



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

March 25, 2009 Government Records Council Meeting

Edward Oskay
Complainant

Complaint No. 2008-53

v.

NJ State Parole Board
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, and because the Custodian provided an anticipated deadline date and adhered to said deadline, the Custodian has properly responded to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Complainant’s request sought specific identifiable government records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), and because the Custodian is obligated to search his files for said records pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Custodian’s failure to ask the named individuals if they maintained any records responsive results in an insufficient search pursuant to Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008) and as such, the Custodian has failed to bear his burden of proving a lawful denial of access to the e-mail subsequently located by Joseph Shields pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian failed to conduct an adequate search for the requested records, the Custodian’s actions were not intentional and deliberate because he conducted a subsequent search and located a record responsive which he certified he will provide to the Complainant upon payment of the copying fee.



Therefore, 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 insufficient search appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of March, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: March 30, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2009 Council Meeting**

**Edward Oskay¹
Complainant**

GRC Complaint No. 2008-53

v.

**NJ State Parole Board²
Custodian of Records**

Records Relevant to Complaint:

1. E-mails between Edward Oskay and Jennifer Meyer-Mahoney dated November 2006, December 2006 and any date in 2007.
2. E-mails from Edward Oskay to Jennifer Meyer-Mahoney dated November 2006, December 2006 and any date in 2007 that were forwarded to Joseph Shields.
3. E-mails from Edward Oskay to Joseph Shields dated November 2006, December 2006 and any date in 2007

Request Made: February 7, 2008

Response Made: February 19, 2008 and February 26, 2007

Custodian: Thomas R. Renahan

GRC Complaint Filed: March 18, 2008³

Background

February 7, 2008

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.

February 19, 2008

Letter from Custodian to Complainant on the sixth (6th) business day following receipt of the Complainant's request. The Custodian seeks a seven (7) business day extension of time (until February 29, 2008) to respond to the Complainant's OPRA request so that the Information Technology ("IT") Unit can conduct an appropriate search of the requested electronic records.

¹ No legal representation listed on record.

² Represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.

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

February 26, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following the Custodian's request for a seven (7) business day extension of time to respond to the request. The Custodian states that access to the requested record is denied because a search of the agency's electronic records system determined that no records responsive to the request exist.

March 18, 2008

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

- Complainant's OPRA request dated February 7, 2008
- Custodian's response to the Complainant's request dated February 26, 2008

The Complainant asserts that he was unlawfully denied access to the records requested. The Complainant agreed to mediate this complaint.

March 31, 2008

Offer of Mediation sent to the Custodian.

April 3, 2008

Letter of representation from Custodian's Counsel. Counsel states that that the Custodian declines mediation because the requested records do not exist.

April 4, 2008

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

April 11, 2008

E-mail from GRC to Custodian's Counsel. The GRC grants the Custodian a five (5) business day extension of time to submit the Custodian's completed SOI.⁴

April 17, 2008

Letter from Custodian's Counsel to GRC. Counsel states that the Custodian received the Complainant's OPRA request on February 7, 2008. Counsel states that upon receipt of said request, the Custodian contacted Christopher Cermele, Chief of the IT Unit, regarding a search for the requested records. Counsel states that on February 7, 2008, the Chief of the IT Unit e-mailed the Custodian seeking clarification of the Complainant's request. Counsel states that the Custodian verbally contacted the Complainant on February 8, 2008 and clarified that the Complainant's request sought e-mails from the Complainant to Joseph Shields, from the Complainant to Jennifer Meyer-Mahoney, and e-mails from the Complainant to either Joseph Shields or Jennifer Meyer-Mahoney that were forwarded between Joseph Shields and/or Jennifer Meyer-Mahoney. Counsel states that the Custodian requested a seven (7) day extension of time via letter dated February 19, 2008 in order to search for the requested records. Counsel states that on February 20, 2008, the IT Unit searched for the requested e-mails and found no records responsive. Counsel states that the Chief of the IT Unit informed the Custodian

⁴ In response to Counsel's verbal request.

that the e-mail system purges the e-mail inboxes every 90 days unless an e-mail is saved by the user. Counsel states that via letter dated February 26, 2008, the Custodian advised the Complainant that no records responsive were located during the search. Counsel asserts that because there are no records responsive to the Complainant's OPRA request, this complaint should be dismissed.

