



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-252

v.

Township of Long Hill (Morris)
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council ("Council") considered the July 23, 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, finds that:

1. Although the Custodian did not inform the Complainant that the requested record did not exist until he certified to such in his Statement of Information dated November 20, 2007, the Custodian did provide the Complainant with two (2) written responses to the OPRA request within the statutorily mandated seven (7) business days in which the Custodian indicated that the Complainant's request was unclear but attempted to accommodate the Complainant's request anyway. As such, the Custodian properly responded to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Vessio v. Barnegat Township, Building and Zoning Department, GRC Complaint No. 2006-70 (April 2007).
2. Because item # 2 of the Complainant's OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request is 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. Because the Custodian certified that the requested record did not exist at the time of the request and because the Complainant's request is invalid because it



is not a request for an identifiable government record, a special service charge is not at issue in this matter. *See Pusterhofer v. NJ Department of Education*, GRC Complaint No. 2005-49 (July 2005) (stating that the Custodian did not unlawfully deny access because the Custodian certified that the requested records did not exist at the time of the request).

4. Because the Complainant did not use the Township's old request form to submit the OPRA request which is the subject of this complaint and because the Custodian certified that the Township adopted the GRC's model request form approximately one (1) month prior to the date of the Complainant's OPRA request, this portion of the Complainant's request, in which the Complainant asserts that the Township's old OPRA request form violated OPRA, is moot.
5. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Long Hill has already adopted the GRC's model request form as its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an official form, it is unnecessary for the Council to order the Township to adopt the model request form.
6. Because the Custodian did not unlawfully deny access to the requested records because the request is invalid as it was not a request for a specific identifiable government record, and because the portion of this complaint regarding the OPRA request form is moot due to the Township's abandonment of the previous OPRA request form and the adoption of the GRC's model request form, 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.
7. The Complainant has not achieved the desired result because the complaint did not bring about change (voluntary or otherwise) in the Custodian's conduct and as such the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

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 30th Day of July, 2008

Robin Berg Tabakin, 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: August 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-252

v.

**Township of Long Hill (Morris)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the OPRA request form used by the Township prior to its adoption of the form it currently uses.
2. A copy of any record (such as a receipt) that shows special service charges for OPRA requests assessed by the Township for the years 2005, 2006 and 2007 to the date of this request.³

Request Made: August 15, 2007

Response Made: August 15, 2007 and August 20, 2007

Custodian: Richard Sheola

GRC Complaint Filed: October 9, 2007

Background

August 15, 2007

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

August 15, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same date the Custodian received such request. The Custodian states that the Township maintains a hand written receipt log of all in-person transactions by date, not purpose. The Custodian states that the log is general in nature and may only contain the notation "OPRA fees." The Custodian states that if the information is available, it would be extremely labor intensive to produce copies. As an alternative, the Custodian states that he will make the receipt books available for review and provide copies of any pages that the Complainant may indicate. The Custodian requests that the Complainant advise as to his preferences.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by John R. Pidgeon, Esq., of Pidgeon & Pidgeon (Princeton, NJ).

³The Complainant requested additional records which are not the subject of this Denial of Access Complaint.

August 20, 2007

Custodian's subsequent response to the Complainant's request. The Custodian provides a copy of the requested OPRA request form. The Custodian asserts that the Complainant's request for a receipt indicating special service charges is unclear. The Custodian states that the Township provides receipts for cash customers but states that said receipts are logged chronologically and not by service type. The Custodian states that researching all cash receipt books for the time period requested would require an estimated ten (10) hours of research, archival retrieval and photocopying. The Custodian asks the Complainant to advise how he wishes to proceed with this request.

September 6, 2007

Letter from Complainant's Counsel to Custodian. Counsel asks the Custodian to state the actual cost of copying the requested records. Counsel also asks if any other records responsive exist. Counsel contends that if the Township assessed special services charges, said charges would be reflected in communications between the Township and the OPRA requestors. Counsel asks the Custodian to identify the special service charge, if any, to fulfill this current request as required by OPRA.

September 27, 2007

Letter from Custodian to Complainant's Counsel. The Custodian states that the copy fee would depend on the number of pages to be copied in conformance with the State's photocopying guidelines. The Custodian states that this request would be labor intensive because the notations on the receipt log do not contain references to special service charges. As such, the Custodian states that he would have to cross reference each receipt with the log to determine if a special service charge had been assessed. Additionally, the Custodian states that he is unaware of any other records responsive to this request.

