



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

William B. McGrath
Complainant

Complaint No. 2007-153

v.

New Jersey Department of Law & Public Safety,
Division of New Jersey State Police
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 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:

1. The Custodian’s failure to respond in writing to the Complainant’s December 7, 2006 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). *See also* Grauer v. New Jersey Department of Children and Families, GRC Complaint No. 2006-214 (November 2007).
2. Because the Custodian has certified that the records responsive to the Complainant’s December 7, 2006 request are a part of Carson Dunbar’s New Jersey State Police personnel file and exempt from access pursuant to N.J.S.A. 47:1A-10, and because the Complainant has failed to provide any evidence to contradict the Custodian’s certification, the Custodian has met her burden of proof that access to the requested records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. It is, therefore, unnecessary to further analyze the remainder of the Custodian’s assertions for denying access to the records.
3. Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that no records responsive to the Complainant’s January 18, 2007 OPRA request exist, and because the Complainant has failed to provide any evidence to contradict the Custodian’s certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant



to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. Because the Complainant's December 7, 2006 and January 18, 2007 OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to a request, 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 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. Although the Custodian's failure to provide a written response to the Complainant's December 7, 2006 request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian's denial was lawful and the Custodian thus bore her burden of proof, 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 "deemed" 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.

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**William B. McGrath¹
Complainant**

GRC Complaint No. 2007-153

v.

**N.J. Department of Law & Public Safety, Division of N.J. State Police²
Custodian of Records**

Records Relevant to Complaint:

December 7, 2006 request

1. Examination of all documents that identify or describe complaints, criticisms or questions pertaining to the credibility, integrity or trustworthiness of Mr. Carson Dunbar, including records that were created during the background investigation and records created during or subsequent to Mr. Dunbar's tenure as Superintendent of the New Jersey State Police ("NJSP").

January 18, 2007 request

1. Examination of all records relating to the inquiry resulting from a public statement made by Mr. Dunbar after he was stopped by the NJSP on the New Jersey Turnpike in August 2001.
2. Examination of all records generated as a result of the discrepancy in the number of employees allegedly assigned to the Federal Bureau of Investigation's ("FBI's") New York Office listed in Mr. Dunbar's résumé and the number of employees declared in an FBI public announcement dated March 30, 2000.

Request Made: December 7, 2006 and January 18, 2007

Response Made: January 4, 2007 and January 25, 2007

Custodian: SFC Linda Largey-Whitehead

GRC Complaint Filed: July 3, 2007³

Background

December 7, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by DAG Sean M. Gorman, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

January 4, 2007

Custodian's response to the OPRA request. The Custodian responds to the Complainant's December 7, 2006 OPRA request on the eleventh (11th) business day following receipt of such request.⁴ The Custodian provides the Complainant with Carson Dunbar's date of hire and date of retirement and informs the Complainant that any other records he requested, if they exist, would be part of Dunbar's personnel file and not subject to disclosure pursuant to N.J.S.A. 47:1A-10.

January 18, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 25, 2007

Custodian's response to the OPRA request. The Custodian responds to the Complainant's January 18, 2007 OPRA request on the second (2nd) business day following receipt of such request.⁵ The Custodian informs the Complainant that access to the requested records is denied because they are investigative files and exempt from disclosure pursuant to Executive Order No. 48 (Hughes 1968). The Custodian further informs the Complainant that the requested records are exempt from disclosure because they contain advisory, consultative or deliberative ("ACD") material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian also informs the Complainant that some of the requested records contained information provided within the Criminal History Database and access to such records for non-criminal justice purposes is restricted pursuant to *N.J.A.C. 13:59-1.1* et seq.

July 3, 2007

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

- Complainant's OPRA request dated December 7, 2006
- Custodian's response to the December 7, 2006 OPRA request dated January 4, 2007
- Complainant's OPRA request dated January 18, 2007⁶
- Custodian's response to the January 18, 2007 OPRA request dated January 25, 2007
- Letter from the Complainant to the GRC dated March 8, 2007
- Letter from the GRC to the Complainant dated April 11, 2007
- Printout of a NJSP website information brochure titled "New Jersey Criminal History Records Checks"
- Printout of Executive Order No. 48 (Hughes 1968)
- Printout of Executive Order No. 21 (McGreevey 2002)

⁴ The Custodian certifies that she received the request on December 18, 2006.

⁵ The Custodian certifies that she received the request on January 23, 2007.

⁶ The Complainant also submitted an OPRA request to the NJ Office of the Attorney General ("OAG") on this same date. The Complainant attached to this complaint a copy of the OAG request and response thereto dated February 26, 2007.

