



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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ROBIN BERG TABAKIN, Chair  
COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**February 25, 2009 Government Records Council Meeting**

Sandra Louise Schuler  
Complainant

Complaint No. 2007-151

v.

Borough of Bloomsbury (Hunterdon)  
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge's Initial Decision dated February 6, 2009. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of February, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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



David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: March 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 25, 2009 Council Meeting**

**Sandra Louise Schuler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-151**

v.

**Borough of Bloomsbury (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. From the Borough Engineer's files: all topography maps/views on file from 1990 to present for Main St.; North St.; Wilson St. Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
2. From the Borough Engineer's files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
3. From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
4. From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
5. From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St.
6. From the Bloomsbury Fire Department: any and all times since 1990 the department has received requests to pump out basement and/or yard for Block 25, Lot 7 (125 Main St.).

**Request Made:** May 14, 2007

**Response Made:** May 21, 2007 and June 5, 2007<sup>3</sup>

**Custodian:** Lisa Burd

**GRC Complaint Filed:** June 25, 2007

**Background**

**March 26, 2008**

Government Records Council's ("Council") Interim Order. At its March 26, 2008 public meeting, the Council considered the March 19, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by

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<sup>1</sup> Represented by Walter M. Luers, Esq. (Oxford, NJ).

<sup>2</sup> Represented by William Edleston, Esq. (Phillipsburg, NJ).

<sup>3</sup> The Custodian verbally informed the Complainant on June 5, 2007 that she had forwarded the Complainant's OPRA requests to the Borough Attorney.

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. The Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer;
2. The Custodian is in violation of the Council's December 19, 2007 Interim Order by not providing the requested records to the Complainant or a certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the time period ordered by the Council or extended by the GRC.

**March 27, 2008**

Council's Interim Order distributed to the parties.

**May 21, 2008**

Complaint transmitted to the Office of Administrative Law.

**February 6, 2009**

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ finds that:

"[the Custodian] did not knowingly and willfully violate OPRA under the totality of the circumstances. Although [the Custodian] recognizes that she has a non-delegable duty in the discharge of her requirements pursuant to OPRA, when the issue arose of complying with the OPRA request related to the borough engineer documents, the mayor instructed [the Custodian] to be guided by legal counsel. As is clear from the memorandum to [the Custodian], [counsel's] letters to the GRC and [counsel's] submissions before me, [counsel] instructed [the Custodian] that she was not obligated to comply because she had no control of the engineer's files in that he was not employed by the borough. (Nonetheless, [the Custodian] did forward the OPRA request to the engineer, the fire chief, current counsel and former counsel all in an attempt to provide a response to [the Complainant's] OPRA requests). And ultimately, the documentation was provided. Additionally, with regard to the failure to provide the Statement of Information or the Certification of Compliance as directed by the GRC, once again, [the Custodian] was instructed by the mayor to seek legal advice from [counsel]. It was [counsel] who then did not advise [the Custodian] to complete the Statement of Information which led to the GRC issuing its findings without any submission from the records custodian. So too, it was [counsel] who requested an extension of time to file the Certification and then did not advise [the Custodian] nor prepare a certification in accordance with R. 1:4-4, for her signature."

Based on the foregoing, the ALJ **FINDS** that “there was no knowing and willful violation of OPRA and that the records custodian did not unreasonably deny access to records under the totality of the circumstances.”

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council accept the Administrative Law Judge’s Initial Decision dated February 6, 2009. Therefore, no further adjudication is required.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 18, 2009



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**INTERIM ORDER**

**March 26, 2008 Government Records Council Meeting**

Sandra Louise Schuler  
Complainant

Complaint No. 2007-151

v.

Borough of Bloomsbury  
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 19, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. The Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer;
2. The Custodian is in violation of the Council's December 19, 2007 Interim Order by not providing the requested records to the Complainant or a certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the time period ordered by the Council or extended by the GRC.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of March, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council



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

Janice Kovach  
Government Records Council

**Decision Distribution Date: March 27, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 26, 2008 Council Meeting**

**Sandra Louise Schuler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-151**

v.

**Borough of Bloomsbury (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. From the Borough Engineer's files: all topography maps/views on file from 1990 to present for Main St.; North St.; Wilson St. Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
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3. From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
4. From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
5. From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St.
6. From the Bloomsbury Fire Department: any and all times since 1990 the department has received requests to pump out basement and/or yard for Block 25, Lot 7 (125 Main St.).

