



**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**

Cynthia A. McBride  
Complainant

Complaint No. 2007-217

v.

Township of Bordentown (Burlington)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 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, finds that because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, which Administrative Law Judge Viscomi approved on July 31, 2009, 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 11<sup>th</sup> 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**

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

**Cynthia A. McBride<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2007-217**

**v.**

**Township of Bordentown (Burlington)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Tax search export file from the Municipal Tax Collector's Office.

**Request Made:** August 13, 2007

**Response Made:** August 28, 2007

**Custodian:** Colleen M. Eckert

**GRC Complaint Filed:** September 18, 2007<sup>3</sup>

**Background**

**October 29, 2008**

Government Records Council's ("Council") Interim Order. At its October 29, 2008 public meeting, the Council considered the October 22, 2008 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, found that:

1. Based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form. Therefore, because the Complainant submitted her request on the Township's official OPRA request form and named a particular record that existed at the time of the request, the Complainant's request is a valid OPRA request.
  
2. Pursuant to Blau v. Union County Clerk, GRC Complaint No. 2003-75 (November 2003), and the specific language of OPRA, as well as judicial

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<sup>1</sup> Represented by Edward C. Eastman, Jr., Esq., of Lomurro, Davison, Eastman & Muñoz, P.A. (Freehold, NJ).

<sup>2</sup> Represented by William John Kearns, Jr., Esq., of Kearns, Reale & Kearns (Willingboro, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

recognition of the importance of the statutory request form, the Complainant's letter request to receive the tax export file twice a week is not valid under OPRA. The Complainant must submit a new OPRA request on an OPRA request form each time records are sought.

3. The Custodian's failure to respond in writing to the 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).
4. The Custodian's August 28, 2007 written response to the Complainant's request is insufficient because the Custodian failed to specifically address the Complainant's preference for receipt of records. As such, the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
5. The Custodian's failure to provide the requested records in the medium requested is a violation of N.J.S.A. 47:1A-5.d. because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant's request as well as at the time of the Custodian's response.
6. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), the commercial use of government records is not a lawful basis for a denial of access.
7. In order to more fully develop the record in this matter, this complaint should be referred to the Office of Administrative Law for a hearing to determine the following: whether the Custodian's offer to provide the requested records on CD-ROM or floppy disk constitutes a meaningful medium pursuant to N.J.S.A. 47:1A-5.d. in light of the Complainant Counsel's assertion that the Township has been providing electronic copies of the requested records to another entity during the investigation of this complaint; whether the Township's removal of the software feature at the request of Mayor George Chidley was intentional in response to the Complainant's OPRA request or tangentially related to the installation of a new version of the software; whether the Custodian's ability to provide the requested records in the medium requested at the time of the request and failure to do so amounts to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances; whether the Mayor knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

### **October 30, 2008**

Council's Interim Order distributed to the parties.

**January 29, 2009**

Complaint transmitted to the Office of Administrative Law.

**July 24, 2009**

Stipulation of Settlement and Dismissal signed by both parties. The parties have agreed to settle the differences between them as follows:

1. The Township agrees to honor the Complainant's OPRA requests for the tax search export file twice weekly electronically, without charge.
2. The Township agrees to pay \$2,814.72 to the law firm of Lumurro, Davison, Eastman & Munoz, P.A. towards the Complainant's attorney's fees and costs of suit in this matter.
3. The Complaint is dismissed with prejudice.

### **Analysis**

Because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, which Administrative Law Judge Viscomi approved on July 31, 2009, no further adjudication is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, which Administrative Law Judge Viscomi approved on July 31, 2009, no further adjudication is required.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009



**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

**INTERIM ORDER**

**October 29, 2008 Government Records Council Meeting**

Cynthia A. McBride  
Complainant

Complaint No.2007-217

v.

