

New Jersey Government Records Council Denial of Access Complaint

Please read these instructions before completing this form:

- This form is to be used only for claims of denial of access to government records that you want the Government Records Council (GRC) to decide. Your request must have been made on or after July 8, 2002 under "OPRA," the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.).
- Please print or type your responses, and provide ALL information requested. Incomplete forms will delay processing. This form is available in downloadable format from the GRC web site at www.nj.gov/grc.
- Only one complaint is required for each OPRA request form, regardless of the number of documents sought in the request.
- *The GRC recommends that you keep a copy of this complaint for your own files.*

• **MAIL, FAX, OR E-MAIL THIS COMPLAINT AND ALL SUPPORTING DOCUMENTATION TO:**

| | |
|----------------------------|--|
| Government Records Council | Fax: (609) 633-6337 |
| PO Box 819 | E-mail: grc@dca.state.nj.us |
| Trenton, NJ 08625-0819 | |

1. About the Requester of the Records:

Full Name: Libertarians for Transparent Government

Mailing Address: 73 Servis Road

City: Skillman State: NJ ZIP 08558

Please provide a phone number at which GRC staff can contact you between 8 A.M.-5 P.M., Monday-Friday: c/o CJ Griffin, Esq.: 201-488-8200

Fax Number: 201-488-5556

E-Mail Address: transparency@pobox.com

If you are represented by an attorney in this matter, please provide:

Name: CJ Griffin, Esq. @ Pashman Stein Phone Number: 201-488-8200

Address: 21 Main Street, Suite 200, Hackensack, NJ 07601 Fax Number: 201-488-5556

E-mail Address: cgriffin@pashmanstein.com

If you are an attorney who requested records and are filing this complaint **on behalf of a client**, please state the client's name:

2. About the Custodian of Records:

Name of the public agency from which records were requested: Township of Kearny

Name of custodian on whom records request was submitted: Pat Carpenter

Telephone Number: 201-283-5601 E-Mail address (if used): pcarpenter@kearnynj.org

Name of custodian who denied records request (if different from above): Response signed by Lyla De Castro

Telephone Number: _____ E-Mail address (if used): _____

Fax Number: _____

3. About the Record Request:

Date your records request was provided to the custodian: 3/4/16

Did you receive a reply to your request? Yes [X] No []

If so, state the date your request was denied: 3/24/16

Have you previously filed a complaint with the GRC concerning the record request that is subject of this complaint? Yes [] No [X]

If yes, provide the GRC complaint number and a copy of the GRC decision in the matter.

Date: Complaint No.:

Have you spoken with or written to the GRC about the record request that is subject of this complaint?

Yes [] Date: No [X]

Have you filed an action in the N.J. Superior Court concerning the record request that is subject of this complaint?

No [X] Yes [] If Yes, Docket Number:

4. Offer of Mediation (please refer to the attached documents for details):

Are you interested in participating in mediation? Yes [] No [X]

5. Documents to submit with this Form:

- Complete the attached Records Denied List to describe the records to which you were denied access.
Attach a copy of the OPRA Records Request form you filed with the public agency and any correspondence between you and the record custodian(s) or custodial agency staff that concern the portion of your OPRA request that was denied.
Summarize the facts of this complaint by writing the content, time and date of any interaction you had with the custodian regarding the OPRA records request that is the subject of this complaint.
Provide any legal arguments, allegations or other information you would like the GRC to consider in deciding this complaint.
Sign the Agreement to Mediate if you wish to participate in the mediation process.

6. Verification of Complaint:

By signing this complaint, I affirm that:

- I am the person who submitted the OPRA request for records which is the subject of this Complaint;
The information I have provided is true to the best of my knowledge and belief;
The documents submitted with this Complaint are true copies of material which I believe is relevant to my claim;
I am not seeking disclosure of any personal information pertaining to the victim of any crime committed by me, which is an indictable offense under the laws of the State of New Jersey, or any other State, or pertaining to the family of that victim; and
I am simultaneously providing a copy of this complaint to the Custodian of Records.

