



**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**

**November 30, 2010 Government Records Council Meeting**

Steven Duarte  
Complainant

Complaint No. 2009-130

v.

Township of Mansfield (Warren)  
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 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 because the Complainant has failed to establish in his motion for reconsideration of the Council’s April 28, 2010 Final Decision 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, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, 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).

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 November, 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: December 3, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

**Supplemental Findings and Recommendations of the Executive Director  
November 30, 2010 Council Meeting**

**Steven Duarte<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-130**

**v.**

**Township of Mansfield (Warren)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

March 13, 2009

- 1) Copies of all vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006;
- 2) Copies of any and all reports, memoranda, etc. from the engineering firm Douglas Mace to the Township of Mansfield regarding Block 2201.02, Lot 11 (2 Hemlock Court).

April 29, 2009

Copies of all vouchers submitted to Mansfield Township from the engineering firm of Doug Mace from August 1, 2006 through December 31, 2006.

**Request Made:** March 13, 2009 and April 29, 2009

**Response Made:** April 30, 2009

**Custodian:** Dena Hrebenak

**GRC Complaint Filed:** April 22, 2009<sup>3</sup>

**Background**

**April 28, 2010**

Government Records Council's ("Council") Final Decision and Order. At its April 28, 2010 public meeting, the Council considered the April 21, 2010 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:

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<sup>1</sup> Formerly represented by Larry Kron, Esq. (Succasunna, NJ). The OPRA requests which are the subject of this Denial of Access Complaint were submitted by Mr. Kron on behalf of the Complainant. Mr. Kron ceased representation of the Complainant on or about April 30, 2009.

<sup>2</sup> Represented by Joel A. Kobert, Esq. (Hackettstown, NJ).

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

1. The Custodian's failure to respond in writing to the Complainant's March 13, 2009 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. Because Item No. 2 of the Complainant's March 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency's files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
3. The Council declines to order disclosure of the remainder of the records sought in the Complainant's March 13, 2009 OPRA request (copies of vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006), because these records were the subject of the revised April 29, 2009 OPRA request which the Complainant received on June 30, 2009.
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian provided the Complainant with all records responsive to the April 29, 2009 request and request Item No. 2 of the Complainant's March 13, 2009 request is invalid because it is overly broad and fails to specify an identifiable government record. 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.

#### **April 30, 2010**

Council's Final Decision and Order distributed to the parties.

#### **August 3, 2010**

E-mail from the Complainant to the GRC. The Complainant inquires as to the status of the case and states that he did not receive a copy of the Council's April 28, 2010 Final Decision in this matter.

#### **August 3, 2010**

E-mail from the GRC to the Complainant. The GRC states that a copy of the Council's Final Decision in this matter was sent to the Complainant's Counsel and attaches another copy of the Council's April 28, 2010 Final Decision for the Complainant's review.

**August 3, 2010**

E-mail from the Complainant to the GRC. The Complainant states that the Complainant's Counsel has not represented him since February 15, 2010. The Complainant states that he did not receive a copy of the Council's April 28, 2010 Final Decision at the time it was rendered, and further states that he is very disappointed. The Complainant asks what he can do to apply for a reconsideration of the Council's April 28, 2010 Final Decision.

**August 3, 2010**

E-mail from the GRC to the Complainant. The GRC states that because the Complainant alleges that he did not receive the Council's April 28, 2010 Final Decision in a timely manner, and because the Complainant requested the opportunity to ask for reconsideration of this matter, the GRC requests that the Complainant submit a letter requesting reconsideration and any legal or factual argument the Complainant believes supports reconsideration of this matter. The GRC directs the Complainant's attention to *N.J.A.C. 5:10502.10(a)* through (e), which sets forth the Council's regulations regarding reconsiderations.

**August 9, 2010**

Complainant's motion for reconsideration, attaching the following:

- Map of property Tax Lot II in Tax Block 2201.02 to be acquired by the Complainant dated July 2, 1007
- Letter from Charles M. Lee, Esq., Township Attorney, to the Complainant dated July 11, 2006
- Letter from Charles M. Lee, Esq., Township Attorney, to the Complainant dated August 17, 2006
- Letter from the Custodian to the Complainant dated July 18, 2007
- Letter from Complainant's Counsel to the Custodian dated November 21, 2008
- Letter from Complainant's Counsel to the Custodian dated March 13, 2009
- OPRA request from Complainant's Counsel to the Township of Mansfield, undated

The Complainant states that he did not receive the Council's April 28, 2010 Final Decision and states that he is providing evidence that the Township should have the records requested.

