

INITIAL DECISION

OAL DKT. NO. GRC 746-08

AGENCY COMPLAINT NO. 2007-107

ALLAN JOHNSON,

Petitioner,

v.

BOROUGH OF OCEANPORT

(MONMOUTH),

Respondent.

Allan Johnson, petitioner, pro se

Scott Arnette, Esq., for Kimberly Jungfer, Custodian

Michael D. Fitzgerald, Esq., for Hugh Sharkey, Councilman/respondent

Record Closed: October 29, 2008

Decided: December 15, 2008

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 21, 2008, Government Records Council Complaint No. 2007-107, Allan Johnson v. Borough of Oceanport, was transmitted to the Office of Administrative Law (OAL) by the Government Records Council (GRC), an agency created pursuant to N.J.S.A. 47:1A-7.a. of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. The GRC is authorized to receive, hear, review and adjudicate complaints filed by any person concerning a denial of access to a government record pursuant to N.J.S.A. 47:1A-7.b.

This case was transmitted to the OAL for a hearing pursuant to N.J.S.A. 47:1A-

7.e. because there are certain facts and/or issues in the case that are in dispute and require more in depth proceedings. Specifically, the Council seeks a determination whether Councilman Hugh Sharkey has knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because Councilman Hugh Sharkey failed to comply with the provisions of the Council's July 25, 2007, Interim Order by failing to respond to the custodian's requests attempting to obtain the records responsive to the complainant's November 9, 2006, request and because Councilman Hugh Sharkey failed to respond to the custodian's initial attempt to obtain the records responsive to the Complainant's November 9, 2006, OPRA request?

The GRC has concluded that it is possible that Councilman Hugh Sharkey's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.

If Councilman Hugh Sharkey is found to have knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, a civil penalty may be assessed in accordance with N.J.S.A. 47:1A-11.a. Additionally, appropriate disciplinary proceedings may be initiated against Councilman Hugh Sharkey against whom a penalty has been imposed.

The GRC has been advised by the Office of the Attorney General that because this civil penalty is personal to "a public official, officer, employee or custodian," due process requires a fact-finding hearing before the penalty may be assessed. As such, the case is referred to the OAL for a fact-finding hearing.

The GRC has already determined that the denial of access was unlawful (see the GRC Interim Order included as an exhibit). The Office of Administrative Law has been asked to restrict its fact-finding to whether the unlawful denial of access is unreasonable under the totality of the circumstances pursuant to N.J.S.A. 47:1A-7.e. and N.J.S.A. 47:1A-11.

FACTUAL DISCUSSION

Statement of undisputed facts

The following facts have been gleaned from the documentary record made before the Government Records Council, and are not disputed by the parties. Therefore, I **FIND** the following to be undisputed facts in this matter:

On November 9, 2006, the complainant Allan Johnson submitted a document request to Kimberley Jungfer, the Clerk of the Borough of Oceanport, its Custodian of Records for all internal and external correspondences, including e-mails, belonging to Councilman Hugh Sharkey concerning Borough business between October 1, 2006, and October 20, 2006, including e-mails to and from individuals from the town of Shrewsbury about a November 1, 2006 meeting (C-5B). Ms. Jungfer, the Custodian of Records, made a response on November 20, 2006 (C-5C). When the requested documents were not supplied, the complainant filed a GRC Complaint on April 20, 2007 (C-5A).

At its July 25, 2007, public meeting, the Government Records Council considered the July 18, 2007, Findings and Recommendations of the Executive Director (C-4) and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations (C-3). Based on this the Council made the following findings:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and NJ.S.A. 47:1A-5.i. because although the Custodian responded in writing within the statutorily mandated seven (7) business days, she failed to provide a sufficient response to the Complainant.
2. Pursuant to NJ.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to Councilman Sharkey's e-mails.
3. The Custodian shall obtain the records requested from Councilman Sharkey and provide those records responsive to the Complainant's November 9, 2006 OPRA request with proper redaction, if necessary, to the Complainant.
4. The Custodian shall comply with item #3 above within five (5) business

- days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.
5. Because the Custodian made an effort to obtain the records responsive to the Complainant's November 9, 2006, OPRA request after not finding any records responsive to this request in the municipal files and responded in writing within the statutorily mandated seven (7) business days to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
 6. Because Councilman Sharkey failed to respond to the Custodian's effort to obtain the records responsive to the Complainant's OPRA request, it is possible that Councilman Sharkey's actions were intentional and deliberate, with knowledge of his wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Councilman Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

On July 31, 2007, the Council's Interim Order (C-3) was distributed to the parties. On August 2, 2007, a letter was received by the GRC (C-7A) from Scott C. Arnette, Esq., the custodian's counsel requesting an extension until August 10, 2007, to comply with the Council's Interim Order. On August 3, 2007, a letter from the GRC (C-7B) was sent to the custodian's counsel granting the custodian an extension until August 10, 2007, to comply with the Council's Interim Order.

