



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

October 31, 2007 Government Records Council Meeting

Tucker Kelley
Complainant

Complaint No. 2007-11

v.

Township of Rockaway (Morris)
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 24, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council unanimously adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of the Complainant's OPRA requests marked "A" and "B."
2. Pursuant to Karen Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), the Custodian is entitled to request clarification from the Complainant regarding his OPRA requests marked "C", "D" and "F."
3. Because the Custodian notified the Complainant that the requested records were in storage and/or archived within the statutorily mandated seven (7) business days and provided the Complainant access to the requested records by the date anticipated by the Custodian, the Custodian has not unlawfully denied access to the records requested in the Complainant's OPRA requests marked "C", "D" and "F" pursuant to N.J.S.A. 47:1A-5.i.
4. Because the Township Engineer informed the Custodian via memorandum dated November 16, 2006 that there were no records responsive to the Complainant's request and because the Custodian informed the Complainant via letter dated November 21, 2006 that the requested records were in storage



or archived as well as because the Custodian did not inform the Complainant that there were no records responsive to his request until November 27, 2006 (the tenth (10th) business day following receipt of the request), the Custodian has not carried her burden of proving a lawful denial of access to the Complainant's OPRA request marked "E" pursuant to N.J.S.A. 47:1A-6.

5. Although the Custodian received some of the requested records from the Road Department on November 13, 2006 but did not make said records available to the Complainant until November 21, 2006, the Custodian still granted access to the requested records in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Thus, the Custodian has not unlawfully denied access to the requested records marked "G."
6. Because the Complainant did not specifically request the following records:
 - Plumbing permit for newer addition
 - Fire permit for new furnace installed in garage
 - Plumbing permit for gas line installed for furnace located in garage
 - Permit for air conditioning installed in new addition
 - Permit for air conditioning installed in older portion of the house
 - Approved water management plan for storm/surface water
 - Approval for sewer connection regards to made connection for surface water discharge
 - Any/all correspondence from any department to Councilman Dachisen concerning Block 10507, Lot 7
 - Permit for siding of entire house
 - Permit for roofing entire house
 - Variance for increased impervious coverage
 - Permit for bathroom in new addition
 - Additional violation/penalty notices
 - Receipts for payment of violations in addition to November 17, 2006
 - Notices of violations from Zoning Department
 - Foundation location survey with setbacks marked/indicated

and because the Custodian certifies that she has provided the Complainant with all records responsive, the Custodian has carried her burden that she has not unlawfully denied access to the records listed above pursuant to N.J.S.A. 47:1A-6.

7. The GRC has no authority over where government records are stored by any agency pursuant to N.J.S.A. 47:1A-7.b.
8. Because of the conflict between the Custodian's statement that the records responsive to the Complainant's request were archived and the fact that the records responsive were dated after the date of the Complainant's OPRA

request, as well as the Complainant's contention that the Construction Official could not have provided the Custodian with his memorandum dated November 21, 2006 because the Construction Official was on vacation from November 20-21, 2006 (the Complainant provided a copy of the Construction Official's time sheet for the time period in question), this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian and/or the Construction Official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 31st Day of October, 2007

Vincent Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman
Government Records Council

Decision Distribution Date: November 15, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2007 Council Meeting**

**Tucker Kelley¹
Complainant**

GRC Complaint No. 2007-11

v.