The Complainant states that on or about November 10, 2008, the Custodian responded to an OPRA request from the Complainant<sup>4</sup> stating that no records responsive exist. The Complainant further states that his attorney at the time sent a letter to the Custodian requesting additional information and confirmation of the Custodian's receipt of the OPRA request. The Complainant states that the Custodian did not reply to said letter.

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<sup>4</sup> This OPRA request is not the subject of the instant matter.

The Complainant also states that he filed additional OPRA requests on March 13, 2009<sup>5</sup> because the Custodian did not respond to the previous OPRA request and also in order to revise the previous OPRA request. The Complainant states that he did not receive any response to the OPRA requests from the Custodian. The Complainant states that the Custodian was obligated to respond to the Complainant's OPRA requests within seven (7) business days of receipt thereof. The Complainant states that the Custodian failed to comply with OPRA in this regard.

In support of his contention that the requested records should exist, the Complainant states that the Township Attorney, Charles Lee, Esq., submitted a Mansfield Township Improvement Drainage Repair Agreement dated July 11, 2006 which was agreed to and executed by all parties. The Complainant states that this Agreement stated that the "Township [would] provide whatever piping and pits are required to handle the catch basins located on Hemlock Court, said discharge to dissipate throughout the right of way." The Complainant asserts that the Agreement identifies the actual addresses and locations in which the work was to be performed.

The Complainant also states that Mr. Lee submitted a letter on August 17, 2006 which stated, "[t]he Township, as you know, has staked out the property line and has concluded the engineering review" and confirms that "the Township will be doing work in September."

The Complainant further states that a copy of the survey shown on tax records identifies a 15-foot drainage right of way easement, which survey is also recorded on the tax map in the Township of Mansfield.

The Complainant asserts that the Custodian submitted a letter acknowledging repairs and work performed by the Township, which the Complainant asserts is evidence that the Township performed work on the property and provided their professional opinions in comparison to their work performance and future issues in relation to the sinkholes and whether repairs would be made to same.

The Complainant asserts that based on the foregoing, there should be records of engineering work, surveys, etc. The Complainant states that he revised his March 13, 2009 OPRA request to be consistent with the various materials submitted herein. The Complainant questions how work could have been done by the Township with no resulting documentation.

The Complainant states that he has not received a response from the Custodian regarding the requested records to date and that he believes that based on the materials provided herein that the Township should have records responsive to the request.

The Complainant requests that the Council reconsider its April 28, 2010 Final Decision based on the materials submitted.

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<sup>5</sup> This is one of the OPRA requests which are the subject of the instant matter.  
Steven Duarte v. Township of Mansfield (Warren), 2009-130 – Supplemental Findings and Recommendations of the Executive Director

### **August 9, 2010**

E-mail from the Complainant to the GRC. The Complainant states that he filed a request for reconsideration of this matter via facsimile to the GRC and requests confirmation that the GRC has received same.

### **August 13, 2010**

E-mail from the GRC to the Complainant. The GRC confirms that it received all 17 pages of the faxed request for reconsideration on August 9, 2010. The GRC states that the matter is currently under review and invites the Complainant to check the Council's upcoming agendas, which are posted on its website, to determine at which Council meeting the matter will be adjudicated.

## **Analysis**

### **Whether the Complainant has met the required standard for reconsideration of the Council's April 28, 2010 Final Decision?**

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)*.

The Complainant in this matter alleged that he did not receive the Council's Final Decision in this matter at the time it was rendered, and the evidence of record shows that he did not receive same until August 3, 2010. The Complainant filed his request for reconsideration in this matter on August 9, 2010. Thus, the Council will consider the Complainant's request for reconsideration of this matter as timely filed pursuant to *N.J.A.C. 5:105-2.10(a) and (b)*.

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 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).

In support of his motion for reconsideration, the Complainant submitted various letters and documentation which he asserts establish that records responsive to his OPRA requests should exist.

