



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 29, 2010 Government Records Council Meeting

Z.T.

Complainant

v.

Bernards Township Board of Education (Somerset)

Custodian of Record

Complaint No. 2007-277

At the June 29, 2010 public meeting, the Government Records Council ("Council") considered the June 22, 2010 *Reconsideration* 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. Because the Complainant has failed to establish in his motion for reconsideration of the Council's April 8, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Because the former Custodian provided payment of the \$1,000 civil penalty to the GRC within the extended deadline date, and because the current Custodian provided a legal certification to the GRC certifying that there are no records responsive to the second portion of request item no. 4 (Report of Misconduct) or the entirety of request item no. 5, within the extended deadline date, both the former Custodian and current Custodian have complied with the Council's April 8, 2010 Interim Order.

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 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 14, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Z. T.¹
Complainant**

GRC Complaint No. 2007-277

v.

**Bernards Township Board of Education (Somerset)²
Custodian of Records**

Records Relevant to Complaint:³

1. Correspondence from Office of Civil Rights of United States Department of Education to Valerie Goger dated August 29, 2006.
2. E-mail from New Jersey Institute of Technology to Marian Palumbo and the guidelines, requests, and instructions that Ms. Palumbo distributed to the teachers at Ridge High School.
3. Exhibits J and K attached to the letter from Scott W. Carbone to the Office of Civil Rights.
4. Documents authorizing the release of V.T.'s transcripts for the 2003-2004, 2004-2005, 2005-2006 and 2006-2007 school years and Report of Misconduct dated February 2, 2006.⁴
5. A list of students who were members of the Ridge High School New Jersey Science League teams for each school year from 2003-2007.
6. The contract between the Bernards Township Board of Education and the Bernards Township Administrators Association for the 2004-2005 school year.
7. Official records which show the Bernards Township Board of Education's appointment of the Open Public Records Act Officer for every school year from 2003-2004 to 2006-2007.

Request Made: October 8, 2007

Response Made: None

Custodian: H. Ronald Smith⁵

GRC Complaint Filed: November 16, 2007⁶

¹ No legal representation listed on record.

² Represented by Derlys M. Gutierrez, Esq., of Adams Stern Gutierrez & Lattiboudere, LLC (Newark, NJ).

³ Items No. 1-4 refer to the letter from Scott W. Carbone to the Office of Civil Rights of the United States Department of Education dated October 12, 2006.

⁴ V.T. is the child of the Complainant in this matter.

⁵ The Custodian at the time of the Complainant's OPRA request and the GRC's requests for a Statement of Information is no longer employed by the Board of Education. The current Custodian is Nick Markarian.

⁶ The GRC received the Denial of Access Complaint on said date.

Background

April 8, 2010

Government Records Council's ("Council") Interim Order. At its April 8, 2010 public meeting, the Council considered the April 1, 2010 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, found that:

1. Because the Custodian Counsel's argument set forth in her Exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law, and because the Custodian has failed to otherwise provide any legal basis for the Council to reject the Administrative Law Judge's findings, the Council accepts the Administrative Law Judge's Initial Decision dated January 19, 2010, which concludes:

"I hereby **FIND** that Custodian of Records Ronald Smith knowingly and willfully violated OPRA and unreasonably denied access, and that his conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent. Based on this finding, I **ORDER** that Ronald Smith shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a)."

However, the Council hereby **MODIFIES** the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

Additionally, the Council hereby **MODIFIES** the Initial Decision to include the following conclusions regarding the validity of the Complainant's OPRA request items no. 2, 4 and 5:

The entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts) fails to seek specific identifiable government records. As such, said requests are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). However, the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 are valid OPRA requests because

they specifically identify government records. As such, the Custodian must disclose said records to the Complainant, or provide a legal certification that said records do not exist. It is noted that this disclosure order applies to the current Custodian since the Custodian named in this complaint and assessed the knowing and willful penalty is no longer employed by the Board of Education.

2. **The former Custodian, H. Ronald Smith, shall comply with item no. 1 above regarding the payment of the \$1,000 civil penalty within five (5) business days from receipt of the Council's Interim Order.**
3. **The current Custodian shall comply with item no. 1 above regarding the disclosure of the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

April 13, 2010

Council's Interim Order distributed to the parties.

April 16, 2010

Letter from Custodian's Counsel to GRC. Counsel states that she received the Council's Interim Order via e-mail on April 12, 2010; however, the overnight mail package was sent to her office's former address. Counsel requests an extension of time until April 26, 2010 to comply with the disclosure portion of the Council's Interim Order. Counsel also requests an extension of time until May 3, 2010 to comply with the penalty payment portion of the Council's Interim Order.

April 16, 2010

Letter from GRC to Custodian's Counsel. The GRC grants Counsel's request for an extension of time to comply with the Council's Interim Order. Specifically, the GRC extends the deadline for the current Custodian's disclosure order until April 26, 2010 and extends the deadline for the former Custodian's penalty payment until May 3, 2010.

April 16, 2010⁷

Current Custodian's Certification. The current Custodian certifies that the requested Report of Misconduct dated February 2, 2006 does not exist. The Custodian also certifies that the requested list of students who were members of the Ridge High School New Jersey Science League Teams for each school year from 2003-2007 do not exist. The Custodian certifies that the district does not maintain a listing of students who were members of extracurricular activities. Additionally, the Custodian certifies that he has caused a diligent search of the Board of Education's ("BOE") records in order to comply with the Council's Interim Order.

⁷ The Custodian's Counsel sent the Custodian's certification under cover letter dated April 20, 2010.
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April 21, 2010

Custodian Counsel's response to the Council's Interim Order. The Custodian's Counsel states that she has enclosed the former Custodian's personal check dated April 19, 2010 in the amount of \$1,000 made payable to the Treasurer, State of New Jersey.

April 21, 2010

Complainant's request for reconsideration of the Council's April 8, 2010 Interim Order. The Complainant requests that the Council reconsider the portion of its Interim Order wherein the Council found that the entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts) fail to seek specific identifiable government records. The Complainant contends that the Council's decision was made in error because the Council failed to consider or appreciate the significance of probative evidence and based its decision on palpably incorrect findings of fact.

The Complainant takes issue with the following portion of the Council's holding:

“[i]n this instant matter, the first portion of the Complainant's request item no. 2 sought access to an e-mail from New Jersey Institute of Technology to Marian Palumbo. The Complainant identified the e-mail by sender and recipient but failed to specify content/subject or provide any date range. As such, the first portion of the Complainant's request item no. 2 fails to seek specifically identifiable e-mail records.