**Township of Rockaway (Morris)²
Custodian of Records**

Records Relevant to Complaint:³

- A. Copy of any and all road opening permits concerning driveway construction and drains tied in from house or yard to sewer in easement area from January 1, 2000 to present regarding 208 Perry Street (Block 10507, Lot 7)
- B. Copy of any and all temporary and permanent Certificate of Occupancy for permit Nos. 92-808 and 02-1296 regarding 208 Perry Street (Block 10507, Lot 7)
- C. Copy of any and all permits for construction of a 14' x 18' deck which replaced the 8' x 7' patio regarding 208 Perry Street (Block 10507, Lot 7)
- D. Copy of any and all permits to erect, install, construct, fabricate, or replace a 12' x 12' shed and a 8' x 8' shed. Please include though not limited to: all approved inspections, plans/prints, and a survey to show location of sheds regarding 208 Perry Street (Block 10507, Lot 7)
- E. Review any and all engineering files regarding 208 Perry Street (Block 10507, Lot 7) including the files concerning the property owner, Michael Dachisen
- F. Review any and all construction files regarding 208 Perry Street (Block 10507, Lot 7) and property owner, Michael Dachisen. Please include but not limited to: non infrastructure plans, surveys, permits, approvals, correspondence, date of all rough/final inspection for each subcode and license seals
- G. Review of any and all Road Department files regarding 208 Perry Street (Block 10507, Lot 7). Please include all permits, inspections, bond retainers, work orders, material list, approvals and correspondence to and from property owner, Michael Dachisen from January 1, 2000 to present

Request Made: November 9, 2006

Response Made: November 13, 2006, November 21, 2006, November 22, 2006 and November 27, 2007

Custodian: Mary Cilurso

GRC Complaint Filed: December 19, 2006

¹ No legal representation listed on record.

² Represented by Tiena Cofoni, Esq. (Montville, NJ).

³ Requests are lettered as per the Complainant's OPRA requests dated November 9, 2006.

Background

November 9, 2006

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant submitted seven (7) separate requests each marked with a letter from "A" through "G," as listed above.

November 13, 2006

Memorandum from Director of Public Works to Custodian. The Director of Public Works states that he has attached some of the records responsive to the Complainant's requests. The Director states that he could not locate any Driveway Permits or Street Opening Permits for the property listed. The Director also states that more complete files on the requested permits should be found in the Construction and Clerk's Offices.

November 13, 2006

Custodian's response to the Complainant's OPRA requests marked "C" through "G." The Custodian responds in writing to the OPRA requests on the first (1st) business day following receipt of such request.⁴ The Custodian requests that the Complainant specify a time frame for the requested records.

November 14, 2006

Letter from Complainant to Custodian. The Complainant states that the time frame for his OPRA requests marked "C" through "F" is May 2, 1998 to November 9, 2006. The Complainant also states that he prefers not to change the dates for his request marked "G."

November 14, 2006

Memorandum from Custodian to Engineering, Zoning and Construction Departments. The Custodian states that she has enclosed a more specific OPRA request from the Complainant. The Custodian requests that the Departments advise the Custodian whether they can or cannot respond within the seven (7) business day time period.

November 16, 2006

Memorandum from Township Engineer to Custodian. The Township Engineer states that the Engineering Office does not have any records responsive to the Complainant's OPRA requests.

November 21, 2006

Memorandum from Construction Official to Custodian. The Construction Official states that the Complainant's request requires a review of archived files therefore the Construction Official cannot respond within the seven (7) business day time period. The Construction Official states that his office will respond by November 29, 2006.

⁴ The Custodian states that the Clerk's Office was closed on November 10, 2006 for Veteran's Day. Tucker Kelley v. Township of Rockaway (Morris), 2007-11 – Findings and Recommendations of the Executive Director

November 21, 2006

Custodian's subsequent response to Complainant's OPRA requests marked "C" through "F" (the seventh (7th) business days following the Custodian's receipt of the requests). The Custodian states that the requested records are archived and are not on the premises. The Custodian states that the records will be available for review on November 29, 2006.

November 21, 2006

Custodian's subsequent response to Complainant's OPRA request marked "G" (the seventh (7th) business days following the Custodian's receipt of the request). The Custodian states that the requested records will be available for review on November 22, 2006.

November 21, 2006

Letter from Complainant to Custodian. The Complainant questions the validity of the Custodian's statement that the requested records are archived and off premises. The Complainant asserts that the subject of the requested records is still active and thus the records should not be archived. The Complainant asks if it is common practice for all open permits and files of the Engineering, Construction and Zoning Department to be placed in storage or archived. The Complainant claims that the Custodian is willfully delaying access to the requested records because of the potential Municipal Land Use and Uniform Construction Code violations that may exist on the property at issue. The Complainant asserts that the Custodian is intentionally withholding the records until November 29, 2006 which would not allow the Complainant to expose the potential problem at the November 28, 2006 Town Council meeting.