- Copy of a State of New Jersey News Release dated September 20, 1999 with Carson Dunbar's résumé attached
- Copy of a FBI Press Release dated March 31, 2000
- Copy of *Newark Star Ledger* article, "State Trooper Stops His Boss on Turnpike," dated August 18, 2001

The Complainant states that Executive Order #48 (Hughes 1968) limits access to records to protect witnesses and informants and because of the adverse effect disclosure would have upon criminal prosecutions. The Complainant asserts, however, that he is not pursuing the criminal prosecution of Mr. Dunbar. The Complainant further states that any informant's name and identifying information may be redacted.

The Complainant states that Mr. Dunbar has spoken publicly about some of the issues which form the subject matter of the records the Complainant requests. The Complainant contends that Mr. Dunbar has no reasonable expectation of privacy with respect to matters that Dunbar has publicly raised.

The Complainant states that he attached the two (2) press release publications to his Denial of Access Complaint because each press release indicates there were significantly less employees assigned to the Federal Bureau of Investigation ("FBI") New York Office than Mr. Dunbar indicated in his résumé. The Complainant further states that he has attached a copy of an article from the *Newark Star-Ledger* because it quotes Mr. Dunbar with respect to the traffic stop.

July 12, 2007

Offer of Mediation sent to both parties.

July 16, 2007

The Complainant agrees to mediate this complaint. The Custodian did not respond to the Offer of Mediation.

July 24, 2007

Request for the Statement of Information sent to the Custodian.⁷

July 31, 2007

Letter from the Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension of time to complete and submit the Statement of Information to the GRC.

⁷ The form of Statement of Information in this matter predated the form presently used by the GRC. Specifically, the form used in this complaint predated publication of the Superior Court's decision in John Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App.Div. 2007) which now requires the Custodian to (a) describe the search undertaken to satisfy the records request upon which this complaint is based and (b) state the last date on which documents that may have been responsive to the request were destroyed. The GRC has subsequently revised the Statement of Information form to reflect the above requirements.

July 31, 2007

Facsimile transmission from the GRC to the Custodian. The GRC grants the Custodian's request for a five (5) business day extension of time to complete and submit the Statement of Information to the GRC.

August 7, 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 July 24, 2007. The reply date was extended by five (5) business days but the GRC has not yet 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.

August 7, 2007⁸

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

- Complainant's OPRA request dated December 7, 2006
- Custodian's response to the December 7, 2006 OPRA request (date obliterated)
- Complainant's OPRA request dated January 18, 2007
- Custodian's response to the January 18, 2007 OPRA request (date obliterated)

The Custodian certifies that she received the Complainant's December 7, 2006 OPRA request on December 18, 2006 and responded to the request on January 4, 2007. The Custodian further certifies that the records responsive to the Complainant's request consist of a background investigation of Carson Dunbar titled Case Number H05199272 comprising nineteen (19) pages.

The Custodian certifies that the records were not disclosed to the Complainant because the records are part of Dunbar's NJSP personnel file and are exempt from access because they are not considered government records pursuant to N.J.S.A. 47:1A-10. The Custodian also certifies that the records are exempt from access under Executive Order No. 11 (Byrne 1974) which prohibits from public dissemination personnel or pension records. In addition the Custodian certifies that the requested records are part of a NJSP background investigation requested by someone who does not allege he is a member of a duly recognized law enforcement agency, and as such they are exempt from public access pursuant to Executive Order No. 48 (Hughes 1968), which provides in relevant part:

"1. No person having custody of State Police investigative files shall turn over the same to any person who is not a member of a duly recognized law enforcement agency unless ordered to do so by a court of competent jurisdiction or by the Governor of the State of New Jersey."

The Custodian further certifies that some of the investigative records contain information from the computerized criminal history database maintained by the NJSP

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

Bureau of Identification. The Custodian certifies that access to criminal history records is controlled by *N.J.A.C.* 13:59-1.1 et seq., which was promulgated pursuant to N.J.S.A. 53:1-20.6. The Custodian certifies that *N.J.A.C.* 13:59-1.2 establishes the individuals and entities who are permitted access to criminal history record information, and the Complainant is not within the class of permitted users. The Custodian certifies that this provision is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a. Accordingly, the Custodian certifies that the Complainant was lawfully denied access to records culled from the criminal history database.

The Custodian also certifies the requested records contain confidential intra-agency memoranda comprised of ACD materials related to the NJSP evaluation of Dunbar's background investigation. As such, the Custodian certifies the records are excluded from the definition of a government record, therefore they are not accessible pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that she received the Complainant's January 18, 2007 OPRA request on January 23, 2007 and responded to the request on January 25, 2007. The Custodian further certifies that there are no records responsive to the Complainant's January 18, 2007 request.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business...[t]he terms shall not include...inter-agency or intra-agency advisory, consultative or deliberative material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

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

OPRA further 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.

Additionally, OPRA states that:

“[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor ...” N.J.S.A. 47:1A-9.a.

OPRA also states that:

“ ... the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record...” N.J.S.A. 47:1A-10.

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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. 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.

