certified that no record was provided for the job description for C. Turner, as this is an unclassified position under N.J.S.A. 40:69A-43, and Civil Service does not have a job description for this title. The Custodian further certified that no record was provided for the job description for J. Alexander, as this is an unclassified position under N.J.S.A. 40:69A-43, and Civil Service does not have a job description for this title. The Custodian additionally certified that no record of a job description was provided for J.C. Martin as this is an unclassified appointment under N.J.S.A. 11A:3-5(b) and Civil Service does not have a job description for this appointment. Finally, the Custodian certified that no records were provided regarding a job

description for C. Simcox, because at the time of the request, a job title had not been approved by Civil Service.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the Complainant's request for billing records existed, and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the requests for the job descriptions of C. Turner, J. Alexander, J.C. Martin and C. Simcox did not constitute requests for existing records, because there are no job descriptions for those unclassified positions. The Custodian certified that the job descriptions for D. Ballard and J. Lowery were disclosed to the Complainant on June 6, 2014. Therefore, the Custodian disclosed the existing records for this request. Further, she did not unlawfully deny access to the remainder of the request because the Custodian certified that no records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Pusterhofer, GRC 2005-49.

Request for the "starting hours" of the following listed individuals: D. Ballard, C. Turner, J. Alexander, J.C. Martin, J. Lowery, and C. Simcox:

Here, the Custodian certified that the request for the starting hours of certain named employees did not constitute a request for an existing record and that therefore no search was done. As such, the Custodian did not unlawfully deny access to the request for the "starting hours" of the certain named employees because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Pusterhofer, GRC 2005-49.

### **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 (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)).

Here, although the Custodian failed to respond in writing to the Complainant's request within the required seven (7) business days, resulting in a "deemed" denial of the Complainant's request, the Custodian did disclose all records responsive to the request on June 6, 2014. Further, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian certified that personnel records were searched and a list of salaries was generated for the requested individuals. The Custodian certified that "this information was made available to the Complainant" on May 13, 2014, and the records were eventually picked up by the Complainant on June 6, 2014. Therefore, the evidence of record indicates that the records were disclosed to the Complainant on June 6, 2014.
3. The Custodian certified that the requests for the job descriptions of C. Turner, J. Alexander, J.C. Martin and C. Simcox did not constitute requests for existing records, as there exist no job descriptions for those unclassified positions. The Custodian certified that the job descriptions for D. Ballard and J. Lowery were eventually disclosed to the Complainant when he picked them up on June 6, 2014. Therefore, the Custodian disclosed the existing records for this request, and did not unlawfully deny access to the remainder of the request because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. The Custodian certified that the request for the starting hours of certain named employees did not constitute a request for an existing record and that therefore no search was done. As such, the Custodian did not unlawfully deny access to the request for the “starting hours” of the certain named employees because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to respond in writing to the Complainant’s request within the required seven (7) business days, resulting in a “deemed” denial of the Complainant’s request, the Custodian did disclose all records responsive to the request on June 6, 2014. Further, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Husna Kazmir  
Staff Attorney

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

June 23, 2014