November 22, 2006

Letter from Custodian to Complainant. The Custodian states that she is responsible for responding to OPRA requests, however she does not control where files are located. The Custodian contends that the Complainant's assertion that she is willfully delaying access to the requested records is untrue because the Custodian asserts that she has spent a significant amount of time on a daily basis responding to the Complainant's voluminous requests. Additionally, the Custodian states that the requested records will be available for review on November 27, 2006.

November 22, 2006

Letter from Complainant to Custodian. The Complainant states that the Custodian never answered his question of how Engineering and Construction files, folders, permits and temporary certificates can be placed in storage or archived off premises if said records are currently active. The Complainant asserts that if the Custodian is aware of or witnessed Township Officials reviewing files or folders responsive to the Complainant's OPRA request but advises the Complainant that the same files or folders are archived, then the Custodian is knowingly and willfully denying access to the requested records. The Complainant also states that the Custodian failed to indicate if the Engineering Department agreed to allow the Complainant to review the requested records on November 27, 2006.

November 27, 2006

Letter from Custodian to Complainant. In response to the Complainant's questions in his letter dated November 21, 2006, the Custodian states that she is responsible for responding to OPRA requests and does not control where files are located. The Custodian contends that she is not knowingly and willfully denying the Complainant access to government records. Further, the Custodian states that the Engineering Department does not maintain any records pertaining to Block 10507, Lot 7.

November 27, 2006

Memorandum from Construction Official to Custodian regarding the Complainant's OPRA request marked "A." The Construction Official states that no driveway permit has been located for 208 Perry Street Block 10507, Lot 7. The Construction Official states that the property owner applied for a permit on November 16, 2006 and the application is under review. The Construction Official also states that said application is enclosed.

November 27, 2006

Memorandum from Construction Official to Custodian regarding the Complainant's OPRA request marked "B." The Construction Official states that no Temporary Certificate of Occupancy or Certificate of Occupancy has been located for permits 92-808 or 02-1286.

November 27, 2006

Memorandum from Construction Official to Custodian regarding the Complainant's OPRA request marked "C." The Construction Official states that no record of a deck permit has been located.

November 27, 2006

Memorandum from Construction Official to Custodian regarding the Complainant's OPRA request marked "D." The Construction Official states that no record of a shed permit has been located.

November 27, 2006

Memorandum from Construction Official to Custodian regarding the Complainant's OPRA request marked "F." The Construction Official states that he has attached the requested permit files for 208 Perry Street Block 10507, Lot 7. The Construction Official also states that permit 92-808 is for an alteration and permit 02-1296 is for an addition and attached garage.

November 27, 2006

Letter from Complainant to Custodian. The Complainant requests the copy fees associated with his OPRA requests marked "C" and "D." The Complainant requests that the Custodian advise of such fees prior to the Complainant's 3:30 appointment to review the requested records on this date.

December 19, 2006

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

- Complainant's OPRA requests dated November 9, 2006 marked "A" through "G"
- Memorandum from Director of Public Works to Custodian dated November 13, 2006
- Letter from Custodian to Complainant dated November 13, 2006
- Letter from Complainant to Custodian dated November 14, 2006
- Memorandum from Township Engineer to Custodian dated November 16, 2006
- Memorandum from Construction Official to Custodian dated November 21, 2006
- Letter from Custodian to Complainant dated November 21, 2006
- Letter from Custodian to Complainant dated November 21, 2006
- Letter from Complainant to Custodian dated November 21, 2006
- Letter from Custodian to Complainant dated November 22, 2006
- Letter from Complainant to Custodian dated November 22, 2006
- Letter from Custodian to Complainant dated November 27, 2006
- Letter from Complainant to Custodian dated November 27, 2006
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding the Complainant's request marked "A"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding the Complainant's request marked "B"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding the Complainant's request marked "C"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding the Complainant's request marked "D"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding the Complainant's request marked "F"⁵

The Complainant states that on November 9, 2006 he submitted seven (7) OPRA requests marked "A" through "G." The Complainant states that in a letter dated November 13, 2006, the Custodian requested a time period for his requests marked "C" through "G" but did not mention the Complainant's requests marked "A" and "B." The Complainant states that he provided the Custodian with a start date of May 2, 1988 for his requests marked "C" through "F" via letter dated November 14, 2006, but did not change the dates on his request marked "G."