April 17, 2008

Certification of Christopher Cermele, Chief of the IT Unit for the NJ State Parole Board. The Chief certifies that on February 20, 2008, he directed IT staff to conduct a search of the following e-mail mailboxes using the following criteria:

Mailboxes

1. Joseph Shields
2. Jennifer Meyer-Mahoney
3. Thomas Renahan
4. Edward Oskay

Search Criteria

1. From/to any of the above users;
2. If found, then time period had to be between November 1, 2006 to August 31, 2007;
3. If found, then the word "Oskay" or "Ocskay" had to be in the results.

The Chief certifies that no records responsive were located using the above search criteria. The Chief also certifies that because GroupWise messages are encrypted (except for the heading and subject line) and because IT staff cannot read the body of the e-mail without disabling the users' e-mail account, this procedure was followed on February 20, 2008 to conduct the necessary search. The Chief certifies that GroupWise automatically purges any e-mails in a user's account that are older than 90 days unless the user saves said messages to an area of their computer exempt from the automatic purging. The Chief certifies that this procedure has remained consistent since the establishment of the independent network in 2001.

April 18, 2008⁵

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

- Complainant's OPRA request dated February 7, 2008
- Certification of Christopher Cermele, Chief of the IT Unit for the NJ State Parole Board, dated April 17, 2008
- Letter from Custodian's Counsel to GRC dated April 17, 2008

The Custodian certifies that he received the Complainant's OPRA request on February 7, 2008 and provided a written response on February 26, 2008 in which he indicated that no records responsive exist. The Custodian states that the search

⁵ The Custodian's signature is dated April 10, 2008; however the Custodian submitted the SOI to the GRC on April 18, 2008.

undertaken to satisfy the records request upon which this complaint is based is described in the certification of Christopher Cermele, Chief of the IT Unit. Additionally, the Custodian certifies that e-mails are automatically destroyed after 90 days unless saved by the user.

April 21, 2008

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian's position in this matter is that searching the Parole Board's mainframe computer, in which no records responsive were located, satisfies the Custodian's obligation to fulfill the OPRA request. The Complainant contends that the requested records are burned onto the hard drives of the personal computers of the Complainant, Joseph Shields and Jennifer Meyer-Mahoney. The Complainant asserts that said computers should be searched by an independent authority.

April 21, 2008

E-mail from GRC to Custodian's Counsel. The GRC states that in the Custodian's SOI, the Custodian asserts that he requested a seven (7) day extension of time to respond to the Complainant's OPRA request via letter dated February 19, 2008. The GRC requests a copy of said letter.

April 23, 2008

The Custodian's Counsel submits to the GRC the requested letter from the Custodian to the Complainant dated February 19, 2008.

October 10, 2008

Letter from GRC to Custodian. The GRC requests that the Custodian provide a legal certification further describing the search undertaken to satisfy the records request upon which this complaint is based. Specifically, the GRC requests that the Custodian certify whether or not said search included inspection of the individual computers of Joseph Shields, Jennifer Meyer-Mahoney or Edward Oskay. The GRC also requests that the Custodian certify whether said search included asking the above named individuals for any responsive records.

October 20, 2008

Custodian's certification. The Custodian certifies that after receiving verbal clarification of the Complainant's OPRA request on February 8, 2008, the Custodian e-mailed Christopher Cermele, Chief of the IT Unit, in order for Mr. Cermele to conduct the search of the e-mail system. The Custodian certifies that he confirmed with Mr. Cermele that the electronic search for e-mails would include all categories such as sent, received, etc. The Custodian certifies that he received Mr. Ceremele's search results on February 20, 2008 which indicated that no records responsive were located.

