



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**June 28, 2022 Government Records Council Meeting**

Brian F. McBride  
Complainant

Complaint No. 2020-240

v.

Township of Washington (Gloucester)  
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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. Notwithstanding the active Public Health Emergency at the time of the request, the Custodian failed to provide any evidence that she made a “reasonable effort” to provide a response from early January 2021 through March 12, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s request since the evidence of record demonstrates that she responded to the Complainant on March 12, 2021.
2. Notwithstanding the Custodian’s “deemed” denial, the Complainant’s OPRA request item No. 4 seeking “records” showing Platt and Riso’s compliance with N.J.S.A. 19:44A-20.5(b) is invalid because it fails to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).; N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015). Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6.
3. Notwithstanding the Custodian’s “deemed” denial, the Complainant’s OPRA request item No. 5 seeking “letters” from Washington Township to Platt and Riso is invalid because it fails to include a date range. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).; N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian lawfully denied

access to this request item. N.J.S.A. 47:1A-6.

4. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's request item Nos. 1, 3, and 6 since the Custodian certified that no responsive records exist, and the Complainant did not provide sufficient contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed responsive records to the Complainant on March 12, 2021. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
6. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant's request on March 12, 2021. Additionally, the evidence of record 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.

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 28<sup>th</sup> Day of June 2022

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: June 30, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2022 Council Meeting**

**Brian F. McBride<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-240**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. “[T]he most recent, active, and in force agreement by and between Platt and Riso (or Stuart Platt as an individual) [(“the Firm”)] and Washington Township [(“the Township”).”
2. “[R]esolutions of the governing body appointing [the Firm] . . . to their respective positions.”
3. “[A] written certification that the estimated amount of the contract to be awarded to [the Firm] exceeds \$17,500. The appropriate official may be the purchasing agent, financial officer, chief administrative officer, or an appointed or elected official with knowledge of the contract.”
4. “Records demonstrating the compliance of [the Firm] with NJSA 19:44A-20.5b.”
5. “[A]ny letters in the possession of [the Township] to the business entities of [the Firm] terminating services in compliance with NJSA 19:44A-20.9.”
6. “Letters of termination sent from [the Township] to the business entities of [the Firm] terminating services in compliance with NJSA 19:44A-20.5b.”

**Custodian of Record:** Christine Ciallella

**Request Received by Custodian:** December 9, 2020

**Response Made by Custodian:** March 12, 2021

**GRC Complaint Received:** December 18, 2020

**Background<sup>4</sup>**

**Request:**

On December 9, 2020, the Complainant submitted an Open Public Records Act (“OPRA”)

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

<sup>2</sup> Represented by Patrick J. Madden, Esq. of Law Offices of Patrick J. Madden, L.L.C. (Haddonfield, NJ). Previously represented by Carmen Saginario, Jr., Esq. of Capehart & Scatchard, P.A. (Mount Laurel, NJ).

<sup>3</sup> The Complainant sought additional records not at issue in this complaint.

<sup>4</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.

request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On December 18, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he never received a response from the Custodian regarding his request. The Complainant noted that his request sought contracts, amongst other records, which were supposed to be “immediately available” upon request.

Response:

On March 12, 2021, the sixty-second (62<sup>nd</sup>) business day after receipt, the Custodian responded to the Complainant in writing. Regarding request item Nos. 1, 3 and 6, the Custodian stated that no responsive records exist. Regarding request item Nos. 4 and 5, the Custodian stated that the request was invalid as seeking information or asking questions and did not identify specific government records. See N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). Regarding, request item No. 2, the Custodian attached responsive records to the e-mail correspondence.

Statement of Information:

On March 12, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 9, 2020. The Custodian certified that she responded to the Complainant on March 12, 2021, by providing responsive records, asserting that no responsive records exist, or asserting that the request items were invalid.

The Custodian asserted that COVID-19 complicated the Township’s ability to respond to the OPRA request. The Custodian contended that, along with the holiday closures, the municipal offices were shut down from December 28, 2020 through January 5, 2021 due to a COVID-19 outbreak amongst employees. The Custodian also contended that she was unable to work from December 9, 2020 through December 21, 2020 due to COVID-19.