John Paff Signature (req) Digitally signed by: John Paff DN: CN = John Paff C = US Date: 2016.03.31 17:22:00 -05'00'

Date

**New Jersey Government Records Council
Denial of Access Complaint – Records Denied List**

Name of Complainant: _____

This is page ____ of ____.

Please fill out this form describing the record (or portion of it) to which access has been denied, the response to your request, including the reason given for denial of access. Submit additional pages if necessary.

| Item # | Description of record (or portion) | Response to request |
|--------|---|---|
| 1 | Minutes of all Town Council meetings held in April 2015 and October 2015. Included within this request are minutes of "caucus," "regular" and "closed/executive" meetings. (Request was for records to be e-mailed) | On 3/24/16, Kearny sent a response stating that he had to pay \$5.56 in copying and postage for minutes, despite his request that they be provided electronically. "Additionally, please note that Clerk's Office requires additional time through April 15 th to review and process your request with regard to 'closed/executive' meetings." |
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EXHIBIT A

From: **John Paff** <paff@pobox.com>
Date: Fri, Mar 4, 2016 at 10:31 AM
Subject: OPRA Request Town of Kearny
To: pcarpenter@kearnynj.org, paff@pobox.com

Town of Kearny

Records request submitted by: Libertarians for Transparent Government, a NJ Nonprofit Corporation.

Please accept this as our request under the Open Public Records Act (OPRA) and the common law right of access. Please send all responses and responsive records via e-mail to Transparency@pobox.com. If you have any questions on this request please call [732-873-1251](tel:732-873-1251).

Records requested:

Minutes of all Town Council meetings held in April 2015 and October 2015. Included within this request are minutes of "caucus," "regular" and "closed/executive" meetings.

--end

Attachment: This request as a text file.

EXHIBIT B

From: **Kearny OPRA Center** <KearnyNJ@mycusthelp.net>
Date: Fri, Mar 4, 2016 at 4:42 PM
Subject: OPRA Request :: W002588-030416
To: Transparency@pobox.com

Dear John Paff,

Thank you. We have received your OPRA request.

If records are not readily available or cannot be provided within seven (7) business days, you will be provided with a response within seven (7) business days indicating the time which will be required to provide the records.

Sincerely,

The Town of Kearny

To track your request and respond, visit the **Open Records (OPRA) Center**, then click on "View My OPRA Requests"

EXHIBIT C

From: **Kearny OPRA Center** <KearnyNJ@mycusthelp.net>
Date: Fri, Mar 4, 2016 at 4:42 PM
Subject: Welcome to the Kearny OPRA Center!
To: Transparency@pobox.com

Dear John Paff,

Thank you for registering with the Kearny OPRA Center. Below you will find your login and password information. Please log in to the OPRA Center to update any contact or password information and to track the progress of your request.

Login: Transparency@pobox.com

assword: 

Kearny OPRA Cernter

This is an auto-generated email and has originated from an unmonitored email account. Please DO NOT REPLY.

EXHIBIT D

From: **Kearny OPRA Center** <KearnyNJ@mycusthelp.net>
Date: Thu, Mar 24, 2016 at 4:40 PM
Subject: Town of Kearny Service Request Updated :: W002588-030416
To: Transparency@pobox.com
Cc: "pcarpenter@kearnynj.org" <pcarpenter@kearnynj.org>

--- Please respond above this line ---

Tuesday, March 24, 2016

W002588-030416-OPRA Request

Dear Mr. Paff:

Please be advised records responsive to your OPRA Request are available for retrieval and the total cost of duplication is \$5.56 (\$2.60 copies/\$2.96 postage/ mailing) payable via check in the mail to the Office of the Town Clerk, 402 Kearny Avenue, Kearny, New Jersey 07032. Upon receipt of the required fee, records will be mailed to the address you provided in your records request. If a mailing address was not provided in your OPRA, please provide your address for mailing of the records requested. Additionally, please note the Clerk's Office requires additional time through April 15th to review and process your request with regard to "closed/executive" meetings.