Township of Bordentown (Burlington)  
Custodian of Record

At the October 29, 2008 public meeting, the Government Records Council (“Council”) considered the October 22, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of the amended findings and recommendations. The Council, therefore, finds that:

1. Based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency’s official OPRA records request form. OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form. Therefore, because the Complainant submitted her request on the Township’s official OPRA request form and named a particular record that existed at the time of the request, the Complainant’s request is a valid OPRA request.
2. Pursuant to Blau v. Union County Clerk, GRC Complaint No. 2003-75 (November 2003), and the specific language of OPRA, as well as judicial recognition of the importance of the statutory request form, the Complainant’s letter request to receive the tax export file twice a week is not valid under OPRA. The Complainant must submit a new OPRA request on an OPRA request form each time records are sought.
3. The Custodian’s failure to respond in writing to the 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).



4. The Custodian's August 28, 2007 written response to the Complainant's request is insufficient because the Custodian failed to specifically address the Complainant's preference for receipt of records. As such, the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
5. The Custodian's failure to provide the requested records in the medium requested is a violation of N.J.S.A. 47:1A-5.d. because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant's request as well as at the time of the Custodian's response.
6. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), the commercial use of government records is not a lawful basis for a denial of access.
7. In order to more fully develop the record in this matter, this complaint should be referred to the Office of Administrative Law for a hearing to determine the following: whether the Custodian's offer to provide the requested records on CD-ROM or floppy disk constitutes a meaningful medium pursuant to N.J.S.A. 47:1A-5.d. in light of the Complainant Counsel's assertion that the Township has been providing electronic copies of the requested records to another entity during the investigation of this complaint; whether the Township's removal of the software feature at the request of Mayor George Chidley was intentional in response to the Complainant's OPRA request or tangentially related to the installation of a new version of the software; whether the Custodian's ability to provide the requested records in the medium requested at the time of the request and failure to do so amounts to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances; whether the Mayor knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of October, 2008

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: October 30, 2008**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 29, 2008 Council Meeting**

**Cynthia A. McBride<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-217**

**v.**

**Township of Bordentown (Burlington)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Tax search export file from the Municipal Tax Collector's Office.

**Request Made:** August 13, 2007

**Response Made:** August 28, 2007

**Custodian:** Colleen M. Eckert

**GRC Complaint Filed:** September 18, 2007<sup>3</sup>

**Background**

**August 13, 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. The Complainant requests to receive said records via e-mail.

**August 13, 2007**

Letter from Complainant to Tax Collector. The Complainant states that she submitted an OPRA request for the tax search export file and would like to receive this file twice a week. The Complainant requests that the file be provided in the medium requested (e-mail). The Complainant states that some other municipalities which have entered into this agreement ask that the Complainant submit a new OPRA request every week for every file while others accept just one (1) request. The Complainant states that she wishes to reach a mutual agreement with the Township.

**August 28, 2007<sup>4</sup>**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eleventh (11<sup>th</sup>) business day following receipt of

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<sup>1</sup> Represented by Edward C. Eastman, Jr., Esq., of Lomurro, Davison, Eastman & Muñoz, P.A. (Freehold, NJ).

<sup>2</sup> Represented by Gregory J. Sullivan, Esq., of Hartsough Kenny Chase & Sullivan (Hamilton, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Custodian's letter is dated August 20, 2007; however, the Custodian did not provide said letter to the Complainant until August 28, 2007 via facsimile.

such request. The Custodian states that she can provide the requested records on either a CD-ROM or a floppy disk. The Custodian states that a pack of 50 CDs costs \$13.98 and a pack of 50 floppy disks costs \$19.98. The Custodian states that she priced the 50 pack due to the frequency the Complainant wishes to receive the records from the Tax Collector. Additionally, the Custodian states that a pack of 25 bubble mailers to protect the integrity of the data costs \$11.98. The Custodian states that she must recoup the cost of mailing same. The Custodian also states that the Complainant may provide her own materials to complete this request. The Custodian further states that the Complainant must file a separate OPRA request for each file requested. The Custodian asks the Complainant to advise how she wishes to proceed.

