



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

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COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**July 30, 2008 Government Records Council Meeting**

Kevin N. Starkey  
Complainant

Complaint Nos. 2007-314 and 2007-318

v.

NJ Department of Transportation  
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant’s requests dated September 12, 2007 in which the Custodian requested an extension of time is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and the Complainant’s requests are “deemed” denied 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. Because the Complainant in this matter identified a type of government record (list or record which identifies the Department of Transportation’s projects in the construction or design phase) within a specific date (1997-2002), the requests are not overly broad. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). The Custodian certified that no records responsive beyond those contained in the archived database exist without the Custodian having to conduct research, which is not required under OPRA. As such, the Custodian’s search is not open-ended, nor does it require research,



but rather requires the Custodian to locate the corresponding list of specific government records from an archived database and print said list.

3. Pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), and Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), the Council does not have the authority to adjudicate the portion of this complaint in which the Complainant challenges the accuracy or completeness of a record's content.
4. Although the Custodian's written request for an extension of time to fulfill the Complainant's requests was inadequate under OPRA and resulted in a "deemed" denial of said requests, because the Custodian provided the requested records from an archived database to the Complainant and waived a portion of the copy fee as well as made other records available upon payment of the copying fee, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
5. Based on the fact that the courts of the State have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not an attorney who is the plaintiff representing himself, as well as the GRC's decision in Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006), the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA.

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 30<sup>th</sup> Day of July, 2008

Robin Berg Tabakin, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: August 1, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Kevin N. Starkey<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2007-314 and 2007-318**

v.

**NJ Department of Transportation<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. GRC Complaint No. 2007-314 (OPRA request no. C31092): List or record that identifies the NJ Department of Transportation's projects that were in the construction phase between 1997 and 2002, including the list or record that identifies the prime contractor, design professional and engineer of record for the above mentioned projects.
2. GRC Complaint No. 2007-318 (OPRA request no. C31073): List or record that identifies the NJ Department of Transportation's projects that were in the design phase between 1997 and 2002, including the list or record that identifies the design professional and engineer of record for the above mentioned projects.<sup>3</sup>

**Request Made:** September 6, 2007

**Response Made:** September 12, 2007

**Custodian:** Alfred J. Brenner

**GRC Complaint Filed:** December 17, 2007

**Background**

**September 6, 2007**

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

**September 12, 2007**

Custodian's response to the OPRA requests.<sup>4</sup> The Custodian responds in writing to the Complainant's OPRA request no. C31092 on the first (1<sup>st</sup>) business day following

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<sup>1</sup> The Complainant is an attorney representing himself.

<sup>2</sup> Represented by DAG Wayne J. Martorelli, on behalf of the NJ Attorney General.

<sup>3</sup> The request numbers assigned to the Complainant's requests reflect the Department of Transportation's internal OPRA tracking system.

<sup>4</sup> The Custodian provided separate e-mailed responses for each request but they are combined here because the responses were identical.

receipt of such request.<sup>5</sup> The Custodian responds to OPRA request no. C31073 on the second (2<sup>nd</sup>) business day following receipt of such request.<sup>6</sup> The Custodian requests an extension of time to fulfill said requests because the requested records may not be readily available. The Custodian states that he may have to reach out to several units within the NJ Department of Transportation (“DOT”) for assistance in obtaining the requested records. The Custodian states that he will contact the Complainant again shortly.

Additionally, the Custodian states that if the Complainant is requesting to receive the records responsive via mail, he will contact and advise the Complainant of the amount due. The Custodian states that the records will not be released until payment is received.

### **September 12, 2007**

E-mails from Custodian to Jane Ditmars of DOT regarding the Complainant’s OPRA requests nos. C31092 and C31073.<sup>7</sup> The Custodian forwards the Complainant’s OPRA requests and asks that Ms. Ditmars reply by September 17, 2007 to indicate whether her unit maintains the requested records. The Custodian requests that Ms. Ditmars provide the requested records to the Custodian’s office at least two (2) business days prior to the Custodian’s deadline to respond to said requests which is September 19, 2007 for OPRA request no. C31073 and September 20, 2007 for OPRA request no. C31092.

### **October 3, 2007**

E-mail from Complainant to Custodian. The Complainant requests the status of OPRA request no. C31092.

### **October 10, 2007**

E-mail from Complainant to Custodian. The Complainant states that he has not received a response to his e-mail dated October 3, 2007 and again requests the status of OPRA request no. C31092.