The Council notes that the Complainant's request for reconsideration turns on his assertion that records responsive to the OPRA request must exist. However, in the April 28, 2010 Final Decision, the Council determined that the Custodian provided the Complainant with all records responsive to the April 29, 2009 OPRA request and that request Item No. 2 of the Complainant's March 13, 2009 request was invalid because it was overly broad and failed to specify an identifiable government record. Moreover, the Council declined to order disclosure of the remainder of the records sought in the Complainant's March 13, 2009 request (copies of vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006), because these records were the subject of the revised April 29, 2009 OPRA request which the Complainant received on June 30, 2009.

The GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. Van Pelt v. Twp of Edison BOE, GRC Complaint No. 2007-179 (January 2008).

As the moving party, 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 submit any new evidence in support of his motion that would establish either of these criteria. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint. *See D'Atria, supra*.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council's April 28, 2010 Final Decision 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, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, 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).



## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council's April 28, 2010 Final Decision 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, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, 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).

Prepared By: Karyn G. Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

November 23, 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*

**FINAL DECISION**

**April 28, 2010 Government Records Council Meeting**

Steven Duarte  
Complainant

Complaint No. 2009-130

v.

Township of Mansfield (Warren)  
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 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 March 13, 2009 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. Because Item No. 2 of the Complainant’s March 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency’s files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
3. The Council declines to order disclosure of the remainder of the records sought in the Complainant’s March 13, 2009 OPRA request (copies of vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006), because



these records were the subject of the revised April 29, 2009 OPRA request which the Complainant received on June 30, 2009.

4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian provided the Complainant with all records responsive to the April 29, 2009 request and request Item No. 2 of the Complainant's March 13, 2009 request is invalid because it is overly broad and fails to specify an identifiable government record. 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.

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 28<sup>th</sup> 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.

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2010 Council Meeting**

**Steven Duarte<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-130**

v.

**Township of Mansfield (Warren)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

March 13, 2009

- 1) Copies of all vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006;
- 2) Copies of any and all reports, memoranda, etc. from the engineering firm Douglas Mace to the Township of Mansfield regarding Block 2201.02, Lot 11 (2 Hemlock Court).

April 29, 2009

Copies of all vouchers submitted to Mansfield Township from the engineering firm of Doug Mace from August 1, 2006 through December 31, 2006.

**Request Made:** March 13, 2009 and April 29, 2009

**Response Made:** April 30, 2009

**Custodian:** Dena Hrebenak

**GRC Complaint Filed:** April 22, 2009<sup>3</sup>

**Background**

**March 13, 2009**

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.

**April 7, 2009**

Letter from Larry Kron, Esq. to the Custodian requesting that the Custodian advise as to the status of the Complainant's OPRA request.

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<sup>1</sup> Formerly represented by Larry Kron, Esq. (Succasunna, NJ). The OPRA requests which are the subject of this Denial of Access Complaint were submitted by Mr. Kron on behalf of the Complainant. Mr. Kron ceased representation of the Complainant on or about April 30, 2009.

<sup>2</sup> Represented by Joel A. Kobert, Esq. (Hackettstown, NJ).

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

**April 22, 2009**

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

- Complainant’s OPRA request dated March 13, 2009
- Letter from Larry Kron, Esq. to the Custodian dated April 7, 2009

The Complainant agrees to mediate this complaint.<sup>4</sup>

**April 29, 2009**

Complainant’s revised OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**April 30, 2009**

Custodian’s response to the revised OPRA request. The Custodian responds verbally to the Complainant’s OPRA request on the first (1<sup>st</sup>) business day following receipt of such request granting access to the requested records. The Custodian states that copy charges for the requested records are \$75.75.

**February 3, 2010**

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

**February 11, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated November 10, 2008, with Custodian’s handwritten response thereto dated November 18, 2008
- Letter from Larry Kron, Esq. to the Custodian dated November 21, 2008
- Letter from Larry Kron, Esq. to the Custodian dated March 13, 2009 (with attachments)
- Complainant’s first (1<sup>st</sup>) OPRA request dated March 13, 2009<sup>5</sup>
- Letter from Larry Kron, Esq. to the Custodian dated April 29, 2009
- Complainant’s second (2<sup>nd</sup>) OPRA request dated April 29, 2009, with Custodian’s handwritten response thereto dated April 30, 2009
- Complainant’s acknowledgement of receipt of the requested records dated June 30, 2009

The Custodian asserts that an identical OPRA request to the instant matter was received on November 18, 2008.<sup>6</sup> The Custodian also asserts that she responded to such OPRA request on the same day, stating that the Township does not have any records responsive to said OPRA request.