The Custodian also noted that the Complainant already submitted numerous other OPRA requests in conjunction with another Township resident. The Custodian stated she received eight (8) OPRA requests from the Complainant in December 2020, and seven (7) more in January 2021. The Custodian contended that she received 2 requests in December and 5 requests in January from the other resident. The Custodian argued that these requests were complex and further complicated her ability to respond to the instant request.

Additional Submissions:<sup>5</sup>

On March 18, 2021, the Complainant responded to the Custodian’s SOI. The Complainant

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<sup>5</sup> The Complainant also raised an objection to representation of the Custodian’s previous firm but has since rescinded his objection with the introduction of Custodian’s current representation.

asserted that the requested contracts were required to be maintained for seven (7) years according to the State's retention schedule. The Complainant then asserted that according to the Township's Reorganization meeting dated January 2, 2017, the Firm was appointed as counsel for the Township. The Complainant attached a copy of the agenda for the January 2, 2017 meeting, asserting that it evidences the appointment of the Firm and the execution of an employment agreement.

The Complainant thus argued that an employment agreement did exist and was destroyed in violation of the State's retention schedule. The Complainant argued that the Custodian should therefore be sanctioned for improper retention of government records.

On March 22, 2022, the Custodian responded to the Complainant's e-mail with a certification. The Custodian certified that while a resolution approving the appointment of the Firm may evidence an agreement, none was ever prepared or executed. The Custodian therefore certified that there are no records responsive to the Complainant's request, and that the Township did not destroy any agreements between it and the Firm.

### Analysis

#### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>6</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 dated October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>7</sup> See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

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<sup>6</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.

<sup>7</sup> OPRA lists immediate access records as "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). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i)(2) now provides that:

*During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.*

[Id. (Emphasis added).]

Although adjudicated during the pendency of this matter, the GRC finds Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022) pertinent. There, the complainant asserted that the custodian failed to timely provide immediate access records under OPRA. The custodian certified that at the time she received the OPRA request, the municipality was operating with reduced staff and subsequently shutdown temporarily due to the pandemic and could not provide a response until the fifth (5<sup>th</sup>) business day after receipt. The Council held that although the request was submitted prior to the enactment of N.J.S.A. 47:1A-5(i)(2), the custodian provided sufficient facts and circumstances to reasonably justify the delay in providing access to the immediate access records.

Here, the Complainant's December 9, 2020 OPRA request sought several records pertaining to the Firm and the Township. At the time of the request, the State was under a Public Health Emergency ("PHE") due to the COVID-19 pandemic, and the Custodian asserted in the SOI that she was out of the office from December 9 through December 21, 2020 due to COVID-19. The Custodian also asserted that the office was shut down from December 28, 2020, through January 5, 2021, due to an outbreak amongst employees.

A review of the evidence demonstrates that the Custodian violated N.J.S.A. 47:1A-5(i). Although the OPRA request was made while a PHE was in effect, and thus the language under N.J.S.A. 47:1A-5(i)(2) applied, the statute still required a "reasonable effort" to provide a response to an OPRA request within the allotted period. Although the Custodian certified to the substantial hardships faced due to the pandemic for the months of December 2020 and early January 2021, the Custodian provided no facts or explanations justifying the lack of response or status updates from January 2021 to the date of response. Furthermore, the Custodian failed to show the reasonable efforts made to respond to the request "as soon as possible . . ." N.J.S.A. 47:1A-5(i)(2).

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. Notwithstanding the active PHE at the time of the request, the Custodian failed to provide any evidence that she made a "reasonable effort" to provide a response from early January 2021 through March 12, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian's failure to timely respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time

resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s request since the evidence of record demonstrates that she responded to the Complainant on March 12, 2021.

### **Validity of Request**

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;<sup>8</sup> N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. *See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders*, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an

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<sup>8</sup> Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Request Item No. 4

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Additionally, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

In the instant matter, the Complainant’s OPRA request item No. 4 sought “[r]ecords demonstrating the compliance of [the Firm] with NJSA 19:44A-20.5b” The Custodian asserted that the request was invalid as seeking information and not specifically identifying government records.

Upon review, the GRC is persuaded that MAG and its progeny support that this portion of the request is invalid. Like the request in Lagerkvist, this request item necessitates the Custodian to conduct research to locate responsive records by failing to identify specific records that may contain the requested information.