On August 8, 2007, a letter was received by the GRC from the custodian (C-7C) attaching an August 8, 2007, e-mail to Councilman Hugh Sharkey (C-7D) requesting the

records responsive to this request. The custodian also requested an additional extension to comply with the Council's July 25, 2007, Interim Order (C-7E). The custodian stated that she is doing everything she can to obtain the requested records but that the custodian's attempts to procure the records have not been successful to date. The custodian further stated that she e-mailed Councilman Sharkey to inform him that he must provide all e-mails responsive to the Complainant's November 9, 2006 OPRA request (C-7F). The custodian further asserted that she sent a memo to Councilman Sharkey and advised him that the custodian had five days to comply with the Council's Interim Order of July 25, 2007 (C-7G). The Custodian also stated that she also advised Councilman Sharkey by e-mail of his noncompliance and explained the GRC's decision and the requirements necessary for the custodian to comply (C-7H).

Also on August 8, 2008, the GRC received a copy of an e-mail from Councilman Sharkey to the custodian and her counsel, Scott Arnette, Esq., indicating this was the first notice he received regarding the complaint and requesting that the custodian's counsel forward all correspondence regarding this complaint (C-7I).

Further, on August 8, 2007, an e-mail was sent from the custodian's counsel to the custodian and Councilman Sharkey (C-7K and C-7L) advising Councilman Sharkey that the custodian has all of the decisional documents on this complaint. The custodian's counsel further stated that the custodian has re-requested the records responsive to this complaint because they were not provided at the time of the original request. The custodian's counsel informed Councilman Sharkey that the custodian is making a good faith effort to comply with the GRC's Interim Order and advised Councilman Sharkey to provide any records responsive to the complainant's November 9, 2006, OPRA request, should they exist, to the custodian for compliance.

Finally, on August 8, 2007, the GRC received an e-mail from Councilman Sharkey requesting that the GRC send him all documents received regarding this complaint so that he may comply with the GRC's Interim Order and provide a thorough response (C-7I). Councilman Sharkey also requested an additional two weeks to review this information and prepare the appropriate response.

On August 9, 2007, Councilman Sharkey sent an e-mail to the custodian and custodian's counsel (C-7M) thanking the custodian for faxing the following:

- Fax cover page from the Custodian to Councilman Sharkey dated August 8, 2007.
- Memo from the custodian to Councilman Sharkey dated August 8, 2007.
- GRC Interim Order, dated August 25, 2007.
- Undated OPRA request form submitted by complainant.
- Memo from the Custodian to Councilman Sharkey regarding complainant's OPRA request dated November 9, 2006.

Councilman Sharkey also asked to review any additional decisional documents regarding this complaint.

Also on August 9, 2007, Councilman Sharkey sent an e-mail to the custodian's counsel advising the custodian's counsel that he viewed the "Findings and Recommendations of the Executive Director" for this complaint and noticed that communication not received by the Councilman had taken place (C-7N). Councilman Sharkey requested to receive all communications between the GRC and Borough of Oceanport regarding this complaint. Custodian's counsel then sent an e-mail to the custodian and Councilman Sharkey requesting that the custodian provide the requested documents to Councilman Sharkey. The custodian's counsel also informed Councilman Sharkey that the custodian possesses all documents regarding this matter and further advised Councilman Sharkey to provide any records to the custodian that are responsive to the complainant's November 9, 2006, OPRA request.

On August 10, 2007, Councilman Sharkey sent an e-mail to the custodian and the custodian's counsel advising that he believes he complied with all of his OPRA obligations in November 2006 (C-7N). On that same date, the custodian responded by e-mail to Councilman Sharkey and asserts that since Councilman Sharkey failed to respond in November 2006, he has not complied with the complainant's OPRA request (C-7N). The custodian reiterates that any e-mails responsive to the complainant's request should be provided to the custodian immediately. Also on that same date

Councilman Sharkey sent an e-mail to the custodian's counsel and the GRC attaching an e-mail dated November 8, 2006 (C-7AA). Councilman Sharkey asked the custodian's counsel if the GRC considered the attached e-mail when preparing the "Findings and Recommendations of the Executive Director" (Ibid). Councilman Sharkey asserted that the provided e-mail dated November 8, 2006, is proof of his intention to be open on the "Shrewsbury Dispatch" issue that is the e-mail subject of the complainant's OPRA request.

Councilman Sharkey then provided eleven more e-mails to the custodian's counsel and the GRC over the next four days (C-7Q to C-7Z and C-7AA). Two of the e-mails provided by Councilman Sharkey regard government business and occurred between October 1, 2006 and October 20, 2006, making them responsive to the complainant's OPRA request.

On August 13, 2007, the custodian sent a letter to the GRC (C-7BB) stating that she had e-mailed and placed memos requesting responsive records in Councilman Sharkey's mailbox. The custodian further states that, as of that date, she has not received anything that could be considered responsive to the complainant's November 9, 2006, OPRA request. The custodian further states that she has asked the custodian's counsel to help with this complaint. The custodian finally asserts that she does not know what else to do in order to comply with the Council's July 25, 2007, Interim Order and feels that she has complied to the best of her ability.