Similarly, the second portion of request item no. 2 sought access to the guidelines, requests and instructions that Ms. Palumbo distributed to the teachers at Ridge High School. Although the Complainant names types of records, he fails to also identify a subject matter or date range. As such, the Complainant's request item no. 2 failed to seek specifically identifiable government records.

In the first portion of item no. 4 of the Complainant's request he sought documents authorizing the release of V.T.'s transcripts for various school years. “Documents” is a general term which does not identify specific government records. The Complainant's request fails to identify any specific government records such as a signed authorization form, a letter from a parent or e-mail from the student. As such, the first part of request item no. 4 failed to seek specifically identifiable government records.”

Specifically, the Complainant asserts that the Council's holding overlooks the following statement included in his OPRA request, “For items #1-4, please refer to the letter dated October 12, 2006, from Scott W. Carbone to the Office of Civil Rights (OCR) of [United States Department of Education]. See Government Records Request Form (attached).” The Complainant contends that referencing a letter to OCR from the BOE's Counsel provided sufficient information about his OPRA request. The Complainant asserts that it is indefensible that the BOE was unaware of the content/subject or date range of the requested e-mail or guidelines because they were specifically mentioned in the letter to OCR. The Complainant also claims that federal and state laws, as well as the

BOE's policy mandate that the BOE must have possessed an authorization document in order to release V.T.'s transcript. As such, the Complainant contends that the BOE should have known the content, subject matter and the date range of such authorization document. The Complainant asserts that his OPRA requests are valid and states that the BOE never claimed that said requests were invalid.

Additionally, the Complainant states that on July 20, 2009, pursuant to the Administrative Law Judge's order,⁸ he sent the Custodian's Counsel a letter describing his OPRA request. The Complainant states that in said letter, he quoted the relevant portion of the OCR letter dated October 12, 2006 regarding the requested e-mail and guidelines. The Complainant claims that he not only provided a description of the e-mail and guidelines but also named BOE employees who claimed to have knowledge of the records. The Complainant asserts that the persons listed in his July 20, 2009 letter should have known the content, subject and date range of the requested records. The Complainant makes the same argument regarding his request for the documents authorizing the release of V.T.'s transcripts.

Further, the Complainant states that the BOE never claimed that his OPRA request failed to seek identifiable government records. The Complainant contends that if the BOE thought his requests were unidentifiable, the Custodian's Counsel would not have put on record at the Office of Administrative Law that she had provided all requested records that existed or that the requested records never existed.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's April 8, 2010?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated April 8, 2010 on April 21, 2010, six (6) business days from the issuance of the Council's Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases

⁸ The ALJ issued a letter order dated August 4, 2009 in which the Judge ordered the Complainant to send a specific letter to the BOE outlining what records he requested.
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where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant in this matter requests that the Council reconsider the portion of its Interim Order wherein the Council found that the entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts) failed to seek specific identifiable government records. In support of his motion for reconsideration, the Complainant submitted that the Council's holding overlooks the following statement included in his OPRA request, "For items #1-4, please refer to the letter dated October 12, 2006, from Scott W. Carbone to the Office of Civil Rights (OCR) of [United States Department of Education]. See Government Records Request Form (attached)." The Complainant contends that referencing a letter to OCR from the BOE's Counsel provided sufficient information about his OPRA request. The Complainant asserts that it is indefensible that the BOE was unaware of the content/subject or date range of the requested e-mail or guidelines because they were specifically mentioned in the letter to OCR.

In the Council's April 8, 2010 Interim Order, the Council stated that:

"...the first portion of the Complainant's request item no. 2 sought access to an e-mail from New Jersey Institute of Technology to Marian Palumbo. The Complainant identified the e-mail by sender and recipient but failed to specify content/subject or provide any date range. As such, the first portion of the Complainant's request item no. 2 fails to seek specifically identifiable e-mail records.

Similarly, the second portion of request item no. 2 sought access to the guidelines, requests and instructions that Ms. Palumbo distributed to the teachers at Ridge High School. Although the Complainant names types of records, he fails to also identify a subject matter or date range. As such, the Complainant's request item no. 2 failed to seek specifically identifiable government records."

The Complainant's reference to a letter in his OPRA request does not provide adequate information for his requests to be considered valid. As the Council cited in its Interim Decision, "in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App.

Div. 2005),⁹ the Superior Court...held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records 'accessible.'" The key language in the Bent decision is that the requestor *must specifically describe the document sought*. As such, a requestor must include such description on the OPRA request itself. A reference to another document within which a custodian may locate such a description is not sufficient under the Bent standard. Similarly, the Complainant's argument that the BOE should have been aware of the content/subject or date range of the requested e-mail or guidelines is not relevant to the issue of whether the request is valid.

For example, in Bart v. Passaic County Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Complainant requested a copy of a sign posted in conformance with OPRA. The Council held that:

"custodians are required to be familiar with all provisions of OPRA as custodians must grant or deny access in accordance with the law. Also, the OPRA provision cited by the Complainant mandates that a record exist. Specifically, N.J.S.A. 47:1A-5.j. provides that:

'[a] custodian shall post prominently in public view in the part or parts of the office or offices of the custodian that are open to or frequented by the public a statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by any person for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed.'

However...a custodian is not required to conduct research in response to an OPRA request. The court in MAG [Entertainment, LLC v. Division of Alcoholic Beverage Control], 375 N.J.Super. 534, 546 (App. Div. 2005)] does not qualify the extent of research custodian may or may not do in response to requests. The court simply states that custodians are not required to conduct research and that only identifiable government records shall be accessible. MAG, *supra*, at 546, 549. The Complainant here fails to explain in his request what N.J.S.A. 47:1A-5.j. provides and thus leaves it to the Custodian to conduct research in order to determine what said provision of OPRA mandates. Thus, the Complainant's request as currently written does not seek an identifiable government record without requiring the Custodian to research a New Jersey State statute."

The Complainant appealed the GRC's decision in Bart v. Passaic County Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). On appeal, the court held that:

"Indeed, as we pointed out in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 178, 915 A.2d

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

23 (App.Div.), *certif. denied*, 190 N.J. 394, 921 A.2d 448 (2007), the short timeframe within which custodians of public records must respond to document requests ‘does not afford the custodian time to speculate about what the requestor seeks, research, [or] survey agency employees’ regarding the request. Consequently, ‘the requestor's obligation [is] “to specifically describe the document sought[.]”’ *Ibid.* (quoting *Gannett N.J. Partners, L.P. v. County of Middlesex*, 379 N. J.Super. 205, 212, 877 A.2d 330 (App.Div.2005)).