### **October 10, 2007**

E-mail from Custodian to Complainant regarding OPRA request no. C31092. The Custodian states that due to the extensive nature of the Complainant’s request, he is still gathering the records responsive by reaching out to several units within DOT. The Custodian requests an extension of time until October 31, 2007 in order to complete the necessary record identification, retrieval and review required.

### **October 15, 2007**

E-mail from Custodian to Complainant regarding OPRA request no. C31092. The Custodian states that some records responsive are in storage or are not readily available and will require legal review prior to release. As such, the Custodian requests an extension of time until November 7, 2007.

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<sup>5</sup> The Custodian certifies in his Statement of Information dated February 1, 2008 that he received said request on September 11, 2007.

<sup>6</sup> The Custodian certifies in his Statement of Information dated February 1, 2008 that he received said request on September 10, 2007.

<sup>7</sup> The Custodian sent a separate e-mail for each request; however, said e-mails are identical.

**October 24, 2007**

E-mail from Custodian to Complainant regarding OPRA request no. C31092. The Custodian again requests an extension of time until November 7, 2007 and assures the Complainant that the records responsive are being gathered. The Custodian states that he will contact the Complainant as soon as the records become available.

**November 30, 2007**

E-mail from Complainant to Custodian regarding OPRA request no. C31092. The Complainant states that the Custodian's November 7, 2007 extension deadline has passed and requests that the Custodian provide the requested records.

**December 10, 2007**

E-mail from Complainant to Custodian regarding OPRA request no. C31092. The Complainant states that he has not yet received the requested records and would like to resolve this matter without intervention from the Government Records Council ("GRC").

**December 11, 2007**

E-mail from Custodian to Complainant regarding OPRA request no. C31092. The Custodian apologizes for the delay and states that the unit is reviewing its database to determine if it can provide the requested data from existing records.

**December 11, 2007**

E-mail from Complainant to Custodian regarding OPRA request no. C31092. The Complainant requests that the Custodian provide a specific date on which the requested records will be provided as it has been approximately four (4) months<sup>8</sup> since the Complainant submitted his OPRA request.

**December 17, 2007**

Denial of Access Complaint filed with the GRC regarding OPRA request no. C31092 with the following attachments:

- Complainant's OPRA request dated September 6, 2007
- E-mail from Custodian to Complainant dated September 12, 2007
- E-mail from Complainant to Custodian dated October 3, 2007
- E-mail from Complainant to Custodian dated October 10, 2007
- E-mail from Custodian to Complainant dated October 10, 2007
- E-mail from Custodian to Complainant dated October 15, 2007
- E-mail from Custodian to Complainant dated October 24, 2007
- E-mail from Complainant to Custodian dated November 30, 2007
- E-mail from Complainant to Custodian dated December 10, 2007
- E-mail from Custodian to Complainant dated December 11, 2007
- E-mail from Complainant to Custodian dated December 11, 2007

The Complainant states that he submitted his OPRA request no. C31092 on September 6, 2007 and received the Custodian's written response dated September 12,

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<sup>8</sup> Actual time elapsed is three (3) months.

2007 in which the Custodian requested an extension of time to fulfill said request. The Complainant states that he requested an update on the status of his request on October 3, 2007 and October 10, 2007. The Complainant states that on October 10, 2007 the Custodian requested an extension of time until October 31, 2007 to fulfill said request. The Complainant also states that on October 15, 2007 the Custodian requested another extension until November 7, 2007 and repeated his request for said extension on October 24, 2007.

The Complainant states that after the Custodian's extension of time expired he requested an update as to the status of his request on November 30, 2007. The Complainant states that on December 10, 2007 he again asked the Custodian for a status update and informed the Custodian that the Complainant may seek relief through the GRC. The Complainant states that the Custodian responded on December 11, 2007 and indicated that DOT is reviewing its database to determine if the requested data can be provided from existing records. Additionally, the Complainant states that on December 11, 2007 he asked the Custodian when he could expect to receive the records responsive to his request. The Complainant states that the Custodian has failed to provide the requested records or advise as to when said records will be provided. The Complainant also notes that three (3) months have passed since the date of the Complainant's request.

Additionally, the Complainant did not agree to mediate this complaint.

#### **December 17, 2007**

The second Denial of Access Complaint filed with the GRC with the Complainant's OPRA request dated September 6, 2007 attached.

The Complainant states that he submitted his OPRA request on September 6, 2007 but is unaware of the request no. assigned to this request.<sup>9</sup> The Complainant states that to date, the Custodian has failed to produce any records responsive to said request.