The Complainant states that in a letter dated November 21, 2006 the Custodian informed him that the requested records are archived and stored off premises and will be available on November 29, 2006. (This response is regarding requests marked "C" through "F"). The Complainant contends that the Custodian's statement that the requested records are archived is false. The Complainant questions how files, folders and permits can be archived when no final inspection was conducted and no Certificate of Occupancy or Approvals were issued. The Complainant states that in a separate letter dated November 21, 2006, the Custodian informed him that the records responsive to the Complainant's request marked "G" will be ready for review on November 22, 2006. The Complainant asserts that the Custodian intentionally delayed his review of the requested records because the memorandum from the Road Department to the Custodian with the requested records attached is dated November 13, 2006. The Complainant states that

⁵ The Complainant submitted additional records with his Denial of Access Complaint; however, said records are not the subject of this complaint.

there is a six (6) day delay from the date of said memorandum to the date of the Custodian's letter providing access to the records.

Additionally, the Complainant states that via letter dated November 21, 2006 he questioned the validity of the Custodian's statement that the requested records are archived off site. The Complainant states that the Custodian provided a response in a letter dated November 22, 2006 in which the Custodian stated that she is not responsible for where files are located. The Complainant states that he submitted another letter to the Custodian dated November 22, 2006 again asking about the alleged archived files. The Complainant states that he received a response from the Custodian dated November 27, 2006 in which the Custodian provided the same response as in her letter dated November 22, 2006.

Further, the Complainant states that on November 27, 2006 he reviewed the records provided in response to his OPRA requests marked "C" through "G." The Complainant states that during said review, he inspected several records that were dated November 2006 and questions how a large amount of activity took place regarding the property in question if the requested records were supposedly archived. The Complainant also states that the property owner, Councilman Dachisen, was very vocal with regards to the Complainant viewing his construction folders and scheduling inspections after the Complainant submitted his OPRA requests on November 9, 2006, which the Complainant contends further proves that the requested records were not archived.

The Complainant asserts that there are other records to which he was not provided access that may further prove that none of the requested records had been archived and were purposely not provided for the Complainant's review. The Complainant requests that this complaint be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.⁶

The Complainant asserts that he has been denied access to the following records:

- Plumbing permit for newer addition
- Fire permit for new furnace installed in garage
- Plumbing permit for gas line installed for furnace located in garage
- Permit for air conditioning installed in new addition
- Permit for air conditioning installed in older portion of the house
- Approved water management plan for storm/surface water
- Approval for sewer connection regards to made connection for surface water discharge
- Any/all correspondence from any department to Councilman Dachisen concerning Block 10507, Lot 7
- Permit for siding of entire house
- Permit for roofing entire house
- Variance for increased impervious coverage
- Permit for bathroom in new addition

⁶ The Complainant discussed additional OPRA requests which are not the subject of this complaint. Tucker Kelley v. Township of Rockaway (Morris), 2007-11 – Findings and Recommendations of the Executive Director

- Additional violation/penalty notices
- Receipts for payment of violations in addition to November 17, 2006
- Notices of violations from Zoning Department
- Foundation location survey with setbacks marked/indicated

January 8, 2007

Offer of Mediation sent to both parties.

January 9, 2007

The Complainant declines mediation. The Custodian also did not agree to mediate this complaint.

January 10, 2007

Request for the Statement of Information sent to the Custodian.