Bart argues that there was nothing particularly complex about his request for documents. He says that the custodian of records under OPRA should be familiar with the Act, particularly N.J.S.A. 47:1A- 5(j), which requires the posting of signs advising members of the public of their right to appeal the ‘denial of, or failure to provide, access to a government record[.]’ He therefore argues that his request for signs posted by the agency ‘in conformance with N.J.S.A. 47:1A-5(j)’ was sufficiently specific. We disagree.

Bart's request for documents required the Agency's custodian of records to undertake some legal research and analysis in order to identify the signs to which Bart was referring in his request. The Act does not, however, require that custodians of government records engage in legal research or consult an attorney in order to identify the records being requested. Bart was required to identify the records he requested with specificity. In our judgment, the GRC correctly found that he failed to do so.”

Similarly in this instant matter, the Custodian is not required to undertake a review of another document to determine the specific records the Complainant is seeking. The Complainant is required to specifically describe the requested records on the OPRA request form, regardless of whether the Custodian *should* have been aware of the requested records.

Additionally, the Complainant states that on July 20, 2009, pursuant to the Administrative Law Judge’s order,¹⁰ he sent the Custodian’s Counsel a letter describing his OPRA request. The Complainant states that in said letter, he quoted the relevant portion of the OCR letter dated October 12, 2006 regarding the requested e-mail and guidelines. The Complainant claims that he not only provided a description of the e-mail and guidelines but also named BOE employees who claimed to have knowledge of the records. The Complainant asserts that the persons listed in his July 20, 2009 letter should have known the content, subject and date range of the requested records. The Complainant makes the same argument regarding the request for the documents authorizing the release of V.T’s transcripts.

¹⁰ The ALJ issued a letter order dated August 4, 2009 (memorializing a July 14, 2009 telephone conference) in which the Judge ordered the Complainant to send a specific letter to the BOE outlining what records he requested.

Based on the evidence of record, the Complainant is correct that the Administrative Law Judge ordered him to provide the Custodian with a specific letter describing the requested records. The evidence of record shows that the Judge issued said order via telephone conference on July 14, 2009 and memorialized said order in writing on August 4, 2009. The evidence of record also indicates that the Complainant provided the Custodian's Counsel with a letter dated July 20, 2009 wherein the Complainant included the relevant sections of the OCR letter to describe in more detail the specific records sought.

However, it is important to recognize that the GRC determined that this complaint should be referred to the Office of Administrative Law in its December 18, 2008 Interim Order because the GRC was unable to determine whether the Complainant's requests were valid OPRA requests. The GRC referred this complaint for a hearing to resolve the facts.

Thus, any additional information the Complainant provided to the Custodian to clarify his OPRA request at any point after the initial filing of this Denial of Access Complaint, including the Complainant's letter in response to the Judge's letter order, is not relevant to the determination of whether the Complainant's OPRA request are valid requests. Such a determination is based on the OPRA request as originally submitted by the Complainant, and as originally included in this Denial of Access Complaint. As previously stated, the entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts), as originally submitted to the Custodian on October 8, 2007, failed to seek specific identifiable government records.

Further, the Complainant states that the BOE never claimed that his OPRA request failed to seek identifiable government records. The Complainant contends that if the BOE thought his requests were unidentifiable, the Custodian's Counsel would not have put on record at the Office of Administrative Law that she had provided all requested records that existed or that the requested records never existed.

However, in Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the court held that "[w]hen the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Thus, the GRC may raise legal issues or exemptions not provided by the Custodian. In fact, the GRC has made similar determinations in prior GRC decisions.

For example, in Bart v. County of Passaic Public Housing Agency, GRC Complaint No. 2008-59 (September 2009), the Complainant requested various records. The Custodian provided a written response in which he provided access to some records. The Public Information Officer also provided a written response in which she provided access to some records. In the Custodian's Statement of Information, he certified that he provided access to some requested records and certified that others do not exist. At no time during the adjudication of the complaint did the Custodian assert that the Complainant's OPRA request, or portions of the request, were invalid. However, the Council held that:

“[b]ecause items # 2-4 of the Complainant’s OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant’s request requires an open-ended search of the Public Housing Authority’s files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J.Super. 445 (App. Div. 2009).”

As the moving party in this reconsideration request, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. Notably, the Complainant’s assertion that his reference to the letter dated October 12, 2006, from Scott W. Carbone to OCR of [United States Department of Education] in his OPRA request provided sufficient information is incorrect because the Custodian is not required to undertake a review of another document to determine the specific records the Complainant is seeking. The Complainant is required to specifically describe the requested records in the OPRA request, regardless of whether the Custodian *should* have been aware of the requested records. Additionally, the Complainant’s letter to the Custodian’s Counsel dated July 20, 2009 wherein he quoted the relevant portion of the OCR letter dated October 12, 2006 regarding the requested e-mail and guidelines is irrelevant to the determination of whether the Complainant’s OPRA request are valid requests. Such a determination is based on the OPRA request as originally submitted by the Complainant, and as originally included in this Denial of Access Complaint. Further, although the Complainant contends that BOE never claimed that his OPRA request failed to seek identifiable government records, the court in Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) held that “...the GRC is not required to accept as adequate whatever the agency offers.”

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council’s April 8, 2010 Interim Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Whether the original and current Custodians complied with the Council's April 8, 2010 Interim Order?

In the Council's April 8, 2010 Interim Order, the Council accepted the portion of the Administrative Law Judge's Initial Decision dated January 19, 2010 which found that the "Custodian of Records Ronald Smith knowingly and willfully violated OPRA and unreasonably denied access, and that his conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent." As such, the Judge ordered the Custodian to pay "a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a)."

The Council modified the Judge's Initial Decision to require that the Custodian's penalties are made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC. The Council ordered the former Custodian to remit his penalty payment within five (5) business days from receipt of the Council's Interim Order, or by April 20, 2010.

Additionally, the Council ordered the current Custodian to disclose the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 to the Complainant, or provide a legal certification that said records do not exist within five (5) business days from receipt of the Council's Interim Order, or by April 20, 2010.

On April 16, 2010, within the compliance timeframe, the Custodian's Counsel requested an extension of time to comply with the Council's Interim Order. Specifically, Council requested an extension of time until April 26, 2010 for the current Custodian to comply with the Council's Order, and an extension until May 3, 2010 for the former Custodian to comply with said Order. The GRC granted Counsel's extension requests via letter dated April 16, 2010.