Further, the Custodian states the OPRA does not require a custodian to create records in response to requests. The Custodian states that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007), the court held that "OPRA does not contemplate wholesale requests for general information to be analyzed, collated and compiled by the responding government entity."

October 9, 2007

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

- Complainant's OPRA request dated August 15, 2008
- Custodian's response to the request dated August 15, 2008
- Letter from Complainant's Counsel to Custodian dated September 6, 2007
- Letter from Custodian to Complainant's Counsel dated September 27, 2007
- Township of Long Hill's OPRA request form

The Complainant states that he submitted his OPRA request on August 15, 2007. The Complainant states that on the same day, the Custodian provided a written response indicating that the requested special service charge information may be in a handwritten

receipt log and would be “extremely labor intensive to produce copies” and thus the Custodian offered to make the log available for the Complainant’s review. The Complainant states that his Counsel asked the Custodian, via letter dated September 6, 2007, if any other records responsive exist and what the special service charge would be to provide the requested records. The Complainant states that the Custodian responded via letter dated September 27, 2007 and indicated that no other records responsive exist that indicate the special services charges assessed by the Township. The Complainant also states that the Custodian did not indicate whether he intended to charge a special service charge to fulfill this request.

The Complainant contends that if the Township ever charged a special service charge to a records requestor, the charge information would be available on the Township’s written responses to the requestor. The Complainant asserts that said records should be available since the Custodian did not indicate that the Township never charged a special service charge. Additionally, the Complainant contends that the Custodian’s response to the request was inadequate because the Custodian failed to estimate a special service charge for providing copies of the receipt log and instead offered to make the log available for review.

Further, the Complainant asserts that until recently the Township’s OPRA request form did not conform to the GRC’s model request form and contained “illegal” provisions. Specifically, the Complainant states that on page two (2) of the form, the Township asks requestors why they are requesting access to records. The Complainant contends that OPRA does not require that a requestor state his/her purpose for requesting records. The Complainant also states that the form sets forth an administrative fee for supervisory and/or clerical personnel to search the requested records which cannot be readily searched by members of the public, quoting \$30 per hour for supervisory personnel and \$25 per hour for clerical. The Complainant asserts that a municipality is only entitled to charge costs in addition to the actual cost of duplicating the record in instances requiring a special service charge and only after receiving a specific request. The Complainant also alleges that none of the exceptions listed on page five (5) of the request form are recognized under OPRA. Further, the Complainant states that the form indicates that the seven (7) business day response time begins when the Township Attorney determines the records may be provided. Additionally, the Complainant states that the Township lists copies of audiotapes at \$10.00, which the Complainant asserts is most likely beyond the actual cost of the tape.

The Complainant requests the following relief from the Council:

1. A finding that the Custodian denied access and violated OPRA by not making copies of the requested records and not describing the special service charge associated with this request
2. A finding that the Township’s OPRA request form violated OPRA
3. An order compelling the Township to use the GRC’s model request form and never revert to its former form
4. A finding that the Complainant is a prevailing party and an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6

5. If the Custodian is found to have knowingly and willfully violated OPRA, a fine imposed upon the Custodian for violating OPRA.

October 16, 2007

Complainant's Counsel submits an amended Denial of Access Complaint.⁴

October 23, 2007

Letter from Custodian's Counsel to GRC. Counsel states that the Complainant's claim that the Township's OPRA request form does not conform with the GRC's model form is identical to the Complainant's claim in O'Shea v. Township of Long Hill (Morris), GRC Complaint No. 2007-169 (September 2007) which the Complainant withdrew after the Township adopted the GRC's model request form. The Custodian asserts that because the Township continues to use the GRC's model request form, this current complaint is moot.