January 16, 2007

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

- Complainant's OPRA requests dated November 9, 2006 marked "A" through "G"
- Letter from Custodian to Complainant dated November 13, 2006
- Letter from Complainant to Custodian dated November 14, 2006
- Memorandum from Custodian to Engineering, Zoning and Construction Departments dated November 14, 2006
- Memorandum from Township Engineer to Custodian dated November 16, 2006
- Letter from Custodian to Complainant dated November 21, 2006
- Letter from Custodian to Complainant dated November 21, 2006
- Letter from Complainant to Custodian dated November 21, 2006
- Letter from Custodian to Complainant dated November 22, 2006
- Letter from Complainant to Custodian dated November 22, 2006
- Letter from Custodian to Complainant dated November 27, 2006
- Letter from Complainant to Custodian dated November 27, 2006
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding Complainant's request marked "A"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding Complainant's request marked "B"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding Complainant's request marked "C"
- Memorandum from Construction Official to Custodian dated November 27, 2006 regarding Complainant's request marked "D"

The Custodian certifies receiving the Complainant's OPRA requests labeled "A" through "G" on November 9, 2006. The Custodian certifies that she does not determine where records are filed in other departments nor does the Custodian determine when such files are to be archived and stored off site. The Custodian certifies that as Custodian it is her responsibility to retrieve the records, wherever the records are located, in response to OPRA requests.

The Custodian certifies that due to the voluminous number of requests submitted by the Complainant on November 9, 2006, the Custodian inadvertently did not provide the Complainant with a specific response to his OPRA requests marked "A" and "B." However, the Custodian also certifies that the Complainant received the requested records on November 27, 2006.

Further, the Custodian contends that she has never intentionally stalled the review of records pursuant to any OPRA request. The Custodian certifies that the delay between the memorandum from the Road Department dated November 13, 2006 and the Custodian's letter to the Complainant dated November 21, 2006 making the requested records available was due to the review of files in the Construction Department and the Clerk's Office in response to the memorandum from the Road Department suggesting that the records requested may be located elsewhere. Further, the Custodian certifies that all records responsive to the Complainant's request have been provided to the Complainant.

January 23, 2007

The Complainant's response to the Custodian's SOI. The Complainant contends that some of the records listed in the Custodian's Statement of Information as records which were provided to the Complainant were not provided or do not exist. Regarding the Complainant's request marked "A", the Complainant states that no permit exists for the connection with the municipal road (drive way). The Complainant states that the record provided was an incomplete application for a permit which was created after the date of the Complainant's OPRA request. The Complainant states that no records exist in response to his requests marked "B" through "E" as indicted in the memoranda to the Custodian from the Construction Official and the Township Engineer. The Complainant contends that the records listed for the request marked "F" are false or incorrect and that the Custodian should have included the records responsive to the Complainant's request marked "G."

The Complainant requests that the Custodian provide a certification indicating where the requested files were located and when the files were retrieved in response to the Complainant's OPRA requests. The Complainant asserts that on November 7, 2006 he requested records from the Construction Department in person and an employee pulled the construction files from behind the counter and stated that the Complainant would have to file an OPRA request for the records. The Complainant contends that during a Township Council meeting on November 8, 2006, Councilman Dachisen stated that he was aware that the Complainant was requesting records regarding his property. The Complainant states that he did not submit his OPRA requests until November 9, 2006 when the requested records allegedly became archived. The Complainant asserts that the Custodian is aware that the requested records were not archived or stored off site because she was present during the November 8, 2006 Township Council meeting when Councilman Dachisen commented on said issue.

Additionally, the Complainant states that nine (9) business days passed between the date of his OPRA requests marked "A" and "B" and the date on which the Custodian claims to have provided the requested records. The Complainant states that the record provided in response to his request marked "A" is not what he requested and that there

are no records responsive to his request marked “B.” The Complainant also states that his request marked “G” clearly indicated that he was requesting files from the Road Department, not the Construction Department.

Further, the Custodian contends that the Custodian and other Township Officials are covering up violations regarding Councilman Dachisen’s property and have knowingly and willfully delayed access to the requested government records.