### **September 18, 2007**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the Complainant’s OPRA request dated August 13, 2007 attached. The Complainant states that she submitted her request on August 13, 2007 and has not received a response from the Custodian. The Complainant contends that the Custodian’s failure to respond to said request is a “deemed” denial.

### **September 19, 2007**

Letter of Representation from Custodian’s Counsel. The Custodian’s Counsel states that the Custodian did respond to the Complainant’s request. Counsel encloses a copy of a letter dated August 20, 2007 addressed to the Complainant from the Custodian along with a facsimile confirmation sheet dated August 28, 2007.

### **September 24, 2007**

Letter from Complainant to Custodian. The Complainant asks the Custodian why she is willing to provide the requested records on a CD-ROM but not in the e-mail/ftp format, as requested.

### **September 25, 2007**

Letter from Custodian’s Counsel to Complainant. The Custodian’s Counsel states that the e-mail/ftp format is not a format in which the Township can provide the requested records. Counsel states that the Township does not have the technological capability to satisfy the request in this manner.

### **September 28, 2007**

Complainant’s amended Denial of Access Complaint. The Complainant attaches a copy of a letter from the Custodian’s Counsel to the Complainant dated September 25, 2007. The Complainant states that on September 21, 2007 she received a letter from the Custodian’s Counsel indicating that the Custodian responded to the Complainant’s OPRA request via letter dated August 20, 2007. The Complainant states that she did not receive the Custodian’s August 20, 2007 response until September 21, 2007 when it was provided by the Custodian’s Counsel. The Complainant states that she asked the Custodian why she was willing to provide the requested records on CD-ROM but not in the medium requested via letter dated September 24, 2007. The Complainant states that she received the Custodian Counsel’s written response on September 25, 2007 in which Counsel alleged that the Township did not have the ability to provide the requested

records via e-mail. The Complainant asserts that according to the Township's website, the municipal officials, including the Tax Collector, have e-mail addresses.

**October 2, 2007**

Complainant's second amended Denial of Access Complaint with the following records attached:

- Custodian's response to the Complainant's request dated August 20, 2007
- Letter from Custodian's Counsel to GRC dated September 19, 2007
- Letter from Complainant to Custodian dated September 24, 2007
- Letter from Custodian's Counsel to Complainant dated September 25, 2007

The Complainant states that she contacted the Custodian's Counsel on September 28, 2007 to inquire about the Township's access to e-mail. The Complainant states that the Custodian's Counsel notified her via voicemail on October 1, 2007 that the Township does not have the ability to create the export file. The Complainant contends that the Township had the ability to create the export file when she submitted her OPRA request.

**October 4, 2007**

Offer of Mediation sent to both parties.

**October 9, 2007**

The Complainant declines mediation. The Custodian did not respond to the Offer of Mediation.

**October 10, 2007**

Request for the Statement of Information ("SOI") sent to the Custodian.

**October 12, 2007**

Custodian's incomplete SOI submitted to GRC.

**October 15, 2007**

Letter from GRC to Custodian. The GRC returns the Custodian's SOI for completion. The GRC states that the Custodian failed to complete the document index in "Item 9" as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

**October 18, 2007<sup>5</sup>**

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

- Complainant's OPRA request dated August 13, 2007
- Custodian's response to the request dated August 20, 2007
- Facsimile confirmation sheet dated August 28, 2008
- Letter from Custodian's Counsel to Complainant dated September 25, 2007

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<sup>5</sup> The Custodian's signature page is dated October 12, 2007; however, the SOI was submitted to the GRC via facsimile dated October 18, 2007.

The Custodian certifies that she received the Complainant's OPRA request on August 13, 2007 and provided a written response on August 28, 2007. The Custodian certifies that she did not deny access to the requested records. The Custodian certifies that she cannot fulfill the request in the format requested because the tax export file does not exist in the Township's system.

**October 18, 2007**

Letter from GRC to Custodian. The GRC requests a legal certification from the Custodian in response to the following questions:

1. Which Township official or employee requested that the software company remove the feature from the software application which would provide the requested record in the requested e-mail/ftp format?
2. Was the feature mentioned above removed before or after the date of the Complainant's request? Please provide the specific date of said removal.