Very truly yours,
Lyla De Castro

EXHIBIT E

Home
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Service Request Type: OPRA Request
Description: OPRA Request
Contact E-Mail: Transparency@pobox.com
Reference No: W002588-030416

*** Type of Information Requested:** Meeting Minutes
*** Describe the document(s) you are requesting:** Minutes of all Town Council Meetings held in April 2015 and October 2015. Included within this request are minutes of "caucus" "Regular" and "closed/executive"
*** Preferred Method to Receive Documents:**

- Inspect
- Pick-up Copies
- Electronic by Email (no more than 2 pages)
- Copies by US Mail
- Copies by Fax (no more than 2 pages)

Message History

On 3/24/2016 4:39:08 PM, Kearny OPRA Center wrote:
 CC: pcarpenter@kearnynj.org
 Tuesday, March 24, 2016

W002588-030416-OPRA Request

Dear Mr. Paff:

Please be advised records responsive to your OPRA Request are available for retrieval and the total cost of duplication is \$5.56 (\$2.60 copies/\$2.96 postage/ mailing) payable via check in the mail to the Office of the Town Clerk, 402 Kearny Avenue, Kearny, New Jersey 07032. Upon receipt of the required fee, records will be mailed to the address you provided in your records request. If a mailing address was not provided in your OPRA, please provide your address for mailing of the records requested. Additionally, please note the Clerk's Office requires additional time through April 15th to review and process your request with regard to "closed/executive" meetings.

Very truly yours,
 Lyla De Castro

On 3/4/2016 4:41:00 PM, Kearny OPRA Center wrote:
 Request was created by staff

On 3/4/2016 4:41:00 PM, Kearny OPRA Center wrote:
 Dear John Paff,

Thank you. We have received your OPRA request.

If records are not readily available or cannot be provided within seven (7) business days, you will be provided with a response within seven (7) business days indicating the time which will be required to provide the records.

Sincerely,

The Town of Kearny

To track your request and respond, visit the [Open Records \(OPRA\) Center](#), then click on "View My OPRA Requests"



EXHIBIT F

[Home](#) [Find Information](#) [Submit Open Records Request](#)

[View My Issues](#) | [Update Your Contact Informa](#)

My Requests

Search Criteria Please Select Equals

| <u>Reference No</u> | <u>Type</u> | <u>Summary</u> | <u>Status</u> | <u>Create Date</u> |
|-----------------------|--------------|-----------------|---------------------|--------------------|
| <u>W002588-030416</u> | OPRA Request | Meeting Minutes | Waiting for Payment | 3/4/2016 |



EXHIBIT G



Town of Kearny
New Jersey

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Meeting Calendar



Displaying 24 meetings from 1/1/2014 to 12/31/2014 for All Meeting Groups

Date: 2016, 2015, **2014**, 2013, 2012, 2011, 2010, 2009, 2008, 2007, All

Group: All Meeting Groups

View: [List](#) | [Calendar](#)

January, 2014

| | | |
|--|------------------------|--------------------------------|
| Jan 3, 2014 6:00 PM Council - Organization Meeting | Agenda | Minutes Packet |
| Jan 14, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| Jan 28, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

February, 2014

| | | |
|--|------------------------|--------------------------------|
| Feb 11, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| Feb 25, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

March, 2014

| | | |
|--|------------------------|--------------------------------|
| Mar 11, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| Mar 25, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

April, 2014

| | | |
|--|------------------------|--------------------------------|
| Apr 8, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| Apr 22, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

May, 2014

| | | |
|--|------------------------|--------------------------------|
| May 13, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| May 27, 2014 6:00 PM Council - Special Meeting | Agenda | Minutes Packet |
| May 27, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

June, 2014

| | | |
|--|------------------------|--------------------------------|
| Jun 10, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| Jun 24, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

July, 2014

| | | |
|--|------------------------|--------------------------------|
| Jul 15, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
|--|------------------------|--------------------------------|

August, 2014

| | | |
|--|------------------------|--------------------------------|
| <input type="checkbox"/> Aug 5, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
|--|------------------------|--------------------------------|