Additionally, the Custodian's Counsel states that upon receiving the Complainant's OPRA request, the Custodian responded in writing advising that the Township maintained a handwritten receipt log of all in-person transactions by date, not by purpose. Counsel states that the Custodian informed the Complainant that it would be extremely labor intensive to produce copies and as an alternative the Custodian would make the receipt book available for the Complainant's review. Counsel also states that the Custodian informed the Complainant's Counsel that he was not aware of any other records responsive to the request. The Custodian's Counsel contends the law does not require that a record be created in response to an OPRA request. Counsel cites NJ Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007) in that "OPRA does not contemplate '[w]holesale requests for general information to be analyzed, collated, and compiled by the responding government entity.'" Counsel asserts that the Custodian complied with OPRA by making the relevant records available to the Complainant so that he could analyze, collate and compile the information.

Further, Counsel alleges that there is nothing in OPRA to support the Complainant's assertion that evidence of special service charges should be reflected in the communications between the Township and the requestor. However, Counsel states that the information is available as a public record to anyone who wants to review the records him or herself.

October 25, 2007

Offer of Mediation sent to both parties. [Neither party agreed to mediate this complaint.]

November 14, 2007

Request for the Statement of Information sent to the Custodian.

November 20, 2007

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

⁴ Amended portions do not change the substance of the Denial of Access Complaint.
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- Complainant's OPRA request dated August 15, 2007
- Custodian's response to the request dated August 15, 2007
- Custodian's subsequent response to the OPRA request dated August 20, 2007
- Letter from Complainant's Counsel to Custodian dated September 6, 2007
- Letter from Custodian to Complainant's Counsel dated September 27, 2007

The Custodian certifies that the requested record did not exist at the time of the Complainant's request. The Custodian certifies that he provided the Complainant with an opportunity to review records that contained the requested information. The Custodian contends that the law does not require custodians to create records in response to an OPRA request pursuant to NJ Builders, *supra*. The Custodian also certifies that the Township adopted the GRC's model request form via Resolution No. 07-156 at its July 20, 2007 meeting. Additionally, the Custodian restates the facts and legal arguments articulated in the Custodian Counsel's letter to the GRC dated October 23, 2007.

November 28, 2007

The Complainant Counsel's response to the Custodian's SOI. Counsel states that the Complainant filed his Denial of Access Complaint because the Custodian failed to specify the special service charge for fulfilling the Complainant's request. Counsel states that pursuant to N.J.S.A. 47:1A-5.c., a special service charge is only warranted if the records request "involves an extraordinary expenditure of time and effort to accommodate the request." Counsel states that in *Vessio v. Township of Barnegat*, GRC Complaint No. 2006-70,⁵ the Council held that a special service charge of \$400.00 was reasonable because fulfilling the request required the Custodian to review one hundred eighty-five (185) storage boxes over a fourteen (14) hour period. Counsel contends that OPRA does not permit a "search first, charge later" policy. Counsel asserts that the Custodian is obligated to specify the amount of time it will take to search for records, the actual cost of the search and advise the Complainant of the costs involved, which the Custodian has failed to do in this matter.

December 20, 2007

Letter from Custodian's Counsel to the GRC. Counsel states that he has enclosed Ordinance No. 220-07 entitled "An Ordinance Amending Fees, Charge for Copies of Public Records and Amending Chapter II of the Township Code entitled 'Administration.'" Counsel states that the Township adopted said ordinance on December 19, 2007 which repeals the section of the Township Code that provided for an hourly rate for supervisor and/or clerical personnel used to search public records. Counsel states that costs will now be determined on a case by case basis. Counsel contends that this ordinance renders the Complainant's complaint regarding the Township's fee schedule moot.

Additionally, Counsel encloses a copy of the Appellate Division's unpublished decision in *Windish vs. Mount Arlington Board of Education Custodian of Records* (2007 WL 4334858), decided December 13, 2007. Counsel states that in said case, the Appellant filed a request for records that would reveal the breakdown of costs/fees for copying government records. The Custodian responded by indicating that the fee schedule was located on the OPRA request form and that no other records responsive

⁵ *Vessio v. Township of Barnegat*, GRC Complaint No. 2006-70 (April 2007).

existed. Counsel states that the court found that the Appellant had no standing in the matter by reasoning that “because the board possessed no documents responsive to the appellant’s demand and, therefore, had nothing to duplicate and no fee to charge, we conclude that appellant had no standing to complain about the board’s fee schedule.”

Counsel contends that this instant complaint is similar to Windish in that the Custodian informed the Complainant’s Counsel that no other records responsive to the Complainant’s request exist. As such, the Custodian’s Counsel asserts that the Complainant has no standing to complain about the Township’s fee schedule.