**Request Made:** May 14, 2007

**Response Made:** May 21, 2007 and June 5, 2007<sup>3</sup>

**Custodian:** Lisa Burd

**GRC Complaint Filed:** June 25, 2007

**Background**

**December 19, 2007**

Government Records Council's ("Council") Interim Order. At its December 19, 2007 public meeting, the Council considered the December 12, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by

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<sup>1</sup> Represented by Erica Edwards, Esq. (Flemington, NJ); however, the Complainant requests that her attorney not be contacted regarding this matter.

<sup>2</sup> Represented by William Edleston, Esq. (Phillipsburg, NJ).

<sup>3</sup> The Custodian verbally informed the Complainant on June 5, 2007 that she had forwarded the Complainant's OPRA requests to the Borough Attorney.



the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian is required to respond to each OPRA request individually pursuant to Martin O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (May 2005).
2. Because the Custodian failed to legally certify whether her letter dated May 21, 2007 is in response to the Complainant's OPRA requests dated May 14, 2007, said requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian did not specifically grant or deny access to the requested records in the Custodian's letter to the Complainant dated May 21, 2007, the Custodian's response is inadequate pursuant to OPRA.
4. While seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary. Thus, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to item # 1 of the Complainant's request.
5. Because the work done by the Borough Engineer, Robert Zederbaum, is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access. As such, the Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer pursuant to Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007) and the Custodian should provide the requested records from the Borough Engineer's files to the Complainant.
6. **The Custodian shall comply with item # 5 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.**
7. Because the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag

Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005).

8. Although the Complainant's request is for information rather than identifiable government records, and as such is not a valid OPRA request pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), because the Custodian failed to complete the requested Statement of Information (and by doing so failing to legally certify to her actions regarding the requests at issue in this complaint), the Custodian has not carried her burden of proving a lawful denial of access to item # 6 of the Complainant's request pursuant to N.J.S.A. 47:1A-6.
9. The Council defers analysis and determination of whether the Custodian and/or the Borough Engineer knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

**December 20, 2007**

Council's Interim Order distributed to the parties.

**December 21, 2007**

E-mail from Custodian's Counsel to GRC. Counsel states that Borough offices will be closed for the holiday through January 1, 2008 and requests an extension of time to comply with the Council's Interim Order.

**December 28, 2007**

E-mail from GRC to Custodian's Counsel. The GRC grants an extension of time until the close of business on January 11, 2008 for the Custodian to comply with the Council's Interim Order.

**January 17, 2008**

Letter from Custodian's Counsel to GRC.<sup>4</sup> Counsel asserts that all records on file with the Borough have been made available to the Complainant on a continuing basis. Counsel contends that there are no other records that exist in either the Borough's files or the Engineer's office that are responsive to the Complainant's request. Counsel states that a copy of a road design, which the Complainant may have already viewed, will be provided to the Complainant as soon as it is received by Counsel.

**January 24, 2008**

Letter from Complainant to GRC. The Complainant requests that the GRC consider all the actions and inactions of the Borough regarding this complaint, specifically the Custodian Counsel's late response to the Council's Interim Order.

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<sup>4</sup> The GRC received said letter from the Complainant and not the Custodian's Counsel.

**January 30, 2008<sup>5</sup>**

Letter from Custodian's Counsel to Complainant. Counsel states that the plan entitled "Reconstruction of North Main Street, Station 0 to Station 9 Plus 25" dated May 19, 1994 is available for the Complainant's review in the Municipal Building. Counsel states that the Borough Engineer advised that any additional information has been transmitted to the Borough for its files. Counsel asserts that the Complainant has had ample opportunities to inspect all of the Borough's files regarding this matter. Counsel contends that there are no additional records responsive to the Complainant's request that the Complainant has not already had the opportunity to inspect.

### **Analysis**

#### **Whether the Custodian complied with the Council's December 19, 2007 Interim Order?**

Because the Borough's offices were closed for the holiday through January 1, 2008, the GRC granted the Custodian an extension until the close of business on January 11, 2008 to comply with the Council's December 19, 2007 Interim Order, thus extending the Custodian's compliance time frame from five (5) business days to eight (8) business days.

Although the Custodian's Counsel provided the GRC with a written submission indicating that he would provide the Complainant with a copy of a road design as soon as he receives said record and subsequently advised the Complainant in writing that said record is available for review, the Custodian has not complied with the Council's Interim Order because the Custodian failed to grant the Complainant access to the requested records from the Borough Engineer's files within the ordered and extended time frame as well as because the Custodian failed to provide the Executive Director with a certified confirmation of compliance pursuant to NJ Court Rule 1:4-4.