September, 2014

| | | |
|---|------------------------|--------------------------------|
| <input type="checkbox"/> Sep 9, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| <input type="checkbox"/> Sep 23, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

October, 2014

| | | |
|---|------------------------|--------------------------------|
| <input type="checkbox"/> Oct 14, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |
| <input type="checkbox"/> Oct 29, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | Minutes Packet |

November, 2014

| | | | | |
|---|------------------------|--|--|--|
| <input type="checkbox"/> Nov 12, 2014 7:00 PM Council - Caucus / Regular Meeting | Agenda | | | |
|---|------------------------|--|--|--|

December, 2014

| | | | | |
|--|--|--|--|--|
| <input type="checkbox"/> Dec 2, 2014 7:00 PM Council - Caucus / Regular Meeting | | | | |
| <input type="checkbox"/> Dec 16, 2014 6:00 PM Council - Special Meeting | | | | |
| <input type="checkbox"/> Dec 29, 2014 6:00 PM Council - Special Meeting | | | | |

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Town of Kearny

New Jersey

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Meeting Calendar



Displaying 26 meetings from 1/1/2015 to 12/31/2015 for All Meeting Groups

Date: 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2008, 2007, All

Group: All Meeting Groups

View: [List](#) | [Calendar](#)

January, 2015

- Jan 6, 2015 6:00 PM
Council - Organization Meeting
- Jan 13, 2015 7:00 PM
Council - Caucus / Regular Meeting

February, 2015

- Feb 2, 2015 8:00 PM
Council - Caucus / Regular Meeting
- Feb 10, 2015 7:00 PM
Council - Caucus / Regular Meeting
- Feb 24, 2015 7:00 PM
Council - Caucus / Regular Meeting

March, 2015

- Mar 16, 2015 6:00 PM
Council - Caucus / Regular Meeting
- Mar 24, 2015 7:00 PM
Council - Caucus / Regular Meeting

April, 2015

- Apr 14, 2015 7:00 PM
Council - Caucus / Regular Meeting
- Apr 28, 2015 7:00 PM
Council - Caucus / Regular Meeting

May, 2015

- May 12, 2015 7:00 PM
Council - Caucus / Regular Meeting
- May 26, 2015 7:00 PM
Council - Caucus / Regular Meeting

June, 2015

- Jun 9, 2015 7:00 PM
Council - Caucus / Regular Meeting
- Jun 24, 2015 7:00 PM
Council - Caucus / Regular Meeting

July, 2015

- Jul 14, 2015 7:00 PM
Council - Caucus / Regular Meeting
- Jul 28, 2015 6:00 PM
Council - Special Meeting

| Month | Date | Time | Meeting Type |
|------------------------|--------------|---------|------------------------------------|
| August, 2015 | | | |
| | Aug 4, 2015 | 6:00 PM | Council - Special Meeting |
| | Aug 11, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| September, 2015 | | | |
| | Sep 1, 2015 | 6:00 PM | Council - Special Meeting |
| | Sep 8, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| | Sep 22, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| October, 2015 | | | |
| | Oct 13, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| | Oct 27, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| November, 2015 | | | |
| | Nov 10, 2015 | 6:00 PM | Council - Special Meeting |
| | Nov 10, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| December, 2015 | | | |
| | Dec 15, 2015 | 7:00 PM | Council - Caucus / Regular Meeting |
| | Dec 28, 2015 | 6:00 PM | Council - Special Meeting |

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EXHIBIT H



| | | | | |
|----------|-----------------|--------------|----------------------|------------------|
| HOME | MAYOR & COUNCIL | E-GOVERNMENT | DEPARTMENT DIRECTORY | TOWN INFORMATION |
| CALENDAR | KEARNY UEZ | | | |

Notice: Undefined index: rf95533 in include_once() (line 1 of /home/kearnynj/public_html/sites/all/themes/keamy/template.php).