Additionally, the Complainant did not agree to mediate this complaint.

#### **December 28, 2007**

E-mail from Custodian to Complainant regarding OPRA request no. C31092. The Custodian states that the records responsive to the Complainant's request are ready to be mailed upon payment of \$36.50. The Custodian states that if payment is not received within thirty (30) days this request will be closed.

#### **December 28, 2007**

E-mail from Custodian to Complainant regarding OPRA request no. C31073. The Custodian states that he placed the records responsive in the mail today and waived the \$3.00 copy fee.

#### **January 7, 2008**

E-mail from Complainant to Custodian regarding OPRA request no. C31073. The Complainant states that he received records responsive to this request on December

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<sup>9</sup> OPRA request no. C31073 as per the Custodian's Statement of Information dated February 1, 2008. Kevin N. Starkey v. NJ Department of Transportation, 2007-314 and 2007-318 – Findings and Recommendations of the Executive Director 4

31, 2007 but asserts that said records are incomplete. The Complainant states that the records do not identify all of the design professionals or project engineers as requested. The Complainant requests a complete list that includes the missing information.

**January 7, 2008**

E-mail from Custodian to Complainant regarding OPRA request no. C31073. The Custodian states that the records provided include all of the information available. The Custodian states that the missing data is not available.

**January 7, 2008**

E-mail from Complainant to Custodian regarding OPRA request no. C31073. The Complainant asks the Custodian to clarify his statement indicating that the missing data is not available. The Complainant asks if said information was destroyed.

**January 8, 2008**

E-mail from Custodian to Complainant regarding OPRA request no. C31073. The Custodian states that the records provided were produced from an existing database and that the Custodian is only able to produce the information that was entered into the database. The Custodian states that he would have to conduct research to locate the missing information, which the Custodian asserts is not the intent of OPRA. The Custodian states that pursuant to MAG Entertainment v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), a request is invalid when it requires the Custodian to conduct research and correlate data from various records.

**January 10, 2008**

E-mail from Custodian to Complainant regarding OPRA request no. C31092. The Custodian states that he has not yet received the Complainant's payment for said request and asks the Complainant to advise when payment will be sent.

**January 10, 2008**

E-mail from Complainant to Custodian regarding OPRA request no. C31092. The Complainant states that he sent his check no. 2943 payable to NJDOT for the amount of \$36.50 on December 28, 2007. The Complainant asks the Custodian to advise if he has located the check.

**January 10, 2008**

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

**January 11, 2008**

OPRA request receipt regarding OPRA request no. C31092. The Custodian states that the records responsive to this request are enclosed.

**January 15, 2008**

E-mail from GRC to Custodian's Counsel granting a five (5) business day extension of time to complete the SOI.<sup>10</sup>

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<sup>10</sup> In response to Counsel's verbal request.



### **January 31, 2008**

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 an SOI on January 10, 2008 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

### **February 1, 2008**

Custodian's SOI with the following attachments:<sup>11</sup>

- Department of Transportation, Division of Construction and Maintenance records retention and disposition schedule dated March 22, 1994
- OPRA request receipt regarding Complainant's OPRA request no. C31073 dated September 10, 2007
- OPRA request receipt regarding Complainant's OPRA request no. C31092 dated September 11, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31073 dated September 12, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31092 dated September 12, 2007
- E-mail from Custodian to Jane Ditmars, DOT, regarding OPRA request no. C31073 dated September 12, 2007
- E-mail from Custodian to Jane Ditmars, DOT, regarding OPRA request no. C31092 dated September 12, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31092 dated October 3, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31092 dated October 10, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31092 dated October 10, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31092 dated October 24, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31092 dated November 30, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31092 dated December 10, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31092 dated December 11, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31092 dated December 11, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31092 dated December 28, 2007
- E-mail from Custodian to Complainant regarding OPRA request no. C31073 dated December 28, 2007

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<sup>11</sup> The signature page of the SOI is dated January 23, 2008, however, the SOI was submitted to the GRC under cover letter dated February 1, 2008.