On August 13, 2007, the GRC sent a letter to Councilman Sharkey enclosing a copy of the complete file maintained by the GRC relating to this complaint. The GRC also granted a two-week extension and ordered Councilman Sharkey to comply with the Council's Interim Order by September 5, 2007.

On September 5, 2007, Councilman Sharkey sent an e-mail to the GRC asserting that because he has not heard from the GRC, he will assume that his August 10, 2007, e-mail to the custodian stating that he has complied with OPRA has satisfied the requirement of the Interim Order. Councilman Sharkey also asserted that he anticipates the GRC amending their Interim Order to reflect that Councilman Sharkey

has responded twice to the complainant's November 9, 2006, OPRA request.

On September 6, 2007, the GRC sent an e-mail to Councilman Sharkey advising him that he has not complied with the GRC's July 25, 2007, Interim Order requiring him to provide the requested e-mails to the custodian so that she may fulfill the complainant's OPRA request. The GRC further states that Councilman Sharkey was granted a two-week extension yet failed to comply with the Interim Order. The GRC finally states that the GRC will proceed accordingly.

On September 6, 2007, Councilman Sharkey sent an e-mail to the GRC asking why the GRC did not recognize his August 10, 2007, e-mail which asserted that Councilman Sharkey complied with OPRA in November 2006.

On September 14, 2007, the GRC sent an e-mail to Councilman Sharkey stating that Councilman Sharkey's August 10, 2007, e-mail is not responsive to the GRC's Interim Order specifically requiring that Councilman Sharkey provide any records responsive to the custodian in order for her to fulfill the complainant's OPRA request. The GRC further states that even though Councilman Sharkey provided the GRC with several e-mails between August 11, 2007, and August 14, 2007, entitled "For Your Consideration," those e-mails should have been directed to the custodian and were not. The GRC further states that these e-mails do not constitute compliance with the GRC's Interim Order. Therefore, the GRC will proceed accordingly.

On October 10, 2007, the GRC sent an e-mail to Councilman Sharkey requesting that Councilman Sharkey provide a legal certification in support of his contention that he complied with the Council's July 25, 2007, Interim Order requiring that all e-mails responsive to the Complainant's November 9, 2006, OPRA request be provided to the custodian. The GRC also requested that Councilman Sharkey certify as to his practice of e-mail retention. The GRC finally requested that Councilman Sharkey provide this certification to the GRC prior to close of business on Friday, October 12, 2007.

On October 18, 2007, the GRC sent an e-mail to Councilman Sharkey advising him that a legal certification was due prior to close of business on October 12, 2007,

and has yet to be provided to the GRC.

On October 19, 2007, Councilman Sharkey sent an e-mail to the GRC informing the GRC that the Oceanport Borough Council approved a resolution to allow Councilman Sharkey to hire an attorney to amend his previous response to the GRC in the specific legal format required by the GRC. Councilman Sharkey requested a reasonable amount of time to find and retain appropriate legal representation to address this matter.

On October 23, 2007, the GRC sent an e-mail to Councilman Sharkey granting an additional five-day extension for him to submit the requested certification to the GRC. Councilman Sharkey's new deadline was by close of business on Monday October 29, 2007.

Based on the foregoing, the Council determined that the custodian attempted to obtain the records from Councilman Sharkey at the time that the complainant submitted his November 9, 2006, OPRA request and after the Council's Interim Order on July 25, 2007. Councilman Sharkey failed to provide the custodian with records responsive to the complainant's November 9, 2006, OPRA request within the statutorily mandated time frame so that the custodian could provide the requested records legally pursuant to N.J.S.A.47:1A-5.g. and N.J.S.A.47:1A-5.i. and again failed to provide the requested records as required by the Council's July 25, 2007, Interim Order.

The Council stated that, pursuant to Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006), the custodian has a duty to obtain the requested records from Councilman Sharkey. However, the Council found it to be clear that the custodian received inadequate responses from Councilman Sharkey after numerous attempts, even after the Council's Interim Order. While the custodian's duty is to obtain the records, it is reasonable to believe that the continuous delay in access to the requested records is not attributable to the actions of the custodian. Further, Councilman Sharkey failed to submit requested information to the GRC on two occasions within the timeframe set forth by the GRC.

Therefore, the Council found that because Councilman Sharkey's failure to respond on two occasions to the custodian's requests for the records responsive to the complainant's November 9, 2006, OPRA request caused the custodian's non-compliance with the Council's July 25, 2007, Interim Order, and because Councilman Sharkey failed to meet several deadlines for submissions to the GRC, the complaint was referred to the Office of Administrative Law for a determination whether Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Hearing testimony

An evidentiary hearing was conducted before me on May 21, 2008. The hearing testimony provided little additional evidentiary detail concerning this matter.¹ A summary of the portions of this testimony I found to be relevant to the issue before me follows.