Accordingly, notwithstanding the Custodian’s “deemed” denial, the Complainant’s OPRA request item No. 4 seeking “records” showing the Firm’s compliance with N.J.S.A. 19:44A-20.5(b) is invalid because it fails to identify a specific record. MAG, 375 N.J. Super. at 546; Bent,



381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-37. Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6.

#### Request Item. No. 5

With respect to requests for e-mails and correspondence, the GRC established specific criteria deemed necessary under OPRA to request such records in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters and text messages. See e.g. Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Alt v. City of Vineland (Cumberland), GRC Complaint No. 2013-205 (June 2014).

Here, the Complainant's OPRA request item No. 5 sought "letters" from the Township to the Firm terminating services with same in compliance with statute. The Custodian asserted that the request was invalid as seeking information and not specifically identifying government records. When applying Elcavage and Armenti, the evidence of record supports finding that the request item is invalid. Specifically, the Complainant did not include a date range; thus, the Custodian's search for these letters would necessarily be open-ended. The GRC is thus satisfied that this request item was invalid, as the required criteria established under controlling case precedent was clearly omitted from the request.

Accordingly, notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request item No. 5 seeking "letters" from the Township to the Firm is invalid because it fails to include a date range. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37, N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Armenti, GRC 2009-154. Thus, the Custodian lawfully denied access to this request item. 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.

#### Item Nos. 1, 2, and 6

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the instant matter, the Custodian certified that no records exist in response to the Complainant's OPRA request item Nos. 1, 3 and 6, which seek records related to an agreement and services between the Firm and the Township. In response, the

Complainant argued that the agenda for the Township's 2017 Reorganization meeting indicated that a resolution appointing the Firm was approved, and therefore a contract between the parties should have existed and would be responsive to request item No. 1. However, the Custodian replied to the Complainant certifying that no contract with the Firm was ever prepared or executed, notwithstanding the approved resolution. Furthermore, the Complainant did not address the Custodian's response to item Nos. 3 and 6.

The Complainant added that if a contract existed but was destroyed, then the Township should be sanctioned for violating the State's retention schedules, since such records were required to be maintained for seven (7) years. However, N.J.S.A. 47:1A-7(b) delineates the Council's powers and duties. Such powers and duties do not include authority over a record's accuracy or whether a record was filed in accordance with existing guidelines. See LoBosco v. N.J. Dep't of Health & Human Servs., GRC Complaint No. 2010-64 (October 2010). In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents." Thus, even if a contract responsive to item No. 1 existed and was destroyed, the GRC has no authority to determine whether the Township violated the state's retention schedules.

Accordingly, notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's request item Nos. 1, 3, and 6 since the Custodian certified that no responsive records exist, and the Complainant did not provide sufficient contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### Request Item No. 2

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Custodian certified that records responsive to the Complainant's OPRA request item No. 2 seeking resolutions were provided on March 12, 2021. The Complainant did not dispute or mention this request item after receiving the response. Therefore, the GRC finds that there is no evidence in the record refuting the Custodian's certification.

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed responsive records to the Complainant on March 12, 2021. Danis, GRC 2009-156, *et seq.*; Burns, 2005-68; Holland, 2014-63, *et seq.*

## **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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant’s request on March 12, 2021. Additionally, the evidence of record 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.

## **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. Notwithstanding the active Public Health Emergency at the time of the request, the Custodian failed to provide any evidence that she made a “reasonable effort” to provide a response from early January 2021 through March 12, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the

Complainant's request since the evidence of record demonstrates that she responded to the Complainant on March 12, 2021.

2. Notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request item No. 4 seeking "records" showing Platt and Riso's compliance with N.J.S.A. 19:44A-20.5(b) is invalid because it fails to identify a specific record. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).; N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015). Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6.
3. Notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request item No. 5 seeking "letters" from Washington Township to Platt and Riso is invalid because it fails to include a date range. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).; N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6.
4. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's request item Nos. 1, 3, and 6 since the Custodian certified that no responsive records exist, and the Complainant did not provide sufficient contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed responsive records to the Complainant on March 12, 2021. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
6. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant's request on March 12, 2021. Additionally, the evidence of record 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.

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