On April 20, 2010 the Custodian's Counsel provided to the GRC the current Custodian's certification dated April 16, 2010 wherein the current Custodian certified that there are no records responsive to the second portion of request item no. 4 (Report of Misconduct) or the entirety of request item no. 5. Additionally, Counsel provided the GRC with the former Custodian's payment of the \$1,000 civil penalty on April 21, 2010.

Therefore, because the former Custodian provided payment of the \$1,000 civil penalty to the GRC within the extended deadline date, and because the current Custodian provided a legal certification to the GRC certifying that there are no records responsive to the second portion of request item no. 4 (Report of Misconduct) or the entirety of request item no. 5, within the extended deadline date, both the former Custodian and current Custodian have complied with the Council's April 8, 2010 Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has failed to establish in his motion for reconsideration of the Council's April 8, 2010 Interim Order that 1) the GRC's decision is based

upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Because the former Custodian provided payment of the \$1,000 civil penalty to the GRC within the extended deadline date, and because the current Custodian provided a legal certification to the GRC certifying that there are no records responsive to the second portion of request item no. 4 (Report of Misconduct) or the entirety of request item no. 5, within the extended deadline date, both the former Custodian and current Custodian have complied with the Council’s April 8, 2010 Interim Order.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Z.T.

Complaint No. 2007-277

Complainant

v.

Bernards Township Board of Education (Somerset)

Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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:

1. Because the Custodian Counsel’s argument set forth in her Exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law, and because the Custodian has failed to otherwise provide any legal basis for the Council to reject the Administrative Law Judge’s findings, the Council accepts the Administrative Law Judge’s Initial Decision dated January 19, 2010, which concludes:

“I hereby **FIND** that Custodian of Records Ronald Smith knowingly and willfully violated OPRA and unreasonably denied access, and that his conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent. Based on this finding, I **ORDER** that Ronald Smith shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a).”

However, the Council hereby **MODIFIES** the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the “Penalty Enforcement Law of 1999” and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.



Additionally, the Council hereby **MODIFIES** the Initial Decision to include the following conclusions regarding the validity of the Complainant's OPRA request items no. 2, 4 and 5:

The entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts) fails to seek specific identifiable government records. As such, said requests are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). However, the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 are valid OPRA requests because they specifically identify government records. As such, the Custodian must disclose said records to the Complainant, or provide a legal certification that said records do not exist. It is noted that this disclosure order applies to the current Custodian since the Custodian named in this complaint and assessed the knowing and willful penalty is no longer employed by the Board of Education.

2. **The former Custodian, H. Ronald Smith, shall comply with item no. 1 above regarding the payment of the \$1,000 civil penalty within five (5) business days from receipt of the Council's Interim Order.**
3. **The current Custodian shall comply with item no. 1 above regarding the disclosure of the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

Interim Order Rendered by the
Government Records Council
On The 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Z. T.¹
Complainant**

GRC Complaint No. 2007-277

v.

**Bernards Township Board of Education (Somerset)²
Custodian of Records**

Records Relevant to Complaint:³

1. Correspondence from Office of Civil Rights of United States Department of Education to Valerie Goger dated August 29, 2006.
2. E-mail from New Jersey Institute of Technology to Marian Palumbo and the guidelines, requests, and instructions that Ms. Palumbo distributed to the teachers at Ridge High School.
3. Exhibits J and K attached to the letter from Scott W. Carbone to the Office of Civil Rights.
4. Documents authorizing the release of V.T.'s transcripts for the 2003-2004, 2004-2005, 2005-2006 and 2006-2007 school years and Report of Misconduct dated February 2, 2006.⁴
5. A list of students who were members of the Ridge High School New Jersey Science League teams for each school year from 2003-2007.
6. The contract between the Bernards Township Board of Education and the Bernards Township Administrators Association for the 2004-2005 school year.
7. Official records which show the Bernards Township Board of Education's appointment of the Open Public Records Act Officer for every school year from 2003-2004 to 2006-2007.

Request Made: October 8, 2007

Response Made: None

Custodian: H. Ronald Smith⁵

GRC Complaint Filed: November 16, 2007⁶

¹ No legal representation listed on record.

² Represented by Derlys M. Gutierrez, Esq., of Adams Stern Gutierrez & Lattiboudere, LLC (Newark, NJ).

³ Items No. 1-4 refer to the letter from Scott W. Carbone to the Office of Civil Rights of the United States Department of Education dated October 12, 2006.

⁴ V.T. is the child of the Complainant in this matter.

⁵ The Custodian at the time of the Complainant's OPRA request and the GRC's requests for a Statement of Information is no longer employed by the Board of Education. The current Custodian is Nick Markarian.

⁶ The GRC received the Denial of Access Complaint on said date.

Background

December 18, 2008

Government Records Council's ("Council") Interim Order. At its December 18, 2008 public meeting, the Council considered the December 10, 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. 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).
2. Based upon the inadequate evidence in this matter, the GRC is unable to determine whether the Complainant's requests are valid OPRA requests and whether the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.
3. Because the Custodian failed to respond to Complainant's OPRA request and failed to respond to the GRC's requests for a Statement of Information in this matter, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

December 19, 2008

Council's Interim Order distributed to the parties.

January 29, 2009

Complaint transmitted to the Office of Administrative Law ("OAL").

March 13, 2009

Letter of Representation from Custodian's Counsel.

January 19, 2010

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ's Findings of Fact are as follows:

"[t]he custodian of records failed to supply the documents requested in the OPRA request, and failed to offer any valid reason for not producing the documents. His explanation that he thought the documents were supplied to [the Complainant's] wife in a previous case lacks credibility. He could

not produce any proof of that request, and [Complainant] provided proof that [Complainant's] wife made her request two months later. He never attempted to contact the [Complainant] to resolve any questions he had about the request. Instead, he simply ignored the requests and follow-up. His testimony was not credible. He provided absolutely no information in support of his position. He was unable to recall any specific information as to why he did not supply any information. Therefore, his testimony lacked credibility and is of no value.”

The GRC transmitted this complaint to OAL for a determination of whether the original Custodian unlawfully denied access to the requested records. The ALJ held that:

“[t]he custodian is required to grant access to the government records or deny the request for access no later than seven business days after receiving the request. N.J.S.A. 47:1A-5(i). Since the requests were made on October 8, 2007, the custodian’s grant of access or denial was due by October 15, 2007. On that day the custodian provided no access to any of the requested records, and failed to file any reason or explanation of his reason for denial.