Allan Johnson testified that he lived in Oceanport for over 50 years. As a taxpayer and resident, he was interested in a proposal for shared services between the Borough of Oceanport and the Borough of Shrewsbury. Councilman Sharkey was the Borough Council representative and liaison involved in discussing this issue.

Mr. Johnson was present at an Oceanport Borough Council meeting on or about November 1, 2006, when Councilman Sharkey reported on discussions with representatives of the Borough of Shrewsbury about this issue and referred to an e-mail that he had in his possession which referred to this meeting and this subject. Because of his interest, Mr. Johnson made a request of the Oceanport Borough Clerk under OPRA for a copy of this e-mail and other documents related to this issue (C-5B). He had also gone to the Borough of Shrewsbury and made an OPRA request there and he was provided with some information from the Borough of Shrewsbury (C-5D and attachments). The information he received from the Borough of Shrewsbury consists of three e-mails dated October 5, 2006, November 13 and 14, 2006, and October 5, 2006

¹ The complainant appeared at the OAL hearing but was under the impression that this matter was to be prosecuted by a representative of the GRC. When it was explained that this is not the case, he proceeded to present testimony in response to my questioning and his cross-examination by counsel.

(attachments to C-5D). However, his request for public records from the Borough of Oceanport custodian of records was still not forthcoming. He also requested the Shrewsbury police study and obtained a copy of this at a cost of \$19.75. Because he never received a response to from the Oceanport custodian of records, he submitted a denial of access complaint to the Government Records Council (C-5A).

On cross-examination, Mr. Johnson identified the copies of the documents he received from the Borough of Shrewsbury. He received no other documents from Shrewsbury relating to Councilman Sharkey. The first of these is not either to or from Councilman Sharkey. Councilman Sharkey was on a shared services committee and he mentioned at the Borough Council meeting on November 1, 2006, that he had an e-mail from Gene Farrell concerning the sharing of services with Shrewsbury. It is possible that one of the three documents provided to him by the Borough of Shrewsbury may have been the e-mail he referred to.

Mr. Johnson acknowledged that he is a registered Democrat and that Councilman Sharkey is a Republican. As of the date of the hearing, Mr. Johnson no longer lives in Oceanport and has moved to Delaware. He was involved in the first aid squad, as was his wife. However, this has no impact on his request for information. He never received a copy of a memo or e-mail from Councilman Sharkey to Gene Farrell and he did not receive the information from Councilman Sharkey. He obtained copies of documents from Shrewsbury, but none from Sharkey and there was never any response from Sharkey to the Oceanport Borough Clerk. At one point, Councilman Sharkey stated he had already fulfilled the request (C-7P), but this was not the case. He also could not get any information from Mr. Farrell, who is a private individual.

Mr. Johnson stated that at a Council meeting, Councilman Sharkey held up an e-mail regarding this shared services committee meeting, which he identified as such. He indicated that the Shrewsbury police study is not part of the OPRA complaint. In response to questioning by Mr. Arnette, he stated that the records custodian responded to his request for documents on November 20, 2006, by saying, "No response" meaning no response from Councilman Sharkey for the requested documents.

Hugh Sharkey testified in response to the complaint in this case. He was a member of the Oceanport Borough Council from 2005 through 2007, and is a registered Republican. In his interactions with the complainant, Allan Johnson, he indicated that Mr. Johnson has shown him nothing but hostility. Mr. Sharkey testified that he does not know what document Mr. Johnson is talking about. He has searched his computer and has been unable to locate any e-mail from Mr. Farrell. He has nothing in his e-mails related to shared services. Prior to October 2006, he reported to the Borough Council on numerous occasions about discussions and meetings between the municipalities. He also attended a breakfast meeting on shared services as early as February 2006.

As a result of the records request, Councilman Sharkey has done an extensive search. His efforts included an entire weekend spent searching through his computer as well as through any documents and materials he in his possession, but was unable to find anything. He does recall a phone conversation with Mr. Farrell but he believes Mr. Farrell made a mistake when he said there was an e-mail. He checked with Mr. Farrell who does not recall this. He admits there was a shared police dispatch study with Shrewsbury, but Captain Spence released the study and he obtained a copy of the study from the Shrewsbury Borough Clerk in December 2006. He was a committee of one representing Oceanport.

Councilman Sharkey admitted that in November 2006, the borough clerk told him about Mr. Johnson's OPRA request. He responded and the borough clerk should have a copy of his response in her possession. His first notice of the Government Records Council complaint was in August 2007 (C-7I). As he indicated in his e-mail of August 10, 2007 (C-7P), he believed that he complied with his OPRA obligations in November 2006. After this he spent an entire Saturday and Sunday trying to locate any additional documents. In July 2005, he gave documents to Monmouth County Prosecutor's office pursuant to subpoenas relating to Mrs. Johnson. Lieutenant Clark from the Monmouth County Prosecutor's office has documents that can be reviewed. He does not have any documents in his possession concerning any of this.