UPCOMING EVENTS

- Mayor and Council Meeting
April 12, 2016
- Annual Passaic River and Town Cleanup
April 23, 2016
- "Deadline to Register to Vote in 2016 Primary Election"
May 17, 2016

ALERTS

- Kearny Recreation Spring Open Pool Program
- Kearny Recreation Girls Softball League Registrations
- Préstamos de desastre de SBA para nueva declaración Sandy sobre 5 Millones; ¿Has solicitado?
- SBA Disaster Loans for New Sandy Declaration Tops \$5 Million; Have You Applied?
- PSE&G warns customers about increase in scams
- Time for dog & cat owners to renew their 2016 pets'

Mayor & Council Agendas/Minutes

| Agenda | |
|--------------------|---|
| March 22, 2016 | 7...March 22, 2016-Regular Meeting & Swearings-in of Firefighters.doc |
| March 8, 2016 | 6...March 08, 2016-Regular Meeting.doc |
| February 23, 2016 | 5...February_23,_2016-Regular_Meeting.doc.pdf |
| February 9, 2016 | 4...February 9, 2016-Regular Meeting.doc |
| January 26, 2016 | 3...January 26, 2016-Regular Meeting.doc |
| January 12, 2016 | 2...January 12, 2016-Regular Meeting.doc |
| January 6, 2016 | 1...January 06, 2016-Reorganization Meeting.doc |
| December 15, 2015 | 28..December 15, 2015-Regular Meeting.pdf |
| November 10, 2015 | 26..November 10, 2015-Regular Meeting.doc |
| October 27, 2015 | 24..October 27, 2015-Regular Meeting.doc |
| October 13, 2015 | 23..October 13, 2015-Regular Meeting.doc |
| September 22, 2015 | 22..September 22, 2015-Regular Meeting.doc |
| September 8, 2015 | 21..September 8, 2015-Regular Meeting.doc |
| August 11, 2015 | 19..August 11, 2015-Regular Meeting.doc |
| | 19..August 11, 2015-Regular Meeting.doc |
| July 14, 2015 | 16 July 14 2015-Regular Meeting.pdf |
| June 24, 2015 | 15..June 24, 2015-Regular Meeting.doc |

license

- SUPPORTIVE SERVICES FOR VETERAN FAMILIES (SSVF) PROGRAM

PUBLIC

ANNOUNCEMENTS

- Mosquito Control Information
- Spring Leaf Bag Collecting
- Mayor Santos Of Kearny Announces Upcoming Civil Service Exam For Municipal Police Officer
- SBA to Close Some Recovery Centers in New Jersey; Last Chance to Get One-On-One Assistance
- Zika Virus - Frequently Asked Questions

Agenda

| | |
|--------------|--|
| June 9, 2015 |  doc039518201506091557002.pdf |
| May 26, 2015 |  13..May 26, 2015-Regular Meeting.doc |
| May 12, 2015 |  12..May 12, 2015-Regular Meeting.doc |

| | | | | | |
|-------------------|-------------------|-------------------|-------------------|------------------------|------------------------|
| 1 | 2 | 3 | 4 | next » | last » |
|-------------------|-------------------|-------------------|-------------------|------------------------|------------------------|

Main Number: (201) 955-7400

Graffiti / Pothole Hotline: (201) 955-7889

April 1, 2016

Government Records Council
101 S Broad Street
Trenton, NJ 08608

Re: *Libertarians for Transparent Government v. Town of Kearny*
GRC Complaint No: _____
Our File No. 9932-011

Dear Council:

This firm represents Complainant, John Paff, in the above-captioned matter. Please accept this letter brief, in lieu of a more formal brief, in support of Complainant's complaint seeking relief from Defendant's denial of the Open Public Records Act ("OPRA") request.

STATEMENT OF FACTS

On March 4, 2016, John Paff submitted an OPRA request on behalf of Libertarians for Transparent Government (a non-profit organization) to the Town of Kearny ("Kearny") via e-mail. The request stated:

Records request submitted by: Libertarians for Transparent Government, a NJ Nonprofit Corporation.