N.J.S.A. 47:1A-5 requires that the custodian shall indicate the specific basis upon which he is unable to comply. 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. N.J.S.A. 47:1A-5(i). Since the [custodian] failed to respond, his actions clearly constituted a denial.”

The GRC also transmitted this complaint to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The ALJ held that:

“[t]he standard for imposing a monetary penalty upon a public official who violated OPRA by unreasonably denying access to government records requires a finding that such violation was both knowing and willful. OPRA contains no definition of these terms.

The United States Supreme Court in McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), determined that the meaning of ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional,’ and is generally understood to refer to conduct that is not merely negligent.

In Fielder v. Stonack, 141 N.J. 101, 125 (1995), the New Jersey Supreme Court dealt with the meaning of the phrase willful misconduct in the context of a police pursuit. The Court held that willful misconduct in the conduct of a police pursuit means the knowing failure of a police officer to follow specific orders. The Court further stated that there must be some knowledge that the act is wrongful. Id. at 124.

There is no presumption of ‘willful’ misconduct arising simply from the failure of a public official to respond in a timely fashion to a request for production. Mere negligence or heedlessness of the need to comply with the statute in a timely manner is not enough to label the failure as willful. There must be some other element of proof to demonstrate that the official acted in reckless disregard of the statutory command, that the lack of response was intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional. Executive Com’n on Ethical Standards v. Salmon, 295 N.J. Super. 86 (App. Div. 1996).

There is no dispute that the custodian failed to respond to two requests for records and also did not respond to the GRC. He knew he had a seven-day time period to respond and failed to do so. His explanation that the documents were already supplied pursuant to an earlier OPRA request lacked credibility. He was well aware of the [Complainant] and ongoing litigation, but refused to answer the request or contact the [Complainant] to explain his position...

Based on the foregoing, I hereby **FIND** that Custodian of Records Ronald Smith knowingly and willfully violated OPRA and unreasonably denied access, and that his conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent. Based on this finding, I **ORDER** that Ronald Smith shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a).”

February 4, 2010

Custodian Counsel’s Exceptions to the ALJ’s Initial Decision filed with the GRC. The Custodian’s Counsel states that the Custodian testified that he was confused by the OPRA request which is the subject of this complaint because of the pending litigation filed by the Complainant and his wife against the Board of Education (“BOE”) with the Office of Civil Rights. Counsel states that the Custodian testified that he did not specifically remember responding to the Complainant’s OPRA request because during said timeframe, he received numerous OPRA requests for records relating to the Complainant’s child.

Counsel states that during the time of the Complainant’s OPRA request, the Complainant and his family were involved in an Office of Civil Rights complaint filed against the BOE. Counsel asserts that the GRC has evidence of the various OPRA requests submitted to the BOE by the Complainant and his wife because of the subsequent Denial of Access Complaints filed by said parties. Counsel states that some of the records at issue in these requests and complaints were documents involving the litigation filed by the Complainant with the Office of Civil Rights. Counsel states that all of the records requests involved the same types of records. Counsel asserts that the volume and repeated nature of these requests confused the Custodian and prevented him from clearly delineating to which requests he had responded and which requests were pending. Counsel contends that at no time did the Custodian knowingly and willfully withhold records.

Counsel states that the Custodian testified consistently that he was confused by the numerous requests filed by the Complainant. Additionally, Counsel states that the Custodian testified that he believed he had responded to the request since he had produced similar records in the discrimination cases that had been filed by the Complainant and his wife. Counsel states that the Custodian repeatedly testified that he did not intentionally withhold records and that no one at the BOE told him to withhold records.

Counsel states that in Beaver v. Township of Middletown, GRC Complaint No. 2003-111 (February 2004), the Council found that the Custodian did not knowingly and willfully violate OPRA when she failed to provide the requested records within the required time frame. Counsel states that the Council reasoned:

“the definition of willful misconduct is analyzed in a Deputy Attorney General’s Opinion dated September 22, 2003 (relating to GRC case 2003-152). DAG Scheindlin cites Fielder v. Stonack, 141 N.J. 101, 124 (1995), wherein the New Jersey Supreme Court held:

‘Like many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use. While its general contours, given its language, are similar in all contexts, it may differ depending on the common-law rule or such statute to which it is relevant, and perhaps even with such rule or statute different depending on the facts.

It is apparent that willful misconduct constitutes more than negligent conduct. [cites omitted]. Further, there must be some knowledge that the act is wrongful.’ 141 N.J. at 124.”

The Custodian’s Counsel asserts that the Custodian’s testimony before the ALJ demonstrates that the Custodian did not knowingly and willfully deny access to the requested records. Counsel contends that the Custodian’s actions were careless at worst in that his office could have more carefully examined the various requests and kept more accurate records of which requests were fulfilled and which requests were not. Counsel claims that the Custodian had no personal animosity towards the Complainant and thus had no reason to intentionally withhold records. Counsel asserts that the ALJ’s Initial Decision fails to take the totality of the circumstances into consideration.

Further, Counsel asserts that the Complainant failed to bear his burden of proving that the Custodian knowingly and willfully violated OPRA. Counsel states that the ALJ’s Initial Decision fails to take into account that the Complainant had said burden. Counsel contends that neither the Complainant’s testimony nor any records presented to the ALJ provide any proof that the Custodian knowingly and willfully denied access. However, Counsel contends that the Complainant provided a page from the Initial Decision in J.C. v. Bernards Township Board of Education, OAL Docket No. GRC 6512-08, GRC Complaint No. 2008-18 which demonstrated that the Complainant and his wife had filed numerous records requests in various venues and corroborates the Custodian’s testimony regarding such.

Based on the foregoing reasons, Counsel respectfully requests that the Council reject the ALJ's Initial Decision and issue a Final Decision dismissing this complaint. Counsel also submits that no penalty should be issued against the Custodian because he did not knowingly and willfully violate OPRA.

February 8, 2010⁷

Complainant's response to the Custodian's Exceptions. The Complainant asserts that the Council may not overturn the ALJ's Initial Decision without finding that said Decision was arbitrary, capricious, without rational basis or induced by improper motives. Non-Profit Affordable Housing v. COAH, 265 N.J. Super. 475, 479 (App. Div. 1993). The Complainant contends that the purpose of the GRC's consideration of the Custodian's Exceptions is not to substitute the GRC's judgment for the ALJ's judgment, but rather to determine whether the decision had a reasonable basis for its determination.