On cross-examination, Councilman Sharkey testified that he has no personal relationship with Mr. Farrell. He testified that he does not recall holding up an e-mail

from Mr. Farrell at a Borough council meeting. He received a study concerning shared services in December 2006. He admitted he did not pay for the study, and it was provided to him as a member of the Borough council.

Councilman Sharkey testified that he complied with the document request and he did not knowingly or willfully withhold anything. He is a CPA licensed in New Jersey.

Following the hearing Mr. Johnson requested the opportunity to obtain and supply to me the minutes of the October 19, 2006, meeting of the Oceanport Borough Council. He requested this opportunity in order to establish that Councilman Sharkey had an e-mail in his possession at the meeting and failed to supply it pursuant to his OPRA request. I accepted in evidence the minutes of the October 19, 2006, meeting of the Oceanport Borough Council (P-5). It is stated on page five of these minutes, "Councilman Sharkey stated the meeting is on November 1st at 7:30 p.m." There is no reference to any document.

LEGAL DISCUSSION

The Government Records Council (GRC) transmitted this contested case concerning the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. to the Office of Administrative Law (OAL) with the direction to restrict its fact-finding to whether the unlawful denial of access by Councilman Hugh Sharkey is unreasonable under the totality of the circumstances pursuant to N.J.S.A. 47:1A-7(e) and N.J.S.A. 47:1A-11. Therefore, I must decide one issue; whether Councilman Hugh Sharkey "knowingly and willfully violated" N.J.S.A. 47:1A-7(e) by unreasonably denying access to public records?

The Open Public Records Act, N.J.S.A. 47:1A-1, know as "OPRA," states:

1. The Legislature finds and declares it to be the public policy of this State that:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public

interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

N.J.S.A. 47:1A-5 provides

g. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If 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 thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

h. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

i. Unless a shorter time period is otherwise provided by

statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record 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, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. . . . 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.

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

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7).

N.J.S.A. 47:1A-11 provides

a. A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil

penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.

Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

Thus, the Legislature determined that where a public official did not respond appropriately to a request for a public record made in accordance with OPRA, that official may be liable to civil monetary penalties. However, it did not make the mere violation of the Act's provisions the basis for the imposition of these penalties. Only where the official acted "knowingly and willfully" and "unreasonably" denied access does the legislation authorize the penalties set forth in 11a. Thus, the evidence in the case must be tested to determine if the custodian's conduct was sufficiently egregious as to warrant the label "knowing and willful."

Interpretation of "Knowing and Willful"

The standard for imposing a monetary penalty upon a public official who violates OPRA by unreasonably denying access to government records requires a finding that such violation was both "knowing and willful." OPRA contains no definition of these terms. Thus, in order to understand their import, and the burden they place upon one seeking to justify the imposition of such penalties, we must look to case law that has sought to understand these terms in the context of other legislation.

In Executive Comm'n on Ethical Stds. v. Salmon, 295 N.J. Super. 86, (App.Div. 1996) ("Executive Comm'n"), an ethics case brought against a sitting Commissioner of the Board of Public Utilities, the Executive Commission on Ethical Standards (ECES) sought Commissioner Salmon's removal on the grounds that he had acted in "willful and continuous disregard of his ethical obligations." The Appellate Division spoke about the subject of "willful" misconduct, stating:

The meaning of "willful" was defined [by the United States Supreme Court in McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988)] as follows:

In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional". . . . The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.

[Id. at 133, 108 S. Ct. at 1681, 100 L. Ed.2d at 123 (citations omitted).]

This court is not bound by an agency's interpretation of a statute. See Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93, 312 A.2d 497 (1973). We reject the Jiffy June standard as no longer persuasive.

In Fielder v. Stonack, 141 N.J. 101, 125, 661 A.2d 231 (1995), the New Jersey Supreme Court dealt with the meaning of the phrase "willful misconduct" in the context of a police pursuit. The police officer who collided with an innocent motorist could not be exonerated under the applicable statute if his conduct constituted "willful misconduct." In holding that willful misconduct in the context of a police pursuit means "the knowing failure [of a police officer] to follow specific orders[.]" id. at 126, 661 A.2d 231, the Court noted that the phrase "willful misconduct" is not immutably fixed but takes its meaning from the context and purpose of its use. Id. at 125, 661 A.2d 231. The Court further said:

Although willful misconduct need not involve the actual intent to cause harm . . . there must be some knowledge that the act is wrongful. . . . "Willful misconduct" is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.

[Fielder, supra, 141 N.J. at 124, 661 A.2d 231.]

Although the Fielder court formulated its "willful" standard expressly for police-chase scenarios, we find its reasoning to be pertinent in the context of ethics violations. Both scenarios deal with possible malfeasance of a person charged with protection of the public. Cases in the criminal context define the word "willful" as signifying an intentional execution of an unlawful plan which has been conceived and deliberated upon. See, e.g., State v. DiPaolo, 34 N.J. 279, 295, 168 A.2d 401 (1961), cert. denied, 368 U.S. 880, 82 S. Ct. 130, 7 L. Ed. 2d 80 (1961).