- OPRA request receipt regarding OPRA request no. C31092 dated December 28, 2007
- OPRA request receipt regarding Complainant's OPRA request no. C31073 dated December 28, 2007
- E-mail from Complainant to Custodian regarding OPRA request no. C31073 dated January 7, 2008
- E-mail from Custodian to Complainant regarding OPRA request no. C31073 dated January 7, 2008
- E-mail from Complainant to Custodian regarding OPRA request no. C31073 dated January 7, 2008
- E-mail from Custodian to Complainant regarding OPRA request no. C31073 dated January 8, 2008
- E-mail from Custodian to Complainant regarding OPRA request no. C31092 dated January 10, 2008
- E-mail from Complainant to Custodian regarding OPRA request no. C31092 dated January 10, 2008
- OPRA request receipt regarding OPRA request no. C31092 dated January 11, 2008<sup>12</sup>

The Custodian certifies that he received the Complainant's OPRA request no. C31073 on September 10, 2007 and the Complainant's OPRA request no. C31092 on September 11, 2007. The Custodian certifies that he provided the Complainant with a written response to both requests on September 12, 2007 in which the Custodian confirmed receipt of said requests and indicated that the requested records may not be readily available and that the Custodian may have to reach out to several units to obtain the requested records. The Custodian also certifies that on September 12, 2007 he forwarded the Complainant's requests to Capitol Management Program's ("CPM") OPRA Liaison for action.

Additionally, the Custodian certifies that on October 3, 2007 he received an e-mail from the Complainant in which the Complainant requested the status of request no. C31092. The Custodian certifies that he received a follow up e-mail from the Complainant on October 10, 2007. The Custodian certifies that the OPRA Unit reached out to CPM to determine the status of the request on said date. The Custodian also certifies that on October 10, 2007 he e-mailed the Complainant to update the status of the Complainant's request based on verbal communications from various DOT units. Additionally, the Custodian states that Judith Parrish of the DOT's OPRA Unit requested an update on the Complainant's request no. C31092 from various units on October 15, 2007. The Custodian certifies that via e-mail dated October 24, 2007 he requested an extension of time until November 7, 2007 to fulfill said request.

The Custodian also certifies that the records responsive to request no. C31073 were identified on December 7, 2007 via an archived database. The Custodian certifies that he mailed the records responsive to the Complainant on December 28, 2007 and waived the \$3.00 copy fee. Additionally, the Custodian certifies that he e-mailed the Complainant on December 28, 2007 to advise that the records responsive to request no.

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<sup>12</sup> The Custodian submitted additional records which are not relevant to the adjudication of this complaint. Kevin N. Starkey v. NJ Department of Transportation, 2007-314 and 2007-318 – Findings and Recommendations of the Executive Director 7

C31092 were ready to be mailed upon receipt of the \$36.50 copy fee. The Custodian certifies that via e-mail dated January 7, 2007 he informed the Complainant that any missing information from the records responsive to request no. C31073 was never entered into the database from which the records were printed. The Custodian also certifies that he received the Complainant's payment for request no. C31092 on January 11, 2008 and provided the records on said date.

The Custodian contends that the Complainant's requests were complicated because of the volume and age of some of the records which are held in off site storage. The Custodian also certifies that DOT staff was advised that all records required legal review which increased the time needed to complete these requests.

Further, the Custodian's Counsel contends that because the Custodian has fully complied with the Complainant's requests which are the subject of this complaint, the Complainant's claim of a denial of access is moot.

### **February 27, 2008**

The Complainant's response to the Custodian's SOI. The Complainant states that the Custodian took in excess of four (4) months to respond to his OPRA requests despite the statutory mandate that he provide records within seven (7) business days. The Complainant also states that the Custodian did not respond to any request until after the Complainant filed his Denial of Access Complaints.

The Complainant requests that the GRC award a reasonable attorney's fee in these complaints pursuant to N.J.S.A. 47:1A-6. The Complainant states that one (1) week prior to the Complainant's filing of his Denial of Access Complaints, the Custodian could not provide an anticipated deadline date as to when the requested records would be provided; however, after the Complainant filed his complaints, the Custodian provided the requested records. The Complainant contends that without filing his complaints, it is unlikely that the Custodian would have provided the records responsive.

Additionally, the Complainant states that N.J.S.A. 47:1A-5.i provides that if records are not provided by the promised date, such failure results in a "deemed" denial. The Complainant states that the Custodian continuously promised to provide records by a certain date and failed to meet said deadlines.