Therefore, because the Custodian has not complied with the Council's December 19, 2007 Interim Order, the Custodian is in violation of such Order.

#### **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:

"[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.

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<sup>5</sup> The GRC received said letter from the Complainant.

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 the Custodian unlawfully denied access to the records responsive to item # 1 of the Complainant’s request which are maintained on file by the Borough Engineer and because the Custodian is in violation of the Council’s December 19, 2007 Interim Order by not providing the requested records to the Complainant or a certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the ordered or extended time period, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. The Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer.

2. The Custodian is in violation of the Council's December 19, 2007 Interim Order by not providing the requested records to the Complainant or a certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within the time period ordered by the Council or extended by the GRC.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

March 19, 2008



## 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

#### December 19, 2007 Government Records Council Meeting

Sandra Schuler  
Complainant

Complaint No. 2007-151

v.

Borough of Bloomsbury (Hunterdon)  
Custodian of Record

At the December 19, 2007 public meeting, the Government Records Council (“Council”) considered the December 12, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations by majority vote. The Council, therefore, finds:

1. The Custodian is required to respond to each OPRA request individually pursuant to Martin O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (May 2005).
2. Because the Custodian failed to legally certify whether her letter dated May 21, 2007 is in response to the Complainant’s OPRA requests dated May 14, 2007, said requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian did not specifically grant or deny access to the requested records in the Custodian’s letter to the Complainant dated May 21, 2007, the Custodian’s response is inadequate pursuant to OPRA.
4. While seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary. Thus, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to item # 1 of the Complainant’s request.



5. Because the work done by the Borough Engineer, Robert Zederbaum, is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access. As such, the Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer pursuant to Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007) and the Custodian should provide the requested records from the Borough Engineer's files to the Complainant.
6. **The Custodian shall comply with item # 5 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.**
7. Because the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005).
8. Although the Complainant's request is for information rather than identifiable government records, and as such is not a valid OPRA request pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), because the Custodian failed to complete the requested Statement of Information (and by doing so failing to legally certify to her actions regarding the requests at issue in this complaint), the Custodian has not carried her burden of proving a lawful denial of access to item # 6 of the Complainant's request pursuant to N.J.S.A. 47:1A-6.
9. The Council defers analysis and determination of whether the Custodian and/or the Borough Engineer knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Interim Order Rendered by the  
Government Records Council  
On The 19<sup>th</sup> Day of December, 2007

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: December 20, 2007**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 19, 2007 Council Meeting**

**Sandra Louise Schuler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-151**

v.

**Borough of Bloomsbury (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. From the Borough Engineer's files: all topography maps/views on file from 1990 to present for Main St.; North St.; Wilson St. Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
2. From the Borough Engineer's files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
3. From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
4. From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
5. From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St.
6. From the Bloomsbury Fire Department: any and all times since 1990 the department has received requests to pump out basement and/or yard for Block 25, Lot 7 (125 Main St.).

**Request Made:** May 14, 2007

**Response Made:** May 21, 2007 and June 5, 2007<sup>3</sup>

**Custodian:** Lisa Burd

**GRC Complaint Filed:** June 25, 2007

**Background**

**May 14, 2007**

Complainant's Open Public Records Act ("OPRA") requests.<sup>4</sup> The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.

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<sup>1</sup> Represented by Erica Edwards, Esq. (Flemington, NJ); however, the Complainant requests that her attorney not be contacted regarding this matter.

<sup>2</sup> Represented by William Edleston, Esq. (Phillipsburg, NJ).

<sup>3</sup> The Custodian verbally informed the Complainant on June 5, 2007 that she had forwarded the Complainant's OPRA requests to the Borough Attorney.

<sup>4</sup> The Complainant submitted three (3) separate OPRA requests for the records requested.

**May 21, 2007**

Custodian's response to Complainant's OPRA requests dated April 14, 2007.<sup>5</sup> The Custodian states that records pertaining to Bloomsbury Hose Company's responses to 125 Main Street are not located in the Custodian's office. The Custodian states that she forwarded the Complainant's request to the Fire Chief and the Borough Attorney. In response to the Complainant's request for "various items," the Custodian states that she has made all of the files available for review and also provided copies. The Custodian states that she does not maintain any additional information in her files. The Custodian also states that she has forwarded a copy of these requests to the Borough Attorney.