Further, Counsel states that the Complainant’s Denial of Access Complainant challenges the Township’s OPRA request form which has not been in use since September 19, 2007 when the Township adopted the GRC’s model request form.⁶ Counsel contends that the Complainant’s complaint is frivolous because the Complainant filed a separate complaint regarding the form issue which he voluntarily withdrew.

February 1, 2008

Letter from Complainant’s Counsel to the GRC. Counsel asserts that the Township’s passage of a new ordinance does not render this complaint moot, but rather proves that the Township’s previous fee schedule was improper under OPRA. Counsel states that the ordinance itself states that certain fees “are inconsistent with guidance received from the GRC.”

Additionally, Counsel contends that the Custodian Counsel’s citation to Windish, *supra*, is irrelevant to this complaint because the Custodian certified in his SOI that “the information is available as a public record to anyone who wants to review relevant records.” Counsel states that the Custodian has not specified the appropriate special service charge for copying the requested records, making it impossible to determine whether the charge is warranted or reasonable.

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.

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*

⁶The Custodian certified in his SOI that said form was adopted on July 20, 2007.
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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 states 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 therefor ...” N.J.S.A. 47:1A-5.g.

Additionally, 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...*” (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 also 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁷

In this complaint, the Complainant states that he submitted his OPRA request on August 15, 2007. The Complainant states that on the same day, the Custodian provided a written response indicating that the requested information may be in a handwritten receipt log and would be “extremely labor intensive to produce copies” and thus the Custodian offered to make the log available for the Complainant’s review. In an e-mail to the Complainant dated August 20, 2007, the third (3rd) business day following the Custodian’s receipt of the request, the Custodian provided the Complainant with the

⁷ 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.

requested OPRA form and asserted that the Complainant's request for special service charge records was unclear. The Custodian also informed the Complainant that researching all cash receipt books for the time period requested would require an estimated ten (10) hours of research, archival retrieval and photocopying. Additionally, in the Custodian's SOI dated November 20, 2007, the Custodian certified that the requested record did not exist at the time of the request and so the Custodian provided the Complainant with an opportunity to review records that contained the requested information.

In Vessio v. Barnegat Township, Building and Zoning Department, GRC Complaint No. 2006-70 (April 2007) the Custodian offered the Complainant the opportunity to inspect the requested records to identify those records the Complainant would be willing to pay to copy. The Council held that:

“[t]he Custodian's March 21, 2006 letter informed the Complainant of the location of the requested information and invited him to come to the Clerk's office to examine the materials during business hours. When Complainant arrived at the Clerk's office on March 24, 2006, the relevant materials were available for Complainant's inspection. The Custodian offered to make the requested information available for Complainant's inspection and selection of particular documents prior to incurring copying fees for any documents. OPRA requires that a Custodian make government records readily accessible for inspection, copying or examination by citizens. N.J.S.A. 47:1A-1. OPRA also requires that a Custodian grant or deny a request for access to a government record not later than seven (7) business days after receiving the request, as long as the record is currently available. N.J.S.A. 47:1A-5.i. The Custodian's actions in this case are, therefore, consistent with OPRA.”

Therefore, in this instant complaint, although the Custodian did not inform the Complainant that the requested record did not exist until he certified to such in his SOI dated November 20, 2007, the Custodian did provide the Complainant with two (2) written responses to the OPRA request within the statutorily mandated seven (7) business days in which the Custodian indicated that the Complainant's request was unclear but attempted to accommodate the Complainant's request anyway. As such, the Custodian properly responded to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i and Vessio, supra.

However, item # 2 of the Complainant's request sought a copy of any record (such as a receipt) that shows special service charges for OPRA requests assessed by the Township for the years 2005, 2006 and 2007 to the date of this request. The Custodian certified that the requested record did not exist at the time of the request but the Custodian provided the Complainant with an opportunity to review records that contained the requested information so that the Complainant could compile the information himself. The Complainant's Counsel asserts that special service charges should be reflected in communications between the Township and requestors. However, the Complainant fails to specifically identify any specific OPRA requests for which special service charges

were assessed. Thus, the Custodian would be required to research Township files to determine which requests, if any, involved a special service charge.