March 2, 2007

Letter from Custodian to GRC. The Custodian states that she was unaware of the Complainant’s letter to the GRC dated January 23, 2007 until said letter was forwarded by the GRC on February 28, 2007. The Custodian states that it is her understanding that the Complainant has reviewed and/or received copies of all records responsive to his request. The Custodian asserts that it is unclear what specific records the Complainant believes exists and was not provided access. The Custodian contends that the Complainant’s allegations that the Custodian participated in covering up violations is false. The Custodian states that she takes her responsibilities as Records Custodian very seriously and asserts that she has never knowingly and willfully delayed or denied access to government records.

March 14, 2007

Letter from Complainant to GRC. The Complainant states that he identified the records that were not produced for his examination on page four (4) of his Denial of Access Complaint. The Complainant contends that it is impossible that the Construction Official provided the Custodian with his memorandum dated November 21, 2006 because the Construction Official was on vacation from November 20-21, 2006. The Complainant states that he has enclosed a copy of the Construction Official’s time sheet for the time period in question. The Complainant states that the Custodian never mentioned where the requested files were located due to their alleged archived status. The Complainant contends that the evidence suggests that the Custodian and other Township Officials knowingly and willfully delayed and denied access to government records.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or

in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

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

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* provided that the record is currently available and not in storage or archived. In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ... If the government record is in storage or archived, the requestor shall be so advised within seven business days* after the custodian receives the request. *The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. 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.

Complainant’s OPRA requests marked “A” and “B”

OPRA provides that if a custodian is unable to comply with a records request, he must notify the complainant in writing indicating a lawful reason for same pursuant to N.J.S.A. 47:1A-5.g. Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days of receipt of said request. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial.

The Complainant states that he submitted his OPRA requests marked “A” and “B” on November 9, 2006. The Custodian certifies that due to the voluminous number of requests submitted by the Complainant on November 9, 2006, the Custodian inadvertently did not provide the Complainant with a specific response to his OPRA requests marked “A” and “B.” However, the Custodian also certifies that the Complainant received the requested records on November 27, 2006.⁷

Therefore, because the Custodian failed to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of the Complainant’s OPRA requests marked “A” and “B.”

Complainant’s OPRA requests marked “C”, “D” and “F”

The Custodian certifies receiving the Complainant’s OPRA requests marked “C”, “D” and “F” on November 9, 2007. Included in the Custodian’s certification dated January 16, 2007 (the Custodian’s Statement of Information) is a letter from the Custodian to the Complainant, dated November 13, 2006, in which the Custodian requests clarification as to the time period for the Complainant’s requests.

In Karen Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), the Custodian sought clarification from the Complainant regarding the Complainant’s OPRA request. The Council held that “[t]he Custodian is proper in requiring clarification when a request is too broad in scope and a reasonable basis exists to seek said clarification.”

Therefore, pursuant to Leibel, the Custodian is entitled to request clarification from the Complainant regarding his OPRA requests marked “C”, “D” and “F.”

Additionally, N.J.S.A. 47:1A-5.i. provides that if the requested records are in storage or archived, the custodian must advise the requestor of such within seven (7) business days after the custodian receives the request. The custodian must also advise the requestor when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

In this complaint, the Custodian advised the Complainant via letter dated November 21, 2006 (the seventh (7th) business day following the Custodian’s receipt of said request) that the requested records are archived and can be made available on November 29, 2006. The Custodian certifies that the Complainant was provided access to the requested records on November 27, 2006.

Therefore, because the Custodian notified the Complainant that the requested records were in storage and/or archived within the statutorily mandated seven (7) business days and provided the Complainant access to the requested records by the date anticipated by the Custodian, the Custodian has not unlawfully denied access to the

⁷ The Complainant was provided with memoranda from the Construction Official to the Custodian indicating that no records responsive exist.

records requested in the Complainant's OPRA requests marked "C", "D" and "F" pursuant to N.J.S.A. 47:1A-5.i.