**June 25, 2007**

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

- E-mail from Laura Brown to Complainant dated April 27, 2007
- Complainant's three (3) OPRA requests dated May 14, 2007
- Letter from Custodian to Complainant dated May 21, 2007<sup>6</sup>

The Complainant states that on June 5, 2007, while reviewing records in response to OPRA requests which are not the subject of this complaint, the Complainant asked the Custodian about the OPRA requests submitted on May 14, 2007. The Complainant states that the Custodian informed her that the requests were forwarded to the Borough Attorney. Additionally, the Complainant asserts that the Custodian stated that she forwarded the Complainant's request regarding calls to the Fire Department to Chief Horsch. The Complainant states that to date, she has not received any responses from the Borough Attorney or the Fire Department regarding her OPRA requests.

Regarding items # 1-5 of the records requested, the Complainant asserts that the Borough Engineer's files or the Borough Attorney's files may contain approvals not located in the Borough Clerk's files because at the Borough Council's April 24, 2007 meeting, the Borough Administrator stated that past records were scattered and not all filed at Borough Hall.

Additionally, regarding items # 3 and # 5 of the records requested, the Complainant contends that pursuant to information received from Allied Oil, the sister company to Marchello Construction (the company awarded the contract for the North Street extension), the Bloomsbury Borough Engineer prepared the site plan for the extension.

**July 12, 2007**

Offer of Mediation sent to both parties.

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<sup>5</sup> The Complainant includes this letter with her Denial of Access Complaint as a response to her OPRA requests dated May 14, 2007; however because of the discrepancy between the dates of the requests and the vague wording of the Custodian's letter, it is unclear as to whether this letter is actually in response to the OPRA requests which are the subject of this complaint.

<sup>6</sup> The Complainant attaches additional documents to her Denial of Access Complaint; however, said documents are not relevant to the adjudication of this complaint.

**July 17, 2007**

Complainant's signed Agreement to Mediate.

**July 18, 2007**

Custodian's signed Agreement to Mediate.

**July 18, 2007**

Complaint referred to mediation.

**September 7, 2007**

Complainant's amended Denial of Access Complaint with the following attachments:

- Letter from Carol Hartweck-Lowry of Planners Diversified to Robert Zederbaum of Heritage Consulting Engineers dated July 13, 1994
- Letter from William J. Caldwell to Borough of Bloomsbury dated August 25, 1994
- NJ Department of State, Division of Archives & Records Management Records Retention and Disposition Schedule for Local Engineering Department

The Complainant clarifies that regarding items # 1-5 of the records requested, the Complainant is seeking zoning permits for Block 25, Lot 28 and/or the North Street extension project. The Complainant asserts that a permit was issued because a home was built on Block 25, Lot 28 and the North Street extension was constructed.

Additionally, regarding items # 3 and # 5 of the records requested, the Complainant contends that Carol Hertweck-Lowry from Planners Diversified has verbally acknowledged that she assisted the Borough Engineer Robert Zederbaum with trying to develop a plan to alleviate the storm water run-off in the area of the North Street extension. The Complainant also contends that Carol Hertweck-Lowry indicated that Mr. Zederbaum prepared the bid documents, site plan and the as-built plan for the North Street extension project. The Complainant states that the NJ Records Retention Schedule indicates that site plans are to be permanently retained unless written permission to dispose of them has been granted from the State. As such, the Complainant asserts that the Borough must be able to provide a copy of the site plan for Block 25, Lot 28 and the North Street extension.

**September 28, 2007**

Complaint referred back from mediation.

**October 1, 2007**

Request for the Statement of Information sent to the Custodian.

**October 11, 2007**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on October 1, 2007 and to date has not received a response. Further, the

GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

### **October 12, 2007**

Letter from Custodian's Counsel to GRC. In response to the GRC's letter dated October 11, 2007, Counsel states that he has been the Borough Attorney for less than four (4) years and during said time none of the requested records have ever come to his attention or been in his possession. Counsel also states that the Borough Engineer advised him that the Borough Engineer's files are not available for public inspection and that if there is any information that he has related to the Complainant's OPRA requests, said information would be in the Borough's possession. Counsel states that the Custodian has provided the Complainant with all available information after an exhaustive search of Borough files. Counsel also states that the Custodian has no authority to direct the Fire Chief to search fire department records because the Fire Chief is not a municipal official but rather an officer of an independent corporation.

Counsel asserts that the Custodian fully responded to the Complainant's request to the extent that Borough records are available. Counsel states that any records not located in the Borough building either no longer exist or may never have existed. Counsel also states that the Complainant's request for records of past or present Borough officials or the Fire Chief are outside the scope of the Custodian's ability to respond. Counsel states that the Complainant's request has consumed a considerable amount of time on the part of the Custodian who has a multitude of other tasks to perform.

