

Imposing Personal Penalties Upon Those Who Knowingly Violate OPRA - NJ OPRA Blog

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Today, *The Record* published a story about the Borough of Wallington's decision to suspend its Borough Clerk and file tenure charges against him with the state Department of Community Affairs. According to *The Record*, the Clerk is charged with "serious deficiencies," including failing to comply with OPRA's statutory time frames "43 times in 2018 and 36 times in 2017."

PSWH Partner CJ Griffin is quoted in the article and discusses the potential liability both a public agency and its records custodian (or other employees) could face for violating OPRA.

Most OPRA cases involve an "ordinary" denial of access that occurred for one reason or the other. It may be that the records custodian or person responding to the OPRA request applied the law incorrectly or that the law was unclear as to whether a record is exempt or not. A records requestor has a right to challenge such a denial and if the court agrees that the response was unlawful, the remedy is that the court will order the record to be released and require the public agency to pay the requestor's reasonable attorneys' fees. No public employee personally pays these attorneys' fees, even if they were the ones who came to the wrong conclusion to withhold a government record from public access.

Beyond the "ordinary" OPRA case, a requestor can seek personal penalties against the records custodian or person responding to the OPRA request. Pursuant to N.J.S.A. 47:1A-11(a):

"[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA] . . . 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.”

The fine is imposed upon the public official, officer, employee or custodian personally and the agency does not pay this fine.

What constitutes a knowing and willful violation of OPRA? There is not a lot of case law on this, but it is clear that in order for the denial to be considered willful the person responding to the request must have actual knowledge that their actions are unlawful.