Please accept this as our request under the Open Public Records Act (OPRA) and the common law right of access. Please send all responses and responsive records via e-mail to Transparency@pobox.com. If you have any questions on this request please call 732-873-1251.

Records requested:

Minutes of all Town Council meetings held in April 2015 and October 2015. Included within this request are minutes of "caucus," "regular" and "closed/executive" meetings.

[Attached as Exhibit A.]

That afternoon, transparency@pobox.com received two e-mails from Kearny. The first simply confirmed that the request was received. [Attached as Exhibit B.] The second was a computer-generated e-mail that provided a log-in and password for "Kearny OPRA Center," Kearny's online OPRA portal. [Attached as Exhibit C.]

No other response was received until 14 business days later, when transparency@pobox.com received the following response:

Please be advised records responsive to your OPRA Request are available for retrieval and the total cost of duplication is \$5.56 (\$2.60 copies/\$2.96 postage/mailing) payable via check in the mail to the Office of the Town Clerk, 402 Kearny Avenue, Kearny, New Jersey 07032. Upon receipt of the required fee, records will be mailed to the address you provided in your records request. If a mailing address was not provided in your OPRA, please provide your address for mailing of the records requested. Additionally, please note the Clerk's Office requires additional time through April 15th to review and process your request with regard to "closed/executive" meetings.

Very truly yours,
Lyla De Castro

[Attached as Exhibit D.]

Because Mr. Paff had clearly indicated that he wanted the records to be e-mailed to him, he logged in to Kearny OPRA Center to check the status of his request. After logging in, he was able to determine that Kearny has a policy of only providing electronic responses by e-mail if the record is "no more than 2 pages." [See Exhibit E.]

To date, Mr. Paff has not paid the unlawful fee and Kearny OPRA Center shows the status as "Waiting for Payment." [See Exhibit F.] To date, Kearny has not produced any "closed/executive" session minutes.

ARGUMENT

OPRA's purpose is "to maximize public knowledge about public affairs and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Lakewood Residents Assoc., Inc. v. Twp. of Lakewood, 294 N.J. Super. 207, 225 (Law Div. 1994)). A citizen's right to access public records has been deemed "unfettered" absent a statutory exemption. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003). Accordingly, pursuant to OPRA,

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 [OPRA] shall be construed in favor of the public's right of access.

[N.J.S.A. 47:1A-1 (emphasis added).]

It is thus the public agency's burden to prove that denial of access is authorized by law. N.J.S.A. 47:1A-6. Based on the reasons below, Kearny cannot meet that burden.

I. DEFENDANTS HAVE VIOLATED THE OPEN PUBLIC RECORDS ACT BY FAILING TO RESPOND TO PLAINTIFF'S OPRA REQUEST IN A TIMELY MANNER

"OPRA's framework calls for quick action" and "swift access" to government records.

Mason, supra, 196 N.J. at 69. Accordingly, N.J.S.A. 47:1A-5(i) provides, in relevant in part:

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 [...]. 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.

[N.J.S.A. 47:1A-5(i)(emphasis added)].

Where an extension is needed, the request for an extension must occur within the 7-day timeframe. See N.J.S.A. 47:1A-5(g) (“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.”). The failure to respond to a request in some manner within seven business days or there is a “deemed denial” of the request. N.J.S.A. 47:1A-5(i). Indeed, pursuant to the GRC’s Custodian Handbook:

What is the time frame for a records custodian to respond to an OPRA request?

Custodians should fulfill a request as soon as possible but not later than seven business days after the request is received, provided that the record is currently available and not in storage or archived. N.J.S.A. 47:1A-5.i. Day One (1) is the day following the custodian’s receipt of the request.

It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

If the custodian fails to respond to the requestor within seven business days after receiving a request, the failure to respond will be deemed a denial of the request. N.J.S.A. 47:1A-5.i.

[Custodian’s Handbook at 16.]