Additionally, Counsel states that he and the Custodian will prepare a document index regarding the Complainant's OPRA requests.<sup>7</sup> Counsel contends that the law should not be utilized to harass Borough officials to search for information that is no longer available, did not exist in the first place, or is in the possession of parties over whom the Custodian has no authority.

### **October 19, 2007**

Letter from Complainant to GRC. The Complainant objects to Counsel's statement that site plans may have never existed for the North Street extension and/or the house built on Block 25, Lot 28. The Complainant contends that she has two (2) witnesses attesting to the fact that the Borough Engineer prepared the site plan for the North Street extension. The Complainant states that, upon further research among Borough files and questioning several licensed engineers, the Complainant learned that a site plan must be prepared prior to the creation of a septic system design. The Complainant attaches a partial copy of the as-built septic design for the house on Block 25, Lot 28 which the Complainant states was approved by the Hunterdon County Health Department.

The Complainant states that if the Borough cannot produce site plans, they should be able to produce disposal approvals from the State for the records which are required to

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<sup>7</sup> The GRC has not received a document index from the Custodian or Counsel.

be maintained on file by the Borough. Additionally, the Complainant states that she is willing to research personal files belonging to Borough officials if given the authority.

### Analysis

#### **Whether the Custodian's response to the OPRA request was legally sufficient?**

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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 therefore ...” N.J.S.A. 47:1A-5.g.

OPRA also 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* ... 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* ...” (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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. 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. Further, the Custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. The Custodian's failure 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, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant's

OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the evidence of record supports the conclusion that the Custodian provided the Complainant with a written response to several OPRA requests via letter dated May 21, 2007; however, it is unclear as to whether said letter is actually in response to the OPRA requests at issue in this complaint. Further, the Custodian failed to respond to the GRC's two (2) requests for a Statement of Information. As such, the Custodian has not certified pursuant to N.J. Court Rule 1:4-4 whether her letter to the Complainant dated May 21, 2007 is actually in response to the Complainant's OPRA requests dated May 14, 2007.

In Martin O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (May 2005), the Complainant submitted OPRA requests on January 26, 2004 and January 29, 2004. The Custodian responded to the Complainant's January 26, 2007 request and believed that said response also satisfied a response to the Complainant's January 29, 2004 request. The Council held that:

“[a]lthough the [C]ustodian considered the January 26<sup>th</sup> and the January 29<sup>th</sup> requests to be similar, and felt that his response to the January 26, 2004 request satisfied as a response to the January 29, 2004 request, he should have provided a specific response to the January 29, 2004 request.”  
*Id.*

Thus, the Custodian is required to respond to each OPRA request individually pursuant to O'Shea, *supra*.

Additionally, because the Custodian failed to legally certify whether her letter dated May 21, 2007 is in response to the Complainant's OPRA requests dated May 14, 2007, said requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Further, regardless of whether the Custodian's letter to the Complainant dated May 21, 2007 was in response to the OPRA requests at issue in this complaint, the Custodian did not specifically grant or deny access to the requested records in that letter. The Custodian merely informed the Complainant that she forwarded the Complainant's requests to the Borough Attorney. This response is inadequate under OPRA.

In John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian failed to grant access, deny access, seek clarification, or request an extension of time within the statutorily mandated seven (7) business days because the Custodian was seeking legal advice from his attorney regarding the OPRA request subject of the complaint. The Council held that:

“[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to

respond. Therefore, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to the request...[Additionally] the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.” *Id.*

The facts of the complaint currently before the Council are similar to those in Paff, supra, specifically regarding item # 1 of the records requested. While the Custodian may have provided the Complainant with a written response to her request, said response does not grant access, deny access, seek clarification or request an extension of time; it simply states that the Complainant’s request had been forwarded to the Borough Attorney.

Thus, while seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to Paff, supra, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary.

Therefore, pursuant to Martin O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (May 2005), the Custodian is required to respond to each OPRA request individually. Because the Custodian failed to legally certify whether her letter dated May 21, 2007 is in response to the Complainant’s OPRA requests dated May 14, 2007, said requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Because the Custodian did not specifically grant or deny access to the requested records in the Custodian’s letter to the Complainant dated May 21, 2007, the Custodian’s response is inadequate pursuant to OPRA. Additionally, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to item # 1 of the Complainant’s request.