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),⁸ 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."⁹

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..."

Therefore, because item # 2 of the Complainant's OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*.

Further, because the Custodian certified that the requested record did not exist at the time of the request and because the Complainant's request is invalid because it is not a request for an identifiable government record, a special service charge is not at issue in this matter. *See* Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005) (stating that the Custodian did not unlawfully deny access because the Custodian certified that the requested records did not exist at the time of the request).

Whether the Custodian violated OPRA and unlawfully denied access by not utilizing the GRC's model request form?

OPRA provides that:

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

⁹ As stated in Bent, *supra*.

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) 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;
- (5) space for the custodian to list reasons if a request is denied in whole or in part
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied. N.J.S.A. 47:1A-5.f.

The Complainant contends that until recently the Township’s OPRA request form did not conform to the GRC’s model request form and violated OPRA. The Complainant states that the Township’s form asked requestors to state his or her reason for requesting the records. The Complainant also states that the form set forth an administrative fee for supervisory and/or clerical personnel to search the requested records which cannot be readily searched by members of the public, quoting \$30 per hour for supervisory personnel and \$25 per hour for clerical. The Complainant also alleges that none of the exceptions listed on page five (5) of the request form are recognized under OPRA. Further, the Complainant states that the form indicates that the seven (7) business day response time begins when the Township Attorney determines the records may be provided. Additionally, the Complainant states that the Township lists copies of audiotapes at \$10.00, which the Complainant asserts is most likely beyond the actual cost of the tape.

The Custodian certified that the Township adopted the GRC’s model request form via Resolution No. 07-156 at its July 20, 2007 meeting. Additionally, the Complainant submitted his request on the Township’s newly adopted form. In said request, the Complainant sought access to a copy of the Township’s old request form, which the Complainant contends violates OPRA.

The evidence of record indicates that at the time of the Complainant’s request, the Township’s old request form was not in use because the Complainant submitted his request on the new form on which he requested a copy of the old form and the Custodian certified that said form had been adopted by the Township at its July 20, 2007 meeting, approximately one (1) month prior to the date of the Complainant’s OPRA request.

The Custodian's Counsel asserts that this portion of the request is moot because the Complainant raised the same form issue in O'Shea v. Township of Long Hill (Morris), GRC Complaint No. 2007-169 (September 2007) which the Complainant withdrew after the Township adopted the GRC's model request form. Additionally, the Custodian asserts that because the Township continues to use the GRC's model request form, this current complaint is moot.

The fact that the Complainant voluntarily withdrew a separate complaint in which the subject matter is identical to this current complaint (whether the Township's OPRA request form violates OPRA) has no bearing on this complaint because the Complainant filed said complaints regarding different OPRA requests.

Nevertheless, "[m]ootness is ordinarily defined as the inability of a court because of attendant circumstances to grant judicial relief." Pressler, *Current N.J. Court Rules*, comment 1.21a on R. 2:8-2. Issues that have been rendered moot by subsequent developments render legal issues abstract and outside the proper realm of adjudicatory bodies. City of Camden v. Whitman, 325 N.J. Super. 236 (App. Div. 1999). *See e.g.*, Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605, 626-27 (2004). (where defendant bank altered its method of compounding interest to comply with NJ Statute in respect of assignment amounts and credited overpayments, issue of whether initial methodology used to compute interest was inconsistent with statute was moot); Rooney v. West Orange Tp., 200 N.J. Super. 201 (App. Div. 1985)(Township's claim for indemnification from board of education was moot, where board had paid full settlement); Handabaka v. Division of Consumer Affairs, Dept. of Public Utilities, 167 N.J. Super. 12 (App. Div. 1979)(where applicant suing for appointment to civil service job no longer desired appointment, case was moot); Passaic County Bar Ass'n v. Hughes, 108 N.J. Super. 161 (Ch. Div. 1969)(where at time suit was started Governor had taken appropriate action with respect to all existing judicial vacancies in county, there was no controversy before court that would permit court to grant relief as to Chief Executive's exercise of his appointing power in relation to those county vacancies).

Therefore, because the Complainant did not use the Township's old request form to submit the OPRA request which is the subject of this complaint and because the Custodian certified that the Township adopted the GRC's model request form approximately one (1) month prior to the date of the Complainant's OPRA request, this portion of the Complainant's request, in which the Complainant asserts that the Township's old OPRA request form violated OPRA, is moot.