Interpretation of N.J.S.A. 52:13D-21(i) must center upon its structure and plain language. Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128, 527 A.2d 1368 (1987). Our consideration is guided by N.J.S.A. 1:1-1 which provides:

In the construction of the laws and statutes of this state . . . words and phrases shall be read and construed with their context, and shall . . . be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

* * *

Accordingly, we determine that conduct, to be considered willful under N.J.S.A. 52:13D-21(i), must be intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional. [Executive Comm'n on Ethical Stds. v. Salmon, supra, 295 N.J. Super. at 105-107.]

In Alston v. City of Camden, 168 N.J. 170 (2001) the Supreme Court also addressed the meaning of "willful misconduct." The Court, citing Fielder, supra, 141 N.J. at 124, 661 A.2d 231, said the following:

. . . [P]laintiff argues that this Court has long recognized that one who acts with the knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, commits an act of willful misconduct.

In Fielder, supra, this Court held that "in the context of a police officer's enforcement of the law, including the pursuit of a fleeing vehicle, willful misconduct is ordinarily limited to a knowing violation of a specific command by a superior, or a standing order, that would subject that officer to discipline." 141 N.J. at 125, 661 A.2d 231. "More particularly, willful misconduct in a police vehicular chase has two elements: 1) disobeying either a specific lawful command of a superior or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated and, intending to violate it." Id. at 126, 661 A.2d 231.

* * *

This Court did note, however, that "[p]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety." Ibid. "It is more than an absence of 'good faith.'" Ibid. (quoting Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95, 473 A.2d 554 (Law Div. 1983)).

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In Fielder, supra, this Court noted that "[p]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety." 141 N.J. at 124, 661 A.2d 231 (citing McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305, 266 A.2d 284 (1970)). However, McLaughlin also may be interpreted to suggest that "reckless" applies only to the "indifference to the consequences" aspect of its holding:

[I]n order to recover for injuries allegedly produced by willful and wanton misconduct, it must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. [McLaughlin, supra, 56 N.J. at 305, 266 A.2d 284.]

[Alston, supra, 168 N.J. at 184-185.]

These cases make it quite clear that there can be no presumption of "willful" misconduct arising simply from the failure of a public official to respond in a timely fashion to a request for production of a public record. Had the Legislature intended to impose civil monetary penalties upon such officials merely for failing to reply within the statutory time frame of seven days, there would have been no need to include the "willful" standard. As the cases discussed above explain, mere negligence or heedlessness of the need to comply with the statute in a timely manner is not enough to label the failure as "willful." There must be some other element of proof to demonstrate that the official acted in reckless disregard of the statutory command, that the lack of response was "intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional." Executive Comm'n, supra. at 107.

Analysis

I **FIND** that there is clear evidence in the record that repeated requests were made of Councilman Hugh Sharkey to provide copies of materials to the Oceanport Custodian of Records in order that the custodian could comply with an OPRA request. The first request consists of a memorandum to Councilman Sharkey from Kimberly A. Jungfer, dated November 9, 2006 (C-5C). This memorandum enclosed a copy of the complainant's OPRA request and requested that Councilman Sharkey advise Ms. Jungfer if he had any of the requested information. It went on to state, "If you have no materials other than the ones previously given would you kindly advise me of that also." When Ms. Jungfer received no response from Councilman Sharkey, she provided to the complainant a copy of the memorandum upon which she wrote, "No response" and included her initials and the date, November 20, 2006. While it may be that this memorandum implies that Councilman Sharkey previously gave materials to Ms. Jungfer, it does not appear that he advised her of this in response to the memo.

After the complainant filed a GRC complaint on April 20, 2007, this matter was investigated by the GRC and the GRC issued a July 25, 2007, Interim Order (C-3). The Oceanport custodian was provided a copy of the interim order, together with the correspondence, and directed to comply with the interim order by providing the requested documents. On August 8, 2007, the custodian sent an e-mail to Councilman Sharkey (C-7D) requesting the records responsive to this request. The custodian sent another e-mail to Councilman Sharkey to inform him that he must provide all e-mails responsive to the complainant's November 9, 2006, OPRA request (C-7F). The custodian also sent another memo to Councilman Sharkey and advised him that she had five days to comply with the Council's interim order of July 25, 2007 (C-7G). She also advised Councilman Sharkey by e-mail of his noncompliance and explained the GRC's decision and the requirements necessary for the custodian to comply (C-7H).