### **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* by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, 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 provides that:

*“[a]ny 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.”* (Emphasis added). N.J.S.A. 47:1A-5.h.

The Custodian’s Counsel contends that the records maintained by the Borough Engineer are not subject to public access under OPRA.

In Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006), the Council found that “[t]he location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to the OPRA.”

Additionally, in Beck v. O’Hare, Docket No. MER-L-2411-07 (Law Div. 2007), an unpublished Law Division decision, the court held that “...reports prepared for a government agency by a third party consultant are entitled to the same protection for deliberative materials as if prepared by the agency. See McClain v. Coll. Hosp., 99 N.J. 346 (1985).” The court quoted McClain in that “[a] consultant acts on behalf of the agency. To that extent the consultant’s opinion is the opinion of the agency.”

Therefore, because the work done by the Borough Engineer, Robert Zederbaum, is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access. As such, the Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer pursuant to Meyers, *supra*, and Beck, *supra*, and the Custodian should provide the requested records from the Borough Engineer’s files to the Complainant.

Regarding items # 2-5 of the records requested, the Complainant does not request any specific record, but rather requests “all documents.”

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)<sup>8</sup>, 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.”<sup>9</sup>

Although the Complainant clarified her request by amending her Denial of Access Complaint on September 7, 2007, such clarification does not cure her invalid OPRA requests.

Therefore, because the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag, *supra*, and Bent, *supra*.

Also, assuming that the Custodian’s May 21, 2007 letter is in response to the Complainant’s requests dated May 14, 2007, the Custodian denied item # 6 of the Complainant’s request for “all times since 1990 the department has received requests to pump out basement and/or yard for Block 25, Lot 7 (125 Main St.)” on the basis that said records were not maintained in her office. The Custodian also stated that she forwarded said request to the Fire Chief because the Fire Department is an independent agency over which the Custodian has no authority. Additionally, the Complainant states that on June 5, 2007 the Custodian verbally informed her that the Custodian had forwarded the Complainant’s request to the Fire Chief.

OPRA provides that when an employee of a public agency receives a request for records, said employee must either forward the request to the appropriate Custodian or direct the requestor to the Custodian. N.J.S.A. 47:1A-5.h.

In this matter, the Custodian allegedly forwarded the Complainant’s request to the Fire Chief. Because the Fire Department is an independent agency, OPRA requests for Fire Department records should be submitted to the Fire Department’s custodian. However, the Custodian failed to provide the GRC with the requested Statement of Information in which the Custodian would certify to her actions regarding the handling of the request.

Therefore, although the Complainant’s request is for information rather than identifiable government records, and as such is not a valid OPRA request pursuant to Mag, *supra*, and Bent, *supra*, because the Custodian failed to complete the requested Statement of Information (and by doing so failed to legally certify to her actions regarding the requests at issue in this complaint), the Custodian has not carried her burden of proving a lawful denial of access to item # 6 of the Complainant’s request pursuant to N.J.S.A. 47:1A-6.

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

<sup>9</sup> As stated in Bent.

**Whether the Custodian's and/or the Borough Engineer's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers analysis and determination of whether the Custodian and/or the Borough Engineer knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian is required to respond to each OPRA request individually pursuant to Martin O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (May 2005).
2. Because the Custodian failed to legally certify whether her letter dated May 21, 2007 is in response to the Complainant's OPRA requests dated May 14, 2007, said requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian did not specifically grant or deny access to the requested records in the Custodian's letter to the Complainant dated May 21, 2007, the Custodian's response is inadequate pursuant to OPRA.
4. While seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary. Thus, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to item # 1 of the Complainant's request.
5. Because the work done by the Borough Engineer, Robert Zederbaum, is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access. As such, the Custodian unlawfully denied access to the records responsive to item # 1 of the requested records which are maintained on file by the Borough Engineer pursuant to Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007) and the Custodian should provide the requested records from the Borough Engineer's files to the Complainant.
6. **The Custodian shall comply with item # 5 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.**

7. Because the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005).
8. Although the Complainant's request is for information rather than identifiable government records, and as such is not a valid OPRA request pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), because the Custodian failed to complete the requested Statement of Information (and by doing so failing to legally certify to her actions regarding the requests at issue in this complaint), the Custodian has not carried her burden of proving a lawful denial of access to item # 6 of the Complainant's request pursuant to N.J.S.A. 47:1A-6.
9. The Council defers analysis and determination of whether the Custodian and/or the Borough Engineer knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

December 12, 2007