Additionally, the Complainant states that the burden of demonstrating that a court action was so deficient rests with the party challenging the decision. Kopera v. West Orange Bd. Of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). The Complainant asserts that the Custodian's Exceptions failed to meet the burden of proving that the ALJ's decision was arbitrary, capricious and unreasonable. Rather, the Complainant states that the Custodian's Exceptions reiterate the arguments presented to the ALJ, express the Custodian's dissatisfaction with the decision, and ask the GRC to throw out the ALJ's Decision and replace it with the one proposed by the Custodian.

The Complainant also asserts that the choice of accepting or rejecting testimony of witnesses ordinarily rests with the hearing judge. Unless the choice was unreasonably made, it must be affirmed. Renan Realty Corp. v. Community Affairs Dep't., 182 N.J. Super. 415 (App. Div. 1981). The Complainant contends that the Custodian failed to provide any specific material evidence contradicting the ALJ's Findings of Fact and failed to present any new or distinct material that the ALJ failed to consider. The Complainant states that the Custodian alleges that the ALJ ignored the evidence presented that there were other records requests ongoing at the time of the Complainant's OPRA request that account for the Custodian's confusion. However, the Complainant states that the ALJ's Initial Decision clearly indicates that the Custodian "could not supply any documentation or proof as to the dates of any other requests" and that the Custodian "provided absolutely no information in support of his position."

The Complainant states that the Custodian's Counsel claims that there is no proof that the Custodian acted knowingly and willfully. The Complainant states that as a matter of law, an act is willfully done if it is done voluntarily and deliberately. McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988). The Complainant states that specific intent may be established from all the facts and circumstances surrounding the case. United States v. Griffin, 525 F.2d 710 (1st Cir. 1975), cert. denied, 424 U.S. 945 (1976). The Complainant states that one would not expect the Custodian to admit his knowing and willful violation, but asserts that the facts and circumstances surrounding the complaint speak louder. The Complainant states that the Custodian testified that he

⁷ Additional correspondence submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.
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was fully aware of OPRA and had handled many OPRA requests. The Complainant contends that if the Custodian believed that he had a legitimate reason to deny the Complainant's OPRA request, he should have provided a response indicating such a reason. However, the Complainant asserts that the Custodian voluntarily and deliberately chose to ignore the Complainant's OPRA request. The Complainant also states that he did not immediately file a Denial of Access Complaint with the GRC. The Complainant states that after 17 days of not receiving a response from the Custodian, he informed the Custodian that a response must be provided within seven (7) business days. The Complainant contends that if the Custodian did not willfully ignore his request, he would have provided a response addressing his alleged confusion. The Complainant states that he waited an additional three (3) weeks before he filed a complaint with the GRC, giving the Custodian ample time to review and respond to his request.

Additionally, the Complainant states that the Custodian ignored requests from the GRC to provide a Statement of Information wherein the Custodian would have articulated his reasons for not responding to the Complainant's OPRA requests. The Complainant asserts that the Custodian did not attempt to provide the GRC with any basis for not responding to the Complainant's OPRA request, yet the Custodian's Counsel asks for the GRC to reject the ALJ's Initial Decision because the Custodian mistakenly believed that he had responded to the request.

Further, the Complainant asserts that the Custodian's reliance on Beaver v. Township of Middletown, GRC Complaint No. 2003-111 (2004) is misplaced because the Custodian in said complaint offered various reasons supported by facts for her failure to timely comply with the OPRA request. Specifically, the Complainant states that in Beaver:

- The OPRA request required some research and review of archived records and related to information involving a time period of some decades;
- The Custodian responded with all of the requested records that existed and the relevant portions were made available for inspection;
- The Custodian was pregnant and the Deputy Clerk had retired at the time of the OPRA request;
- The Custodian apologized for the delay which resulted from "...the search of old records and a miscommunication as to the documents required for a response" and the requestor was informed that the request would take a longer period of time.

The Complainant contends that contrary to Beaver, the Custodian in this instant matter failed to provide any of the requested records, ignored the request and follow-up correspondence, never attempted to contact the Complainant, and failed to offer any valid reason for not producing the requested records.

Moreover, the Complainant states that during the January 5, 2010 hearing at OAL, the Custodian's Counsel stated that she would put on the record that she had provided the Complainant with all of the requested records that exist and that the remaining records (request items no. 2, 4 and 5) do not exist. As such, the Complainant states that the question of the existence of request items no. 2, 4 and 5 was dropped from the hearing. However, the Complainant states that on January 25, 2010 the Custodian's

Counsel informed him that she would not put on the record that request items no. 2, 4 and 5 do not exist. As such, the Complainant contends that the Custodian continues to deny access to the requested records with no legal justification. The Complainant requests that the GRC order the Custodian to disclose the records responsive to request items no. 2, 4 and 5.⁸

Analysis

Whether the Council should accept, reject or modify the Administrative Law Judge's Initial Decision dated January 19, 2010?

In the ALJ's Initial Decision dated January 19, 2010, the ALJ determined that the Custodian's testimony lacked credibility and was of no value. The ALJ found that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records, and that the Custodian's conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent. As such, the ALJ ordered the Custodian to be subject to a civil penalty of \$1,000 for his initial violation of OPRA pursuant to N.J.S.A. 47:1A-11.a.

The Custodian's Counsel respectfully requests that the Council reject the ALJ's Initial Decision and issue a Final Decision dismissing this complaint. Counsel also submits that no penalty should be issued against the Custodian because he did not knowingly and willfully violate OPRA. Specifically, the Custodian's Counsel states that the Custodian testified that he was confused by the OPRA request which is the subject of this complaint because of the pending litigation filed by the Complainant and his wife against the BOE with the Office of Civil Rights. Counsel states that the Custodian testified that he did not specifically remember responding to the Complainant's OPRA request because during said timeframe he received numerous OPRA requests for records relating to the Complainant's child. Counsel asserts that the volume and repeated nature of these requests confused the Custodian and prevented him from clearly delineating which requests he had responded to and which requests were pending.

Additionally, Counsel states that in Beaver v. Township of Middletown, GRC Complaint No. 2003-111 (February 2004), the Council found that the Custodian did not knowingly and willfully violate OPRA when she failed to provide the requested records within the required time frame. Thus, Counsel contends that the Custodian's actions were careless at worst in that his office could have more carefully examined the various requests and kept more accurate records of which requests were fulfilled and which requests were not. Counsel claims that the Custodian had no personal animosity towards the Complainant and thus had no reason to intentionally withhold records. Counsel asserts that the ALJ's Initial Decision fails to take the totality of the circumstances into consideration.