In addition to the above, on August 8, 2007, e-mails were sent from the custodian's counsel to Councilman Sharkey (C-7K and C-7L) advising Councilman Sharkey that the custodian had re-requested from him the records responsive to the complaint because they were not provided by him at the time of the original request. It

does not appear in the record that Councilman Sharkey disputed this assertion. These e-mails further informed Councilman Sharkey that the custodian was making a good faith effort to comply with the interim order and advised Councilman Sharkey to provide to the custodian any records responsive to the complainant's November 9, 2006, OPRA request for compliance. On August 8, 2007, the GRC received an e-mail from Councilman Sharkey requesting copies of all documents regarding this complaint so that he may comply with the interim order and provide a thorough response. On August 9, 2007, custodian's counsel sent another e-mail to Councilman Sharkey advising him to provide any records to the custodian that are responsive to the complainant's November 9, 2006, OPRA request (C-7M). Councilman Sharkey's only response to this was an e-mail sent to the custodian and the custodian's counsel advising that he believed he complied with all of his OPRA obligations in November 2006 (C-7N). In response to this, the custodian responded by e-mail to Councilman Sharkey that since Councilman Sharkey failed to respond in November 2006, he has not complied with the complainant's OPRA request. The custodian reiterated that any e-mails responsive to the complainant's request should be supplied to the custodian immediately (C-7N). On the same date, Councilman Sharkey sent an e-mail to the custodian's counsel and the GRC attaching an e-mail dated November 8, 2006 (C-7AA). He asserted that this e-mail dated November 8, 2006, is proof of his intention to be open on the subject of the complainant's OPRA request (C-7N).

In a case such as this, the complainant faces a heavy burden in order to prove that the violations by the public official were "knowingly and willful." Based on the foregoing, I **FIND** that there were nine requests for documents made of Councilman Sharkey, one on November 9, 2007, six on August 8, 2007 and two on August 9, 2007. It was not until August 11, 2007, that Councilman Sharkey provided eleven more e-mails responsive to the complainant's OPRA request (C-7Q – C-7Z and C-7AA). However, I **FIND** that Councilman Sharkey did not provide a copy of any of these responsive documents to the Oceanport Custodian of Records as required by OPRA. In fact, I **FIND** that there is no evidence in the record that Councilman Sharkey ever provided these responsive documents or any others to the custodian, as required by OPRA, in response to the complainant's OPRA request.

On August 13, 2007, the GRC sent a letter to Councilman Sharkey ordering him to comply with the council's interim order by September 5, 2007. On September 5, 2007, Councilman Sharkey sent an e-mail to the GRC asserting that because he had not heard from the GRC, he will assume his August 10, 2007, e-mail to the custodian stating that he has complied with OPRA has satisfied the requirements of the interim order. It is noted that what he sent to the custodian eleven 11 or twelve e-mails to the custodian that he provided to the custodian's counsel and to the GRC.

However, in this case, Councilman Sharkey was requested to provide responsive documents to the custodian of record on November 9, 2006 (C-5C), and on August 8, 2007 (C-7D, C-7F, C-7G, and C-7H). In addition on August 8, 2007, custodian's counsel advised Councilman Sharkey to provide records responsive to complainant's November 9, 2006, OPRA request to the custodian (C-7K and C-7L). He was again put on notice by an e-mail from the custodian that Councilman Sharkey has not complied with the OPRA request (C-7N).

On August 13, 2007, the GRC ordered Councilman Sharkey to comply with the council's interim order by September 5, 2007.

After considering the totality of the circumstances, and after considering the number of occasions upon which Councilman Hugh Sharkey was notified of his obligation and responsibility to provide documents to the Oceanport Custodian of Records, and after considering the number of times he had an opportunity to provide such documents and failed to do so, and after considering that when he eventually provided copies, they were not provided to the custodian of records as required by the statute, but were provided to others, I **FIND** that Councilman Hugh Sharkey has knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. I make these findings because Councilman Hugh Sharkey failed to comply with the provisions of the Council's July 25, 2007, Interim Order by failing to respond to the custodian's requests attempting to obtain the records responsive to the complainant's November 9, 2006, request, and because Councilman Hugh Sharkey failed to respond to the custodian's initial attempt to obtain the records responsive to the complainant's November 9, 2006, OPRA request. I **FIND** that

Councilman Hugh Sharkey's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent. Based on this finding, Councilman Hugh Sharkey shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a).

DECISION AND ORDER

Based on the foregoing, I hereby **FIND** that Councilman Hugh Sharkey knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and that the conduct and actions of Councilman Hugh Sharkey were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent. Based on this finding, I **ORDER** that Councilman Hugh Sharkey shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a).