Complainant's OPRA request marked "E"

The Custodian certifies receiving the Complainant's OPRA request marked "E" on November 9, 2007. Included in the Custodian's certification dated January 16, 2007 (the Custodian's Statement of Information) is a memorandum from the Township Engineer to the Custodian dated November 16, 2006 in which the Township Engineer states that there are no records responsive to the Complainant's OPRA request. However, also included in the Custodian's certification is a letter from the Custodian to the Complainant dated November 21, 2006 in which the Custodian stated that the requested records are in storage or archived and can be made available on November 29, 2006. Further, in a letter from the Custodian to the Complainant dated November 27, 2007 (ten (10) business days from the Custodian's receipt of the Complainant's request) the Custodian informed the Complainant that there were no records responsive to his request.

Because the Township Engineer informed the Custodian via memorandum dated November 16, 2006 that there were no records responsive to the Complainant's request and because the Custodian informed the Complainant via letter dated November 21, 2006 that the requested records were in storage or archived as well as because the Custodian did not inform the Complainant that there were no records responsive to his complaint until November 27, 2006 (the tenth (10th) business day following receipt of the request), the Custodian has not carried her burden of proving a lawful denial of access to the Complainant's OPRA request marked "E" pursuant to N.J.S.A. 47:1A-6.

Complainant's OPRA request marked "G"

The Custodian certifies receiving the Complainant's OPRA request marked "G" on November 9, 2007. The Complainant states that in a letter dated November 21, 2006, (the seventh (7th) business day following the Custodian's receipt of the request), the Custodian informed him that the records responsive to the Complainant's request marked "G" will be ready for review on November 22, 2006. The Complainant asserts that the Custodian intentionally delayed his review of the requested records because the memorandum from the Road Department to the Custodian with the requested records attached is dated November 13, 2006. The Complainant states that there is a six (6) day delay from the date of said memorandum to the date of the Custodian's letter providing access to the records.

The Custodian contends that she has never intentionally stalled the review of records pursuant to any OPRA request. The Custodian certifies that the delay between the memorandum from the Road Department dated November 13, 2006 and the Custodian's letter to the Complainant dated November 21, 2006 making the requested records available was due to the review of files in the Construction Department and the Clerk's Office in response to the Memorandum from the Road Department suggesting that the records requested may be located elsewhere. The Custodian certifies that the

Complainant reviewed all records responsive to the Complainant's request on November 27, 2006.

Although the Custodian received some of the requested records from the Road Department on November 13, 2006 but did not make said records available to the Complainant until November 21, 2006, the Custodian still granted access to the requested records in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.. Thus, the Custodian has not unlawfully denied access to the requested records.

Records in which the Complainant alleges the Custodian denied access

The Custodian certifies that the Complainant was provided with all records responsive to his OPRA requests on November 27, 2006. The Complainant asserts that he has been denied access to the following records:

- Plumbing permit for newer addition
- Fire permit for new furnace installed in garage
- Plumbing permit for gas line installed for furnace located in garage
- Permit for air conditioning installed in new addition
- Permit for air conditioning installed in older portion of the house
- Approved water management plan for storm/surface water
- Approval for sewer connection regards to made connection for surface water discharge
- Any/all correspondence from any department to Councilman Dachisen concerning Block 10507, Lot 7
- Permit for siding of entire house
- Permit for roofing entire house
- Variance for increased impervious coverage
- Permit for bathroom in new addition
- Additional violation/penalty notices
- Receipts for payment of violations in addition to November 17, 2006
- Notices of violations from Zoning Department
- Foundation location survey with setbacks marked/indicated

The New Jersey Superior Court has held that "[w]hile 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." (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (March 2005). 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.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)⁸, the Superior Court references Mag in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁹

The Complainant’s November 9, 2006 OPRA request does not include a specific request for any of the records to which the Complainant asserts he has been denied access.

Because the Complainant did not specifically request the records listed above and because the Custodian certifies that she has provided the Complainant with all records responsive to the Complainant’s OPRA request, the Custodian has carried her burden of proof that she has not unlawfully denied access to the records listed above pursuant to N.J.S.A. 47:1A-6.

Whether the Government Records Council has authority over where a public agency stores government records?

OPRA provides that:

“[t]he Government Records Council shall... receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7.b.