⁸ The Complainant makes additional arguments regarding the Custodian's actions that are not relevant to the adjudication of this Denial of Access Complaint.
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Further, Counsel asserts that the Complainant failed to bear his burden of proving that the Custodian knowingly and willfully violated OPRA. Counsel states that the ALJ's Initial Decision fails to take into account that the Complainant had said burden.

However, the Complainant asserts that the GRC may not overturn the ALJ's Initial Decision without finding that said Decision was arbitrary, capricious, without rational basis or induced by improper motives. The Complainant asserts that the Custodian's Exceptions failed to meet the burden of proving that the ALJ's decision was arbitrary, capricious and unreasonable. Rather, the Complainant states that the Custodian's Exceptions reiterate the arguments presented to the ALJ, express the Custodian's dissatisfaction with the decision, and ask the GRC to throw out the ALJ's Decision and replace it with the one proposed by the Custodian.

Moreover, the Complainant states that during the January 5, 2010 hearing at OAL, the Custodian's Counsel stated that she would put on the record that she had provided the Complainant with all of the requested records that exist and that the remaining records (request items no. 2, 4 and 5) do not exist. As such, the Complainant states that the question of the existence of request items no. 2, 4 and 5 was dropped from the hearing. However, the Complainant states that on January 25, 2010 the Custodian's Counsel informed him that she would not put on the record that request items no. 2, 4 and 5 do not exist. As such, the Complainant contends that the Custodian continues to deny access to the requested records with no legal justification. The Complainant requests that the GRC order the Custodian to disclose the records responsive to request items no. 2, 4 and 5.

The bulk of the Custodian Counsel's Exceptions pertain to the Custodian's testimony before the ALJ during the OAL hearing. Counsel reiterates the Custodian's testimony in support of Counsel's contention that the Custodian's actions were at worst negligent rather than knowing and willful. As previously stated, the ALJ found that the Custodian's testimony lacked credibility and was of no value.

Pursuant to *N.J.A.C.* 1:1-18.6 (c), the New Jersey Administrative Code that governs proceedings before OAL "the agency head may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record."

The ALJ's Findings of Fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties.

"The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip

op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the testimony and evidence, explaining how he weighed the proofs before him and explaining why he credited or discredited certain testimony. The ALJ’s conclusions are clearly aligned and consistent with those credibility determinations. As such, the Council finds that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ’s conclusions.

However, the Custodian’s Counsel also states that the Council failed to find that the Custodian in Beaver, *supra*, knowingly and willfully violated OPRA despite the Custodian’s failure to provide the requested records within the statutorily mandated time frame. Counsel contends that the same ruling should apply in this instant matter.

As the Complainant pointed out in his response to Counsel’s Exceptions, the facts in Beaver are distinguishable from the facts in this instant matter. Specifically, in Beaver, the Custodian’s Counsel certified that the requestor was notified that fulfilling the request would take longer than the statutorily mandated seven (7) business days. However, in this instant matter, the Custodian made no attempt to contact the Complainant regarding his OPRA request even after the Complainant informed the Custodian that his response was overdue.

Further, the ALJ’s Initial Decision takes into account that “there is not a presumption of ‘willful’ misconduct arising simply from the failure of a public official to respond in a timely fashion to a request for production.” Still, the ALJ determined that the Custodian knowingly and willfully violated OPRA because the Custodian was aware of his obligations under OPRA and refused to comply with such.

Additionally, the Complainant requests that the Council order the Custodian to disclose the records responsive to request items no. 2, 4 and 5 of his OPRA request. The Complainant states that during the January 5, 2010 hearing at OAL, the Custodian’s Counsel stated that she would put on the record that she had provided the Complainant with all of the requested records that exist and that the remaining records (request items

no. 2, 4 and 5) do not exist. As such, the Complainant states that the question of the existence of request items no. 2, 4 and 5 was dropped from the hearing. However, the Complainant states that on January 25, 2010 the Custodian's Counsel informed him that she would not put on the record that request items no. 2, 4 and 5 do not exist. As such, the Complainant contends that the Custodian continues to deny access to the requested records with no legal justification.

Because the Council initially transmitted this complaint to OAL to determine whether the Complainant's OPRA requests were valid OPRA requests, and because no such conclusion exists in the ALJ's Initial Decision regarding request items no. 2, 4 and 5, the Council addresses said issue here.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹⁰

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

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

¹⁰ As stated in Bent, *supra*.

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

“The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” (Emphasis added.) *Id.*

The Council expanded its decision in Sandoval, *supra*, for clarification purposes in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (February 2010). Specifically, the Council held that:

“an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail and (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted. Additionally, a valid e-mail request must identify the sender and/or the recipient thereof.”

In this instant matter, the first portion of the Complainant’s request item no. 2 sought access to an e-mail from New Jersey Institute of Technology to Marian Palumbo. The Complainant identified the e-mail by sender and recipient but failed to specify content/subject or provide any date range. As such, the first portion of the Complainant’s request item no. 2 fails to seek specifically identifiable e-mail records.

Similarly, the second portion of request item no. 2 sought access to the guidelines, requests and instructions that Ms. Palumbo distributed to the teachers at Ridge High School. Although the Complainant names types of records, he fails to also identify a subject matter or date range. As such, the Complainant’s request item no. 2 failed to seek specifically identifiable government records.

In the first portion of item no. 4 of the Complainant's request he sought documents authorizing the release of V.T.'s transcripts for various school years. "Documents" is a general term which does not identify specific government records. The Complainant's request fails to identify any specific government records such as a signed authorization form, a letter from a parent or e-mail from the student. As such, the first part of request item no. 4 failed to seek specifically identifiable government records.

However, the second portion of request item no. 4 specifically identified a Report of Misconduct dated February 2, 2006. Also, request item no. 5 specifically identified a list of student members of Ridge High School New Jersey Science League teams from 200-2007. As such, said request items are valid OPRA requests.

Therefore, because the Custodian Counsel's argument set forth in her Exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law, and because the Custodian has failed to otherwise provide any legal basis for the Council to reject the Administrative Law Judge's findings, the Council accepts the Administrative Law Judge's Initial Decision dated January 19, 2010, which concludes:

"I hereby **FIND** that Custodian of Records Ronald Smith knowingly and willfully violated OPRA and unreasonably denied access, and that his conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent. Based on this finding, I **ORDER** that Ronald Smith shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a)."