### **March 19, 2008<sup>13</sup>**

Letter from Custodian's Counsel to GRC. Counsel contends that the Complainant's requests were not requests for records but rather requests for the Custodian to compile lists of information. Counsel states that at the time of the Complainant's requests, no records responsive existed within DOT files and thus in order to comply with said requests the Custodian was forced to prepare an extraction of information which is not required under OPRA. Counsel asserts that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), OPRA's time limitations for a response did not apply in this

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<sup>13</sup> Additional correspondence submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.  
Kevin N. Starkey v. NJ Department of Transportation, 2007-314 and 2007-318 – Findings and Recommendations of the Executive Director 8

matter. Counsel states that the Custodian provided extracts of information as an accommodation to the Complainant, even though such is not required under OPRA. Thus, Counsel contends that the Complainant has no basis for his request for attorney's fees. Additionally, Counsel states that the Complainant's request for attorney's fees is not in relation to a requestor retaining legal counsel but rather relates to time billed by the Complainant's own law firm.

### **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 also provides that:

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

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ... The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied." (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>14</sup> The custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, N.J.S.A. 47:1A-5.i. provides that a custodian shall advise the requestor when a record can be made available.

In this complaint, the Complainant states that he submitted his OPRA requests on September 6, 2007. The Custodian certifies that he received request no. C31073 on September 10, 2007 and request no. C31092 on September 11, 2007. The Custodian also certifies that he provided the Complainant with a written response to both requests on September 12, 2007 in which he requested an extension of time to fulfill said requests. The Custodian failed to provide an anticipated deadline date as to when the requested records would be made available. However, the Custodian requested an extension of time to fulfill request no. C31092 and provided an anticipated deadline date of when the requested records would be made available via e-mail dated October 10, 2007, approximately one (1) month following the Custodian’s receipt of said request. Nevertheless, the Custodian’s October 10, 2007 request for an extension was well beyond the statutorily mandated time period to respond.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7<sup>th</sup>) business day following receipt of such request in which the

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<sup>14</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Custodian requested an extension of time to fulfill said request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied 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)].”

The facts of this complaint are similar to those in Hardwick, supra. Specifically, the Custodian in this instant matter provided a written response to both of the Complainant’s requests within the statutorily mandated seven (7) business days. In such written response, the Custodian requested an extension of time to fulfill said requests but failed to provide an anticipated deadline date as to when the requested records would be made available. Thus, the Council’s ruling in Hardwick, supra, applies to this instant matter.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant’s requests dated September 12, 2007 in which the Custodian requested an extension of time is inadequate under OPRA pursuant to Hardwick, supra, and the Complainant’s requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra.

Additionally, the Custodian’s Counsel contends that the Complainant’s requests were not requests for records but rather requests for the Custodian to compile lists of information. Counsel states that at the time of the Complainant’s requests, no records responsive existed within DOT files and thus in order to comply with said requests the Custodian was forced to prepare an extraction of information which is not required under OPRA. The Custodian, however, certified in his SOI that although the Complainant’s request would have normally constituted research, a database had been developed and archived which contained most of the information requested.

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),<sup>15</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”<sup>16</sup>

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, *supra*, 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...”

Because the Complainant in this matter identified a type of government record (list or record which identifies the DOT’s projects in the construction or design phase) within a specific date (1997-2002), the requests are not overly broad. *See MAG, supra, Bent, supra, and NJ Builders, supra.* The Custodian certified that no records responsive beyond those contained in the archived database exist without the Custodian having to conduct research, which is not required under OPRA. As such, the Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding list of specific government records from an archived database and print said list.

**Whether the Government Records Council has authority over the accuracy of a record’s content pursuant to N.J.S.A 47:1A-7.b.?**

OPRA provides that:

“[t]he Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;

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<sup>15</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>16</sup> As stated in Bent, supra.

- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied..." N.J.S.A. 47:1A-7.b.

The Complainant stated in his e-mail to the Custodian dated January 7, 2008 that the records provided in response to request no. C31073 do not include all of the requested information. The Custodian stated in his e-mail to the Complainant dated January 8, 2008 that the records provided were produced from an existing database and that the Custodian is only able to produce information that was entered into said database.

N.J.S.A. 47:1A-7.b. delineates the Council's powers and duties. Such powers and duties do not include having authority over a record's content. In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that "[it] does not have jurisdiction over the accuracy of the documents content." Additionally, in Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), the Council ruled that it "lacks the jurisdiction to determine the validity of a record pursuant to [OPRA]."

Therefore, pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa, supra, and Gillespie, supra, the Council does not have the authority to adjudicate the portion of this complaint in which the Complainant challenges the accuracy or completeness of a record's content.