N.J.S.A. 47:1A-7.b. delineates the power of the GRC. The GRC administers OPRA and adjudicates denial of access complaints. In this complaint, the Complainant questions the validity of the Custodian’s assertion that the requested records were in storage or archived. The Complainant certifies that she does not determine where records are filed in other departments, nor does the Custodian determine when such files are to be archived and stored off site. The Custodian certifies that as Custodian it is her responsibility to retrieve the records, wherever the records are located, in response to OPRA requests.

The GRC has no authority over where government records are stored by any agency pursuant to N.J.S.A. 47:1A-7.b.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent.

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 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 (App. Div. 1996) at 107).

Because of the conflict between the Custodian’s statement that the records responsive to the Complainant’s request were archived and the fact that the records responsive were dated after the date of the Complainant’s OPRA request, as well as the Complainant’s contention that the Construction Official could not have provided the Custodian with his memorandum dated November 21, 2006 because the Construction Official was on vacation from November 20-21, 2006 (the Complainant provided a copy of the Construction Official’s time sheet for the time period in question), this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian and/or the Construction Official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or

- requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of the Complainant’s OPRA requests marked “A” and “B.”
2. Pursuant to Karen Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), the Custodian is entitled to request clarification from the Complainant regarding his OPRA requests marked “C”, “D” and “F.”
 3. Because the Custodian notified the Complainant that the requested records were in storage and/or archived within the statutorily mandated seven (7) business days and provided the Complainant access to the requested records by the date anticipated by the Custodian, the Custodian has not unlawfully denied access to the records requested in the Complainant’s OPRA requests marked “C”, “D” and “F” pursuant to N.J.S.A. 47:1A-5.i.
 4. Because the Township Engineer informed the Custodian via memorandum dated November 16, 2006 that there were no records responsive to the Complainant’s request and because the Custodian informed the Complainant via letter dated November 21, 2006 that the requested records were in storage or archived as well as because the Custodian did not inform the Complainant that there were no records responsive to his request until November 27, 2006 (the tenth (10th) business day following receipt of the request), the Custodian has not carried her burden of proving a lawful denial of access to the Complainant’s OPRA request marked “E” pursuant to N.J.S.A. 47:1A-6.
 5. Although the Custodian received some of the requested records from the Road Department on November 13, 2006 but did not make said records available to the Complainant until November 21, 2006, the Custodian still granted access to the requested records in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Thus, the Custodian has not unlawfully denied access to the requested records marked “G”.
 6. Because the Complainant did not specifically request the following records:
 - Plumbing permit for newer addition
 - Fire permit for new furnace installed in garage
 - Plumbing permit for gas line installed for furnace located in garage
 - Permit for air conditioning installed in new addition
 - Permit for air conditioning installed in older portion of the house
 - Approved water management plan for storm/surface water
 - Approval for sewer connection regards to made connection for surface water discharge
 - Any/all correspondence from any department to Councilman Dachisen concerning Block 10507, Lot 7
 - Permit for siding of entire house
 - Permit for roofing entire house
 - Variance for increased impervious coverage
 - Permit for bathroom in new addition
 - Additional violation/penalty notices
 - Receipts for payment of violations in addition to November 17, 2006

- Notices of violations from Zoning Department
- Foundation location survey with setbacks marked/indicated

and because the Custodian certifies that she has provided the Complainant with all records responsive, the Custodian has carried her burden that she has not unlawfully denied access to the records listed above pursuant to N.J.S.A. 47:1A-6.

7. The GRC has no authority over where government records are stored by any agency pursuant to N.J.S.A. 47:1A-7.b.
8. Because of the conflict between the Custodian's statement that the records responsive to the Complainant's request were archived and the fact that the records responsive were dated after the date of the Complainant's OPRA request, as well as the Complainant's contention that the Construction Official could not have provided the Custodian with his memorandum dated November 21, 2006 because the Construction Official was on vacation from November 20-21, 2006 (the Complainant provided a copy of the Construction Official's time sheet for the time period in question), this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian and/or the Construction Official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

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Approved By:

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Executive Director

October 24, 2007