The Custodian asserts that the Complainant's OPRA request and subsequent clarification of the request did not include asking the named individuals for any responsive records other than e-mails. However, the Custodian states that in compliance with the GRC's letter dated October 10, 2008, he contacted Jennifer Meyer-Mahoney and Joseph Shields and asked that they search their non-electronic files for any printed e-mails or other records responsive to the Complainant's request. The Custodian states that

Ms. Meyer-Mahoney indicated that she did not locate any records responsive. The Custodian states that Mr. Shields located an e-mail dated May 30, 2007 from the Complainant to Mr. Shields regarding Mandatory Supervision. The Custodian certifies that this is the only record responsive to the Complainant's request. The Custodian also certifies that he will make said record available to the Complainant upon payment of the applicable OPRA copying fee.

October 21, 2008

E-mail from Complainant to GRC. The Complainant contends that records responsive to his request are maintained on the hard drives of the named individuals. The Complainant asserts that the Custodian's effort of asking said individuals to search their computers for any responsive records falls short of what is necessary to satisfy his OPRA request.

January 23, 2009

Letter from GRC to Custodian. The GRC asks the Custodian to provide a legal certification addressing whether the New Jersey State Parole Board keeps backup files of its electronic data and if so, whether any records responsive to the Complainant's OPRA request were located on said backup files.

January 30, 2009

Custodian's Certification. The Custodian certifies that he contacted Christopher Cermele, Chief of the Parole Board's IT Unit who informed the Custodian that certain electronic file/data systems are backed up. The Custodian certifies that the Chief informed him that the Novell Groupwise system, which contains the Parole Board's e-mail system, is not backed up. Additionally, the Custodian certifies that because the e-mail system is not backed up, he could not conduct a search for any records responsive in the backup system. The Custodian also certifies that unless a user archives or otherwise saves e-mails, the e-mails will automatically be purged from the system.

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 states that:

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

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ... 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, 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). Additionally, N.J.S.A. 47:1A-5.i. provides that if a custodian requires time beyond the statutorily mandated seven (7) business days to fulfill a request, the custodian must advise the requestor when the records can be made available; a custodian’s failure to provide the records by said date results in a deemed denial.

In this complaint, the Custodian certified that he received the Complainant's OPRA request on February 7, 2008. The Custodian also certified that he provided the Complainant with a written response on February 19, 2008, the sixth (6th) business day following receipt of said request, in which the Custodian requested a seven (7) business day extension of time until February 29, 2008 to comply with said request so that the Custodian could conduct a search for the requested e-mails. The Custodian certified that he provided the Complainant with a written response on February 26, 2008, the fifth (5th) business day following the Custodian's request for an extension, in which the Custodian denied access to the requested e-mails on the basis that no records responsive existed.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, and because the Custodian provided an anticipated deadline date and adhered to said deadline, the Custodian has properly responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

However, although the Custodian certified that no records responsive to the Complainant's request were located during the IT Chief's search of the e-mail system, the Complainant asserts that the requested records are burned onto the hard drives of the personal computers of the Complainant, Joseph Shields and Jennifer Meyer-Mahoney. The Custodian contends that the Complainant's request did not include asking the named individuals for any responsive records other than e-mails. However, the Custodian subsequently asked said individuals for records responsive and located one (1) record responsive which was maintained by Joseph Shields. The Custodian certified that he will provide said record to the Complainant upon payment of the copying fee. Further, the Custodian certified that the Parole Board's e-mail system is not saved on a backup drive.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to Mag, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’^[5] The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’^[6]”

^[5] “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

^[6] “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Edward Oskay v. NJ State Parole Board, 2008-53 – Findings and Recommendations of the Executive Director

Additionally, the court in MAG, *supra*, 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).