Here, Mr. Paff submitted a request on Complainant’s behalf on March 4, 2016. The seventh day to respond therefore would have been by March 15, 2016. Kearny did not respond by that date or contact Mr. Paff to seek an extension of time. Instead, on March 24, 2016, which is the 14th business day after Mr. Paff submitted the request, Kearny submitted a response. While Complainant will detail below why that response was unlawful in other regards, it is important to note that Kearny first violated the statute by failing to comply with OPRA’s timelines. Kearny’s response constitutes a deemed denial of Complainant’s request. See, e.g.

Kelley v. Township of Rockaway (Morris), GRC Complaint No.: 2007-11 (November 15, 2007)

(Interim Order)(“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.”)

II. DEFENDANTS HAVE VIOLATED THE OPEN PUBLIC RECORDS ACT BY CHARGING FOR COPIES OF RECORDS THAT WERE REQUESTED TO BE PRODUCED IN ELECTRONIC FORMAT

OPRA expressly states that “electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.” N.J.S.A. 47:1A-5(b). The GRC’s Custodian Handbook warns agencies to be careful in imposing charges for electronic records:

A custodian must grant access to a government record by the method of delivery requested by the requestor (regular mail, fax, or e-mail). O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). Charges for such delivery must reflect actual cost. Be careful before attempting to charge for fax or e-mail deliveries. Unless you can prove actual cost, you are not allowed to charge anything.

[Custodian Handbook at 24.]

Here, Kearny has adopted a policy only providing a requestor electronic copies of records if the total page number is less than two pages. This policy contradicts OPRA’s requirement that public agencies grant access to the record “in the medium requested,” N.J.S.A. 47:1A-5(d), as well as the requirement that they cannot charge more than the “actual cost” of producing a record electronically. N.J.S.A. 47:1A-5(b). This is not a circumstance where Kearny does not have access to electronic versions of documents—the minutes are typed in some word processing

program and could have been produced in that format. Indeed, Mr. Paff notes that Kearny has routinely posted electronic versions of their minutes, agenda, etc. on its website (though it has not done so for any of the meetings Mr. Paff has requested). [See Exhibits G and H.] Accordingly, Kearny cannot argue it does not maintain these records in electronic format.

Alternatively, Kearny could have produced a PDF of the minutes by scanning them and e-mailing them to Mr. Paff. Instead, Kearny opted to adopt a policy whereby it will not produce more than two pages electronically and they imposed (without any advance notice or justification)¹ a copying charge and postage charge upon Complainant and refuse to produce the records until the payment is received.

Accordingly, Kearny violated OPRA by simply notifying Complainant that it must pay copying charges and postage charges for records that it had requested in electronic form, all because Kearny has adopted a policy that does not comply with OPRA's clear statutory requirements.

CONCLUSION

For the foregoing reasons, Paff respectfully asks this council to enforce his statutory rights under OPRA by: 1) finding Kearny in violation of OPRA for failing to timely respond to Complainant's request, unlawfully charging copying and postage charges, and failing to produce

¹ While OPRA does permit a records custodian to provide records in a medium other than the one requested if the government agency does not actually keep records in the requested medium, the custodian must still state the specific basis why they are unable to produce records in the requested medium in compliance with the request. N.J.S.A. 47:1A-5(d, g). See also Gannett Satellite Information Network, Inc. v. Borough of Raritan, 2012 WL 3563031 at *2 (Law Div. August 15, 2012)(Government agency denied OPRA request by attempting to produce payroll records in PDF instead of digital format as requested.) ; O'Shea v. Township of Fredon (Sussex), GRC Complaint No.: 2007-251 at *7 (April 30, 2008)(the custodian is required to explain why the requested medium is not available if responsive records are not produced in the requested medium.).

the records in the medium requested; 2) ordering Kearny to withdraw its request for copying and postage charges; 3) ordering Kearny to produce the records electronically via e-mail without any charges; 4) ordering Kearny to produce the closed/executive session minutes; and 5) awarding Complainant reasonable attorneys' fees and costs of suit as a prevailing party, pursuant to N.J.S.A. 47:1A-6.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'CJ Griffin', with a long horizontal flourish extending to the right.

CJ Griffin