Additionally, the GRC's Advisory Opinion No. 2006-01 provides that a valid OPRA request is one that is submitted on the agency's official OPRA request form. N.J.S.A. 47:1A-5.f. mandates that public agencies adopt an official OPRA request form. However, the GRC's Advisory Opinion No. 2006-01 also provides that "[w]hen an agency has not adopted its own official OPRA records request form, requestors may submit their records request on the Model Request Form located on the Government Records Council website (www.nj.gov/grc/)."

Therefore, because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Long Hill has already adopted the

GRC's model request form as its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an official form, it is unnecessary for the Council to order the Township to adopt the model request form.

Whether the Custodian'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?

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.

In this complaint, the Custodian properly responded to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian provided the Complainant with two (2) written responses to the OPRA request within the statutorily mandated seven (7) business days in which the Custodian indicated that the Complainant's request was unclear but attempted to accommodate the Complainant's request anyway. Additionally, the Complainant's request is invalid because the Complainant failed to request a specific identifiable government record. Further, the portion of the Complainant's request regarding the Township's prior form allegedly violating OPRA is moot because the Complainant did not use the Township's old request form to submit the OPRA request which is the subject of this complaint and because the Custodian certified that the Township adopted the GRC's model request form approximately one (1) month prior to the date of the Complainant's OPRA request.

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

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negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Therefore, because the Custodian did not unlawfully deny access to the requested records because the request is invalid as it was not a request for a specific identifiable government record, and because the portion of this complaint regarding the OPRA request form is moot due to the Township's abandonment of the previous OPRA request form and the adoption of the GRC's model request form, 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J. Stat. Ann. § 47:1A-6 and N.J. Stat. Ann. § 47:1A-7(f), against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award

of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

In this instant complaint, the Custodian's responses to the Complainant's request were proper pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian provided the Complainant with two (2) written responses to the OPRA request within the statutorily mandated seven (7) business days in which the Custodian indicated that the Complainant's request was unclear but attempted to accommodate the Complainant's request anyway. Nevertheless, the Complainant's request is invalid because the Complainant failed to request a specific identifiable government record. Additionally, the portion of this complaint regarding the Township's request form is moot.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about change (voluntary or otherwise) in the Custodian's conduct and as such the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian did not inform the Complainant that the requested record did not exist until he certified to such in his Statement of Information dated November 20, 2007, the Custodian did provide the Complainant with two (2) written responses to the OPRA request within the statutorily mandated seven (7) business days in which the Custodian indicated that the Complainant's request was unclear but attempted to accommodate the Complainant's request anyway. As such, the Custodian properly responded to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Vessio v. Barnegat Township, Building and Zoning Department, GRC Complaint No. 2006-70 (April 2007).
2. Because item # 2 of the Complainant's OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request is 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. Because the Custodian certified that the requested record did not exist at the time of the request and because the Complainant's request is invalid because it is not a request for an identifiable government record, a special service charge is not at issue in this matter. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005) (stating that the Custodian did not

unlawfully deny access because the Custodian certified that the requested records did not exist at the time of the request).

4. Because the Complainant did not use the Township's old request form to submit the OPRA request which is the subject of this complaint and because the Custodian certified that the Township adopted the GRC's model request form approximately one (1) month prior to the date of the Complainant's OPRA request, this portion of the Complainant's request, in which the Complainant asserts that the Township's old OPRA request form violated OPRA, is moot.
5. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Township of Long Hill has already adopted the GRC's model request form as its own form, as well because the GRC's Advisory Opinion No. 2006-01 states that a requestor may use the model form when a public agency has not adopted an official form, it is unnecessary for the Council to order the Township to adopt the model request form.
6. Because the Custodian did not unlawfully deny access to the requested records because the request is invalid as it was not a request for a specific identifiable government record, and because the portion of this complaint regarding the OPRA request form is moot due to the Township's abandonment of the previous OPRA request form and the adoption of the GRC's model request form, 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.
7. The Complainant has not achieved the desired result because the complaint did not bring about change (voluntary or otherwise) in the Custodian's conduct and as such the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

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Executive Director

July 23, 2008