**October 25, 2007**

Custodian's Certification. The Custodian certifies that Mayor George Chidley requested that the software company remove the feature from the software application which would provide the requested record in the requested e-mail/ftp format. The Custodian certifies that in conjunction with the upgrades of the Township's Tax and Finance Department packages, a new version of the software was installed on September 18, 2007 which made compliance with the Complainant's OPRA request in the format requested impossible.

**October 25, 2007**

Letter from Custodian's Counsel to GRC with the Complainant's OPRA request and letter to the Tax Collector dated August 13, 2007 attached. The Custodian's Counsel asserts that the Complainant's OPRA request lacks the specificity required by the definition of a government record under N.J.S.A. 47:1A-1.1. Counsel contends that the request places private companies in the position of determining the particular software used by a municipality. Counsel also asserts that the Complainant's proposal for an ongoing business arrangement is beyond the authority of the municipal employees to whom the request was directed. Thus, Counsel contends that the Complainant's request is not a valid OPRA request and the Township erred in attempting to respond but rather should have denied the request upon its submission. Counsel claims that OPRA is designed to facilitate public access to public records and not to enhance the operation of private, for-profit companies.

**November 13, 2007**

Letter from Custodian's Counsel to GRC. The Custodian's Counsel requests a stay of the GRC's review of this complaint. Counsel states that the parties have begun negotiations to resolve this matter.

**November 15, 2007**

Letter from GRC to Custodian's Counsel. The GRC denies Counsel's request for a stay because stays are granted only after the Council has issued either an Interim Order

or a Final Decision. The GRC states that it will continue with the adjudication of this complaint until the Complainant withdraws her complaint.

**December 14, 2007**

Letter of Representation from Complainant's Counsel. The Complainant's Counsel contends that the Custodian's response to the Complainant's request indicates that the Custodian fully understood said request. Counsel asserts that there is no evidence in the record before the GRC to suggest that the Township lacked sufficient information to determine what records the Complainant requested.

The Complainant's Counsel states that the Complainant is not a private company nor would her request determine the specific software used by the Township because the Custodian certified that at the time of the request the records could be provided in an e-mail/ftp format. In response to the Custodian Counsel's claim that the Complainant's proposed ongoing business arrangement goes beyond the authority of the Tax Collector, the Complainant's Counsel states that the Complainant sought access to public records on a bi-weekly basis and offered to pay for said records up front rather than by installments.

Additionally, Counsel asserts that nothing in OPRA precludes private, for-profit companies from gaining access to public records as the Custodian's Counsel suggested. The Complainant's Counsel cites to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006) in which the Council held that:

“[t]here is no restriction or prohibition against the commercial use of government records requested under OPRA contained within the provisions of OPRA. Additionally, the Custodian did not provide any legal support for the conclusion that the Legislature did not intend for people to access government records under OPRA for their own financial gain.”

Further, Counsel claims that based on the Custodian's certification, the Mayor knowingly and willfully violated OPRA and unreasonably denied access by having the software company remove the feature from the software application that would have provided the requested records in the medium requested after the date of the Complainant's request. Counsel contends that the Custodian's certification that the removal of the feature was in conjunction with a software upgrade is disingenuous as it gives the impression that the feature was not removed in response to the Complainant's request. Counsel asserts that it is important to determine what the upgrade involved.

Counsel states that the Complainant's request was for the tax export file, a tool available to the Township at the time of the request which would provide copies of the electronic public tax records maintained by the Township. Counsel asserts that the Township's removal of this tool does not relieve the Custodian of her responsibility to fulfill the OPRA request.

**January 17, 2008**

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the parties have been unsuccessful in attempting to resolve this matter and suggests that mediation may be helpful.

**January 22, 2008**

E-mail from Complainant to GRC. The Complainant requests that the GRC refer this complaint to mediation.