However, the Council hereby **MODIFIES** the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

Additionally, the Council hereby **MODIFIES** the Initial Decision to include the following conclusions regarding the validity of the Complainant's OPRA request items no. 2, 4 and 5:

The entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts) fails to seek specific identifiable government records. As such, said requests are invalid under OPRA pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. However, the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 are valid OPRA requests because they specifically identify government records. As such, the Custodian must disclose said records to the Complainant. It is noted that this disclosure order applies to the current Custodian since the Custodian named in this complaint and assessed the knowing and willful penalty is no longer employed by the Board of Education.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian Counsel's argument set forth in her Exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law, and because the Custodian has failed to otherwise provide any legal basis for the Council to reject the Administrative Law Judge's findings, the Council accepts the Administrative Law Judge's Initial Decision dated January 19, 2010, which concludes:

"I hereby **FIND** that Custodian of Records Ronald Smith knowingly and willfully violated OPRA and unreasonably denied access, and that his conduct was intentional and deliberate, with knowledge of wrongfulness, and not merely negligent. Based on this finding, I **ORDER** that Ronald Smith shall be subject to a civil penalty of \$1,000 for this initial violation pursuant to N.J.S.A. 47:1A-11(a)."

However, the Council hereby **MODIFIES** the Initial Decision to require that pursuant to N.J.S.A. 47:1A-11.a., this penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999" and the rules of the Court governing actions for the collection of civil penalties. Therefore, pursuant N.J.S.A. 2A:11 and N.J. Court Rule 4:70-3, payment of civil penalties are to be made payable to the Treasurer of the State of New Jersey and shall be remitted to the GRC.

Additionally, the Council hereby **MODIFIES** the Initial Decision to include the following conclusions regarding the validity of the Complainant's OPRA request items no. 2, 4 and 5:

The entirety of request item no. 2 and the first portion of request item no. 4 (documents authorizing release of transcripts) fails to seek specific identifiable government records. As such, said requests are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). However, the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 are valid OPRA requests because they specifically identify government records. As such, the Custodian must disclose said records to the Complainant, or provide a legal certification that said records do not exist. It is noted that this disclosure order applies to the current Custodian since the Custodian named in this complaint and assessed the

knowing and willful penalty is no longer employed by the Board of Education.

2. **The former Custodian, H. Ronald Smith, shall comply with item no. 1 above regarding the payment of the \$1,000 civil penalty within five (5) business days from receipt of the Council's Interim Order.**
3. **The current Custodian shall comply with item no. 1 above regarding the disclosure of the second portion of request item no. 4 (Report of Misconduct) and the entirety of request item no. 5 within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

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

INTERIM ORDER

December 18, 2008 Government Records Council Meeting

Z.T.

Complaint No. 2007-277

Complainant

v.

Bernards Township Board of Education (Somerset)

Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 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. 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).
2. Based upon the inadequate evidence in this matter, the GRC is unable to determine whether the Complainant's requests are valid OPRA requests and whether the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.
3. Because the Custodian failed to respond to Complainant's OPRA request and failed to respond to the GRC's requests for a Statement of Information in this matter, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 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: December 19, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Z. T.¹
Complainant**

GRC Complaint No.2007-277

v.

**Bernards Township Board of Education (Somerset)²
Custodian of Records**

Records Relevant to Complaint:³

1. Correspondence from Office of Civil Rights of United States Department of Education to Valerie Goger dated August 29, 2006.
2. E-mail from New Jersey Institute of Technology to Marian Palumbo and the guidelines, requests, and instructions that Ms. Palumbo distributed to the teachers at Ridge High School.
3. Exhibits J and K attached to the letter from Scott W. Carbone to the Office of Civil Rights.
4. Documents authorizing the release of V.T.'s transcripts for the 2003-2004, 2004-2005, 2005-2006 and 2006-2007 school years and Report of Misconduct dated February 2, 2006.⁴
5. A list of students who were members of the Ridge High School New Jersey Science League teams for each school year from 2003-2007.
6. The contract between the Bernards Township Board of Education and the Bernards Township Administrators Association for the 2004-2005 school year.
7. Official records which show the Bernards Township Board of Education's appointment of the Open Public Records Act Officer for every school year from 2003-2004 to 2006-2007.

Request Made: October 8, 2007

Response Made: None

Custodian: H. Ronald Smith⁵

GRC Complaint Filed: November 16, 2007⁶

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Items No. 1-4, refer to the letter from Scott W. Carbone to the Office of Civil Rights of the United States Department of Education dated October 12, 2006.

⁴ V.T. is the child of the Complainant in this matter.

⁵ The Custodian at the time of the Complainant's OPRA request and the GRC's requests for a Statement of Information is no longer employed by the Board of Education.

⁶ The GRC received the Denial of Access Complaint on said date.

Background

October 8, 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.

October 25, 2007

E-mail from Complainant to the Custodian. Complainant states that he has not received a response to his OPRA request. Complainant attaches a copy of the OPRA request.

November 16, 2007

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

- Complainant's OPRA request dated October 8, 2007
- E-mail from the Complainant to the Custodian dated October 25, 2007

The Complainant asserts that the Custodian's failure to respond to his OPRA request is a knowing and willful violation of OPRA. Complainant requests that the GRC enforce OPRA and protect his rights under applicable laws.

November 26, 2008

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

December 5, 2007

Request for the Statement of Information sent to the Custodian.

December 17, 2007

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on December 5, 2007 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

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 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 places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the matter before the Council, the Custodian never responded to the Complainant’s OPRA request nor did the Custodian respond to the Complainant’s e-mail seeking the status of the request.

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 v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Moreover, the Custodian failed to respond to the GRC’s request for a Statement of Information, nor did the Custodian submit any evidence in this matter.

Based upon the inadequate evidence in this matter, the GRC is unable to determine whether the Complainant's requests are valid OPRA requests and whether the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.

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).

Because the Custodian failed to respond to Complainant's OPRA request and failed to respond to the GRC's requests for a Statement of Information in this matter, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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).
2. Based upon the inadequate evidence in this matter, the GRC is unable to determine whether the Complainant's requests are valid OPRA requests and whether the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.
3. Because the Custodian failed to respond to Complainant's OPRA request and failed to respond to the GRC's requests for a Statement of Information in this matter, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Elizabeth Ziegler-Sears
Case Manager/Staff Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008