Further, in Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian initially denied the Complainant’s OPRA request on the basis that no records responsive to the request exist. However, the Complainant submitted e-mails with his Denial of Access Complaint that were responsive to his request. Upon receipt of said e-mails, the Custodian searched her files again and located records responsive to the Complainant’s request. The Custodian certified that her failure to produce records responsive was a result of an inadequate search because she believed the records were maintained by another State agency. The Council held that:

“[b]ecause the certifications provided by the Custodian and Ms. Smith state that they performed an inadequate initial search based on the assumption that a [Job Analysis Questionnaire] is a [Department of Personnel] record, and that a proper search yielded other records responsive to the Complainant’s August 30, 2007 request, the Custodian unlawfully denied access to the requested records in his September 10, 2007 response to the Complainant’s OPRA request. The Custodian has failed to bear his burden of proof that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6.”

The Complainant in this instant complaint requested e-mails sent between himself, Jennifer Meyer-Mahoney, and Joseph Shields from November 1, 2006 to August 31, 2007. The Complainant has identified specific government records sent between specific parties within a specific time period. Pursuant to MAG, *supra*, the Complainant requested “identifiable government records.” As such, pursuant to Donato, *supra*, the Custodian is required to search his files for the requested identifiable government records.

When a request is made for a person’s e-mails, a reasonable search includes contacting the named party to determine if he/she maintains any e-mails responsive to the request. Here, the Custodian certified that the search for e-mails involved the IT Chief conducting a search of the named individuals’ e-mail accounts, which yielded no results. However, in the Chief’s certification in which he details said search, he certified that unless the named individuals saved e-mails elsewhere, said e-mails are automatically purged from their inbox after 90 days. Thus, a reasonable search would involve asking the named individuals if they had saved any e-mails that would be responsive to the Complainant’s request. The Custodian contends that the Complainant’s request did not include asking the named individuals for any responsive records other than e-mails. However, the Custodian subsequently asked said individuals for records responsive and

located one (1) record responsive which was maintained by Joseph Shields. The Complainant asserts that asking the named individuals for any responsive records saved on their computers does not satisfy his request. However, the Complainant has failed to provide any evidence to contradict the Custodian's certification that only one (1) record responsive exists on the computers of said individuals.

Therefore, because the Complainant's request sought specific identifiable government records pursuant to MAG, *supra*, and because the Custodian is obligated to search his files for said records pursuant to Donato, *supra*, the Custodian's failure to ask the named individuals if they maintained any records responsive results in an insufficient search pursuant to Schneble, *supra*, and as such, the Custodian has failed to bear his burden of proving a lawful denial of access to the e-mail subsequently located by Joseph Shields pursuant to N.J.S.A. 47:1A-6.

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 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 properly responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, provided an anticipated deadline date and adhered to said deadline. The Custodian denied access to the Complainant's request on the basis that no records responsive exist. However, the Custodian's search for the requested records was inadequate because the Custodian failed to ask the named individuals if they maintained any records responsive. After the Custodian conducted said search, a record responsive to the Complainant's request was located. The Custodian asserts that the Complainant's request did not include asking the named individuals if they maintained any records responsive.

Although the Custodian failed to conduct an adequate search for the requested records, the Custodian's actions were not intentional and deliberate because he conducted a subsequent search and located a record responsive which he certified he will provide to the Complainant upon payment of the copying fee. Therefore, 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 insufficient search appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, and because the Custodian provided an anticipated deadline date and adhered to said deadline, the Custodian has properly responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Complainant's request sought specific identifiable government records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), and because the Custodian is obligated to search his files for said records pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Custodian's failure to ask the named individuals if they maintained any records responsive results in an insufficient search pursuant to Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008) and as such, the Custodian has failed to bear his burden of proving a lawful denial of access to the e-mail subsequently located by Joseph Shields pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian failed to conduct an adequate search for the requested records, the Custodian's actions were not intentional and deliberate because he conducted a subsequent search and located a record responsive which he certified he will provide to the Complainant upon payment of the copying fee. Therefore, 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 insufficient search appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 18, 2009