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 15, 2008 _____

DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency: _____

Mailed to Parties:

DATE

mph

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES

For petitioner:

Allan Johnson

For respondent-custodian

None

For respondent-councilman

Hugh Sharkey

LIST OF EXHIBITS

ALJ Exhibits:

- C-1 GRC Interim Order, dated November 28, 2007
- C-2 Supplemental Findings and Recommendations of the Executive Director, dated November 21, 2007
- C-3 GRC Interim Order, dated July 25, 2007
- C-4 Findings and Recommendations of the Executive Director, dated July 18, 2007
- C-5A Denial of Access Complaint
- C-5B Request for Public Records
- C-5C November 9, 2008, memo from Kimberly A. Jungfer to Councilman Hugh Sharkey
- C-5D Request Access to Government Records to Shrewsbury Borough
- C-5E October 5, 2006, e-mail (F. Neary)
- C-5F December 14, 2006, e-mail (K. Krueger)
- C-5G October 5, 2006, e-mail (Captain Spencer)
- C-5H Borough of Shrewsbury Receipts
- C-6A Kimberly A. Jungfer letter of May 22, 2007

- C-6B Kimberly A. Jungfer letter of May 22, 2007 with GRC Receipt Stamp
- C-6C Part One Contact Information
- C-6D Part Two about the Denial of Access Complaint
- C-6E Certification
- C-6F Request for Public Records
- C-6G Kimberly A. Jungfer memo to Councilman Sharkey, dated November 9, 2006
- C-6H Item Ten
- C-7A Scott C. Arnette, Esq., letter, dated August 2, 2007
- C-7B Frank F. Caruso, Case Manager, letter, dated August 3, 2007
- C-7C E-mail from Kim Jungfer to Hugh Sharkey, dated August 8, 2007
- C-7D E-mail from Kim Jungfer to Hugh Sharkey, dated August 8, 2007
- C-7E Kimberly A. Jungfer letter, dated August 8, 2007
- C-7F Memo from Kimberly A. Jungfer to Councilman Sharkey, dated August 8, 2007
- C-7G E-mail from Kim Jungfer to Hugh Sharkey, dated August 8, 2007
- C-7H E-mail from Kim Jungfer to Hugh Sharkey, dated August 8, 2007
- C-7I Frank Caruso e-mail from GRC to Frank Caruso
- C-7J E-mail, dated August 8, 2007
- C-7K Additional e-mails
- C-7L E-mail from Scott Arnette to Hugh Sharkey
- C-7M Additional e-mails
- C-7N Additional e-mails
- C-7O E-mail from H. Sharkey, dated August 8, 2007
- C-7P H. Sharkey e-mail to Scott Arnette and Kim Jungfer
- C-7Q E-mail from H. Sharkey to Scott Arnette and GRC
- C-7R E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7S E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7T E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007

- C-7U E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7V E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7W E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7X E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7Y E-mail from H. Sharkey to Scott Arnette and GRC, dated August 11, 2007
- C-7Z E-mail from H. Sharkey forwarding October 28, 2006, e-mail to GRC
- C-7AA E-mail from H. Sharkey to Scott Arnette and GRC, forwarding November 8, 2006, e-mail
- C-7BB August 13, 2007, letter from Kimberly A. Jungfer to GRC
- C-7CC E-mail from Frank Caruso to GRC, dated August 14, 2007, forwarding copies of e-mails
- C-7DD Page Two of the Prior Exhibit
- C-7EE E-mail from Frank Caruso to GRC, dated August 14, 2007, forwarding e-mails
- C-7FF E-mail from Frank Caruso to GRC, dated August 14, 2007, forwarding H. Sharkey e-mail of June 29, 2006
- C-7GG E-mail from H. Sharkey to Kim Jungfer
- C-7HH Catherine Starghill, Esq., Executive Director, GRC, letter, dated August 21, 2007
- C-7II H. Sharkey e-mail to Catherine Starghill, dated September 6, 2007
- C-7JJ H. Sharkey e-mail to Frank Caruso, dated September 5, 2007
- C7-KK Catherine Starghill e-mail to H. Sharkey, dated September 14, 2007
- C7-LL Delivery Notification
- C-7MM Delivery Notification, dated October 10, 2007
- C-7NN E-mail to H. Sharkey containing Guideline for Legal Certification with Delivery Certification attached
- C-7OO Delivery Certification, dated October 18, 2007
- C-7PP E-mail from Frank Caruso to H. Sharkey

- C-7QQ Resolution of the Governing Body of the Borough of Oceanport regarding Legal Fees
- C-7RR E-mail from H. Sharkey to Frank Caruso, dated October 19, 2007
- C-7SS Delivery Notification
- C-7TT E-mail from Frank Caruso to H. Sharkey

For the petitioner:

- P-1 Copies of Receipts from Borough of Shrewsbury to Allan Johnson for Document Requests
- P-2 Firm Profile for Workers Compensation Consultants, Inc., Hugh Sharkey, CPA, President
- P-3A Undated Screen of Hugh Sharkey, CPA, containing Town Data for Little Silver, Oceanport, West Long Branch and Shrewsbury Dispatch Study and 2007 Budget Request
- P-3B Screen showing Oceanport Police Department 2007 Operating Budget Proposal
- P-4 Petitioner's Request for Public Records from the Borough of Oceanport Custodian, requesting copy or Proposed 2007 Police Budget for Oceanport
- P-5 Minutes of the October 19, 2006, meeting of the Oceanport Borough Council

For respondent-custodian

None

For respondent-councilman

None