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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, the Custodian certified in the SOI that she received the Complainant’s December 7, 2006 OPRA request on December 18, 2006 and responded in writing to the request on January 4, 2007, which is the eleventh (11th) business day following receipt of such request. The Custodian further certified that she received the Complainant’s January 18, 2007 OPRA request on January 23, 2007 and responded in writing to the request on January 25, 2007, which is the second (2nd) business day following receipt of the request. The Custodian therefore responded to the latter request within the statutorily mandated seven (7) business day time period; however, the Custodian failed to respond to the former request in a timely manner.

Accordingly, the Custodian’s failure to respond in writing to the Complainant’s December 7, 2006 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Item #1 of the December 7, 2006 records request – records that identify or describe complaints, criticisms or questions pertaining to the credibility, integrity or trustworthiness of Carson Dunbar.

The Custodian certified that the records responsive to the Complainant’s December 7, 2006 request consist of a background investigation of Carson Dunbar titled Case Number H05199272. The Custodian certified that the records were not disclosed to the Complainant for the following reasons:

1. The records are a part of Dunbar’s NJSP personnel file exempt from access pursuant to N.J.S.A. 47:1A-10.
2. The records are exempt from access under Executive Order No. 11 (Byrne 1974) which prohibits from public dissemination personnel or pension records and is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a.
3. The records are part of a NJSP background investigation and are exempt from public access pursuant to Executive Order No. 48 (Hughes 1968) and applicable to OPRA by operation of N.J.S.A. 47:1A-9.a.
4. The investigative records contain certain information from the computerized criminal history database and the Complainant is not a permitted user pursuant to *N.J.A.C. 13:59-1.1 et seq.*

5. The records contain memoranda related to the NJSP evaluation of Dunbar's background investigation which is ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian first certifies that the records responsive to the Complainant's December 7, 2006 request are a part of Dunbar's NJSP personnel file and exempt from access because they are not considered government records pursuant to N.J.S.A. 47:1A-10., which provides that personnel records "...shall not be considered a government record and shall not be made available for public access..." This provision of OPRA allows for certain specific information in a personnel file to be disclosed; however, the Complainant did not request access to such information.

Because the Custodian has certified that the records responsive to the Complainant's December 7, 2006 request are a part of Carson Dunbar's NJSP personnel file and exempt from access pursuant to N.J.S.A. 47:1A-10., and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has met her burden of proof that access to the requested records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. It is, therefore, unnecessary to further analyze the remainder of the Custodian's assertions for denying access to the records.

Item #1 of the January 18, 2007 records request – records relating to the inquiry resulting from a public statement made by Dunbar after he was stopped by the NJSP in August 2001.

Item #2 of the January 18, 2007 records request – records generated as a result of the discrepancy in the number of employees allegedly assigned to the FBI's New York Office listed in Dunbar's résumé and the number of employees declared in an FBI public announcement dated March 30, 2000.

Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that no records responsive to the Complainant's January 18, 2007 OPRA request exist, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Although not raised as a reason for denial of access by the Custodian in the SOI, both the Complainant's December 7, 2006 request and his January 18, 2007 requests are overly broad in that they do not specify identifiable government records and require the Custodian to conduct research to determine which, if any, government records are responsive to the OPRA requests. Further, the December 7, 2006 request requires the Custodian to research her files for records responsive to the Complainant's request based upon subjective criteria.

OPRA requests for information, requests that fail to identify specific government records and requests that require the Custodian to conduct research have been deemed as

invalid requests under OPRA. Specifically, 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 (App. Div. 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 (App. Div. 2005),⁹ 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."¹⁰

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f 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." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause 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 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

In this complaint, the Complainant's requests are broad and unclear because they do not specifically identify a government record, therefore to fulfill the Complainant's requests the Custodian would have to conduct research which she is not obligated to do.

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

Accordingly, because the Complainant's December 7, 2006 and January 18, 2007 OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to a request, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Whether the Custodian's untimely response to the Complainant's December 7, 2006 request 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.

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, 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, 107 (App. Div. 1996).

Although the Custodian's failure to provide a written response to the Complainant's December 7, 2006 request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian's denial was lawful and the Custodian thus bore her burden of proof, 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 "deemed" 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's December 7, 2006 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). *See also* Grauer v. New Jersey Department of Children and Families, GRC Complaint No. 2006-214 (November 2007).
2. Because the Custodian has certified that the records responsive to the Complainant's December 7, 2006 request are a part of Carson Dunbar's New Jersey State Police personnel file and exempt from access pursuant to N.J.S.A. 47:1A-10, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has met her burden of proof that access to the requested records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. It is, therefore, unnecessary to further analyze the remainder of the Custodian's assertions for denying access to the records.
3. Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that no records responsive to the Complainant's January 18, 2007 OPRA request exist, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Complainant's December 7, 2006 and January 18, 2007 OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to a request, 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 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. Although the Custodian's failure to provide a written response to the Complainant's December 7, 2006 request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian's denial was lawful and the Custodian thus bore her burden of proof, 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 "deemed" 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.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009