**January 23, 2008**

Offer of Mediation re-sent to parties.

**January 24, 2008**

Custodian's signed Agreement to Mediate.

**January 25, 2008**

Complainant's signed Agreement to Mediate.

**January 28, 2008**

Complaint referred to mediation.

**July 2, 2008**

Complaint referred back to the GRC for adjudication.

**July 7, 2008**

Letter from GRC to Complainant. The GRC offers the Complainant an opportunity to amend her Denial of Access Complaint in the event that some issues were resolved during the mediation process and no longer require adjudication.

**July 9, 2008**

Letter from Complainant's Counsel to GRC. The Complainant's Counsel asserts that the Custodian's delay in providing the Complainant with the requested records is troublesome because the Township had the capability of providing said records in the medium requested at the time of the request but the Mayor had the feature removed from the software system after receipt of the Complainant's OPRA request. Additionally, Counsel asserts that the Township provided tax export information electronically to First American Tax Service both before the filing of this Denial of Access Complaint and during the investigation of said complaint. Counsel contends that the Complainant is entitled to receive the requested tax export file electronically and the Custodian has failed to meet her burden of proof for refusing to fulfill the request.

**July 16, 2008**

Letter from Complainant's Counsel to the GRC. The Complainant's Counsel states that a requestor who prevails in any proceeding shall be entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f. As such, Counsel submits an Affidavit of Services pursuant to NJ Court Rule 4:42-9(b) and reserves the right to supplement the fee application as this complaint progresses.

### **July 25, 2008**

Letter from Custodian's Counsel to GRC. The Custodian's Counsel contends that the Township has not refused to fulfill the Complainant's OPRA request. Counsel asserts that the requested records are unavailable in the format requested and the Township cannot be compelled to adapt its technological capability at the request of an outside business.

Counsel continues to assert that the Complainant's request was not a valid OPRA request but rather a request for an ongoing business relationship.

Additionally, because Counsel contends that the Township did not deny access to the Complainant's request, Counsel asserts that attorney's fees should not be awarded.

### **July 30, 2008**

Letter from Complainant's Counsel to GRC. The Complainant's Counsel restates the facts and legal arguments he previously submitted to the GRC. Counsel also asserts that the Mayor, the Custodian and the software company should be examined under oath to determine whether the removal of the software feature was in response to the Complainant's request or an unintentional action in connection with the software upgrade. Counsel also contends that such examination should determine whether the Custodian's certification dated October 25, 2007 was provided in a manner to be intentionally misleading.

## **Analysis**

### **Whether the Complainant's August 13, 2007 request for records constitutes a valid OPRA records request?**

The Complainant submitted her OPRA request on August 13, 2007 on the Township's official OPRA request form. However, on the same date, the Complainant also submitted a letter to the Tax Collector in which the Complainant explains her request by stating that she wishes to receive the tax export file via e-mail twice a week.

The Custodian's Counsel asserts that the Complainant's proposal for an ongoing business arrangement is beyond the authority of the municipal employees to whom the request was directed. Thus, Counsel contends that the Complainant's request is not a valid OPRA request and the Township erred in attempting to respond but should have denied the request upon its submission.

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;

- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
  - (3) specific directions and procedures for requesting a record;
  - (4) a statement as to whether prepayment of fees for a deposit is required;
  - (5) the time period in which the public agency is required by OPRA to make the record available;
  - (6) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
  - (7) space for the custodian to list reasons if a request is denied in whole or in part;
  - (8) space for the requestor to sign and date the form;
  - (9) space for the custodian to sign and date the form if the request is fulfilled or denied.
- Id.*

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that "each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

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

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian "shall" sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See* Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word "shall" in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then



the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5, if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA's central purpose of making government records "readily accessible" to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute's form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See* Mag Entertainment LLC v. Div. of ABC, 375 N.J.Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J.Super. 30, 33 (App. Div. 2005), the Court held that the requestor's general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a "brief description" of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J.Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form. Therefore, because the Complainant submitted her request on the Township's official OPRA request form and named a particular record that existed at the time of the request, the Complainant's request is a valid OPRA request.