**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.



The Custodian in this complaint provided a written response to the Complainant's OPRA requests within the statutorily mandated seven (7) business days in which he requested an extension of time to fulfill said requests, but failed to provide an anticipated deadline date pursuant to N.J.S.A. 47:1A-5.g. However, the Custodian continued to request multiple time extensions for request no. C31092 and provided anticipated dates on which the records would be made available, although the Custodian did not adhere to said deadline dates. Nevertheless, the Custodian made the requested records, which he printed from an archived database, available to the Complainant on December 28, 2007, approximately three (3) months following the receipt of said requests. The Custodian also waived the copy fees associated with request no. C31073.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

The Custodian in this matter provided the Complainant with a written response to his requests within the statutorily mandated seven (7) business days, even though said response was inadequate because the Custodian failed to provide an anticipated deadline date when requesting an extension of time to fulfill said requests. Additionally, the Custodian requested several more time extensions regarding request no. C31092 and indicated that he and his staff were attempting to locate records responsive. The evidence of record indicates that the Custodian was making an attempt to fulfill the Complainant's request. Further, the Custodian provided the records responsive to the Complainant prior to this complaint being adjudicated by the Council (records the Custodian printed from an archived database). The Custodian also waived the copy fee for request no. C31073.

Therefore, although the Custodian's written request for an extension of time to fulfill the Complainant's requests was inadequate under OPRA and resulted in a "deemed" denial of said requests, because the Custodian provided the requested records from an archived database to the Complainant and waived a portion of the copy fee as well as made other records available upon payment of the copying fee, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

OPRA provides that:

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

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

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

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

In this complaint, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant’s requests dated September 12, 2007 in which the Custodian requested an extension of time is inadequate under OPRA pursuant to Hardwick, supra, and as such the Complainant’s requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra. Additionally, the Custodian made the requested records available to the Complainant on December 28, 2007, after the Complainant’s filing of his Denial of Access Complaint on December 17, 2007.

The more complicated aspect of this issue is whether the Complainant is entitled to reasonable attorney’s fees. According to the Supreme Court of New Jersey, the New Jersey Legislature has promulgated a “substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for the prevailing party.*” (Emphasis added.) New Jerseyans For A Death Penalty Moratorium v. New Jersey Department of Corrections and Devon Brown, 182 N.J. 628 (2005) (decision without a published opinion), (quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for incorporating a fee-shifting measure: to ensure “that plaintiffs with bona fide claims are able to find lawyers to represent them[,]... to attract competent counsel in cases involving statutory rights, ... and to ensure justice for all citizens.” New Jerseyans For A Death Penalty Moratorium supra, quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989). Thus, the courts of the state have determined that the state’s fee-shifting statutes are intended to

compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself.

In Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006) the requestor filed a Denial of Access Complaint with the GRC, represented himself and sought prevailing party attorney's fees. The Council held that "based on the fact that courts of the state have determined that the state's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not the plaintiff representing himself, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA."

OPRA provides that a person who is denied access to a government record may either file a proceeding in Superior Court or file action with the GRC. N.J.S.A. 47:1A-6. In this matter the Complainant's name is on the OPRA request and the Denial of Access Complaint as the requestor of records, and the Complainant has not provided any evidence suggesting that he is represented by another attorney. As such, the Complainant thus represents himself in this matter.

Based on the fact that the courts of the State have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not an attorney who is the plaintiff representing himself, as well as the GRC's decision in Pitts, supra, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant's requests dated September 12, 2007 in which the Custodian requested an extension of time is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and the Complainant's requests are "deemed" denied 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. Because the Complainant in this matter identified a type of government record (list or record which identifies the Department of Transportation's projects in the construction or design phase) within a specific date (1997-2002), the requests are not overly broad. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). The Custodian certified that no records responsive beyond those contained in the archived database exist without the

Custodian having to conduct research, which is not required under OPRA. As such, the Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding list of specific government records from an archived database and print said list.

3. Pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), and Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), the Council does not have the authority to adjudicate the portion of this complaint in which the Complainant challenges the accuracy or completeness of a record's content.
4. Although the Custodian's written request for an extension of time to fulfill the Complainant's requests was inadequate under OPRA and resulted in a "deemed" denial of said requests, because the Custodian provided the requested records from an archived database to the Complainant and waived a portion of the copy fee as well as made other records available upon payment of the copying fee, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
5. Based on the fact that the courts of the State have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not an attorney who is the plaintiff representing himself, as well as the GRC's decision in Pitts v. NJ Department of Corrections, GRC Complaint No. 2005-71 (April 2006), the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA.

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Executive Director

July 23, 2008