However, in the Complainant's letter to the Tax Collector dated August 13, 2007 (which was separate and apart from the Complainant's valid OPRA request), the Complainant requested to receive the tax export file twice a week. Because this letter was not submitted on the agency's OPRA request form, it is not a valid OPRA request. Moreover, In Blau v. Union County Clerk, GRC Complaint No. 2003-75 (November 2003), the requestor sought access to copies of deeds and mortgages on an ongoing basis. The Council held that, "[t]he request for copies 'on a continuing basis' is not valid under OPRA and that the requestor must submit a new OPRA request to the custodian for each new batch of documents sought."

Therefore, pursuant to Blau, *supra*, and the specific language of OPRA, as well as judicial recognition of the importance of the statutory request form, the Complainant's letter request to receive the tax export file twice a week is not valid under OPRA. The Complainant must submit a new OPRA request on an OPRA request form each time records are sought.

## 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 ... 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 also states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

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.

Further, OPRA 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. 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.<sup>6</sup> 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).

In this complaint, the Custodian certified that she received the Complainant’s OPRA request on August 13, 2007. The Custodian also certified that she provided the Complainant with a written response to the request via facsimile on August 28, 2008, the eleventh (11<sup>th</sup>) business day following the Custodian’s receipt of the request, in which the Custodian offered to provide the requested records on either CD-ROM or floppy disk. Although the Complainant asserts that she did not receive said response from the Custodian, the Custodian provided a copy of the facsimile confirmation page to the GRC. In any event, the Custodian’s written response to the Complainant’s request was not within the statutorily mandated seven (7) business days.

Therefore, the Custodian’s failure to respond in writing to the 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, *supra*.

Additionally, the Complainant’s OPRA request dated August 13, 2007 sought access to the tax export file via e-mail. However, the Custodian’s written response to the request offered to provide the records via CD-ROM or floppy disk. The Custodian’s response does not mention the Complainant’s preference of receiving the tax export file via e-mail.

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<sup>6</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance.

In O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the Complainant indicated in his OPRA request that he preferred to receive the requested records via e-mail rather than paper copies sent via regular mail. The Custodian’s written response to the request offered to provide paper copies of the requested records but made no mention of the Complainant’s request to receive said records via e-mail. The Council held that, “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.”

The facts in this instant matter are similar to those in O’Shea, supra. Specifically, the Complainant in this matter sought access to records via e-mail. The Custodian’s written response offered to provide records in another medium and said response did not address the Complainant’s preferred method of receipt. Thus, the Council’s ruling in O’Shea, supra, applies to this current complaint.

Therefore, the Custodian’s August 28, 2007 written response to the Complainant’s request is insufficient because the Custodian failed to specifically address the Complainant’s preference for receipt of records. As such, the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to O’Shea, supra.

Additionally, OPRA provides that a custodian must provide the requested records in the medium requested if the agency maintains the records in said medium. N.J.S.A. 47:1A-5.d.

Regarding this complaint, the Custodian certified that the software application feature that would provide the requested records in the medium requested was removed on September 18, 2007. Thus, it is clear that the Custodian had the ability to provide the requested records in the medium requested at the time of the Complainant’s request (August 13, 2007) and at the time of the Custodian’s response (August 28, 2007) but failed to provide the records in the medium requested.

Therefore, the Custodian’s failure to provide the requested records in the medium requested is a violation of N.J.S.A. 47:1A-5.d. because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant’s request as well as at the time of the Custodian’s response.

Further, the Custodian’s Counsel claims that OPRA is designed to facilitate public access to public records and not to enhance the operation of private, for-profit companies. The Complainant’s Counsel asserts that nothing in OPRA precludes private, for-private companies from gaining access to public records.

In Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), the Custodian asserted that “the Legislature did not intend for OPRA to be used by companies like Data Trace to gain access to government records for commercial purposes and financial gain.” The Council held that “[t]here is no restriction or prohibition against

the commercial use of government records requested under OPRA contained within the provisions of OPRA... and it is not the province of the GRC to rule on this public policy aspect.”

Therefore, pursuant to Spaulding, *supra*, the commercial use of government records is not a lawful basis for a denial of access.

**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.

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).

A custodian who is found to have knowingly and willfully violated OPRA and unreasonably denied access *under the totality of the circumstances* is subject to a civil penalty under OPRA. In this current matter the record indicates that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she failed to grant access, deny access, seek clarification or request an extension of time within the statutorily mandated seven (7) business days. The Custodian also violated N.J.S.A. 47:1A-5.g.

because her written response to the Complainant's OPRA request was insufficient as it did not address the Complainant's preferred method of receiving the requested records (e-mail). The Custodian's response offered to provide the records on CD-ROM or floppy disk. The evidence of record indicates that at the time of the Complainant's request the Township possessed the technological capability to provide the requested records in the medium requested yet the Custodian failed to provide the records in the requested medium. As such, the Custodian violated N.J.S.A. 47:1A-5.d. The evidence of record also indicates that approximately one (1) month after the date of the Complainant's OPRA request, the Township removed the feature from its software system that would enable the Custodian to provide the records in the medium requested. However, the Complainant's Counsel asserts that the Township provided tax export information electronically to First American Tax Service both before the filing of this Denial of Access Complaint and during the investigation of said complaint.

Before a determination can be made as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access *under the totality of the circumstances*, more information is required.

Therefore, in order to more fully develop the record in this matter, this complaint should be referred to the Office of Administrative Law for a hearing to determine the following: whether the Custodian's offer to provide the requested records on CD-ROM or floppy disk constitutes a meaningful medium pursuant to N.J.S.A. 47:1A-5.d. in light of the Complainant Counsel's assertion that the Township has been providing electronic copies of the requested records to another entity during the investigation of this complaint; whether the Township's removal of the software feature at the request of Mayor George Chidley was intentional in response to the Complainant's OPRA request or tangentially related to the installation of a new version of the software; whether the Custodian's ability to provide the requested records in the medium requested at the time of the request and failure to do so amounts to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances; whether the Mayor knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form. Therefore, because the Complainant submitted her request on the Township's official OPRA request form and named a particular record that existed at the time of the request, the Complainant's request is a valid OPRA request.

2. Pursuant to Blau v. Union County Clerk, GRC Complaint No. 2003-75 (November 2003), and the specific language of OPRA, as well as judicial recognition of the importance of the statutory request form, the Complainant's letter request to receive the tax export file twice a week is not valid under OPRA. The Complainant must submit a new OPRA request on an OPRA request form each time records are sought.
3. The Custodian's failure to respond in writing to the 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).
4. The Custodian's August 28, 2007 written response to the Complainant's request is insufficient because the Custodian failed to specifically address the Complainant's preference for receipt of records. As such, the Custodian violated N.J.S.A. 47:1A-5.g. pursuant to O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008).
5. The Custodian's failure to provide the requested records in the medium requested is a violation of N.J.S.A. 47:1A-5.d. because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant's request as well as at the time of the Custodian's response.
6. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), the commercial use of government records is not a lawful basis for a denial of access.
7. In order to more fully develop the record in this matter, this complaint should be referred to the Office of Administrative Law for a hearing to determine the following: whether the Custodian's offer to provide the requested records on CD-ROM or floppy disk constitutes a meaningful medium pursuant to N.J.S.A. 47:1A-5.d. in light of the Complainant Counsel's assertion that the Township has been providing electronic copies of the requested records to another entity during the investigation of this complaint; whether the Township's removal of the software feature at the request of Mayor George Chidley was intentional in response to the Complainant's OPRA request or tangentially related to the installation of a new version of the software; whether the Custodian's ability to provide the requested records in the medium requested at the time of the request and failure to do so amounts to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances; whether the Mayor knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

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October 22, 2008