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<sup>4</sup> There is no evidence in the record as to when mediation was offered to the Custodian nor what response was made thereto.

<sup>5</sup> The Complainant’s OPRA request was attached to the letter from Larry Kron, Esq. to the Custodian dated March 13, 2009. However, the second page of the OPRA request bears a typewritten date of November 10, 2008.

<sup>6</sup> The Custodian made several assertions of fact in a letter accompanying the SOI; these assertions were not certified.

The Custodian further asserts that the instant OPRA request was received on March 13, 2009. The Custodian asserts that this OPRA request sought identical records as the OPRA request submitted to her on November 18, 2008. The Custodian states that the second page of the OPRA request in this matter still bears a submission date of November 10, 2008. The Custodian asserts that she did not respond to the March 13, 2009 OPRA request because she had already responded to the OPRA request dated November 18, 2008 stating that no records responsive existed.

The Custodian contends that she spoke with Larry Kron, Esq., on April 29, 2009 and explained to him that the OPRA request was already responded to on November 18, 2008. The Custodian asserts that Mr. Kron explained to her that the records sought were all vouchers that were sent to the township from Mace Consulting Engineers. The Custodian further asserts that she asked Mr. Kron to amend the OPRA request and fax it to her; the Custodian asserts that she responded verbally to Mr. Kron on April 30, 2009 to inform him that the requested vouchers were ready to be picked up at the Custodian's office and that the fee for the records was \$75.75. The Custodian contends that at that time, Mr. Kron informed the Custodian that he no longer represented the Complainant and that the Custodian must notify the Complainant directly. The Custodian asserts that she called the Complainant on April 30, 2009 and left messages on two different voicemails, and also that she called several times subsequently, but received no response. The Custodian asserts that the Complainant picked up the requested records on June 30, 2009.

### **February 15, 2010**

The Complainant's response to the Custodian's SOI. The Complainant asserts that the March 13, 2009 OPRA request is not identical to the OPRA request dated November 18, 2008. The Complainant states that the March 13, 2009 OPRA request clearly requests copies of vouchers and memoranda of specific dates which were not the records subject of the November 18, 2008 OPRA request.

The Complainant contends that OPRA requires a custodian to respond to requests as soon as possible and that requestors must receive a response within seven (7) business days after the custodian receives an OPRA request. The Complainant asserts that the Custodian has a legal duty to respond to each OPRA request received whether she believes an OPRA request was previously submitted or not. The Complainant states that the Township did not respond to the instant OPRA request within seven (7) business days of receipt thereof, nor did the Township provide a date upon which access would be granted. The Complainant states that he therefore assumed that he was denied access to the records requested. The Complainant asserts that the Custodian has therefore violated OPRA.

The Complainant also states that Mr. Kron made several attempts via letter dated April 7, 2009 to follow up to the March 13, 2009 OPRA request because of the Custodian's failure to respond appropriately to the request. The Complainant states that Mr. Kron advised the Complainant to file a Denial of Access Complaint with the GRC. The Complainant further states that based upon Mr. Kron's professional legal opinion, the Complainant filed the instant Denial of Access Complaint with the GRC.

The Complainant states that he did pick up the requested records responsive to the April 29, 2009 OPRA request from the Custodian's office on June 30, 2009; however, the Complainant states that said records were completely different and not the same as those records requested in the March 13, 2009 OPRA request. The Complainant states that to date, he has not received a response to the March 13, 2009 OPRA request, and further believes that the Township should have in its possession records responsive to the request for reports, memoranda, etc. from the engineering firm Douglas Mace to the Township of Mansfield regarding Block 2201.02, Lot 11 (2 Hemlock Court).<sup>7</sup>

### 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.

In the matter before the Council, the Complainant submitted an OPRA request on March 13, 2009. The Custodian failed to respond to this request; the evidence of record indicates that the Custodian believed said request to be identical to a previous request filed on behalf of the Complainant on November 18, 2008. The evidence of record further

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<sup>7</sup> The Complainant also included extensive argument regarding the circumstances surrounding the November 18, 2008 OPRA request; this argument is not relevant to the adjudication of this complaint. Steven Duarte v. Township of Mansfield (Warren), 2009-130, Findings and Recommendations of the Executive Director

indicates that after a conversation with the Complainant's Counsel at the time, the Custodian became aware that the records sought in the March 13, 2009 OPRA request were different than those sought in the November 18, 2008 OPRA request; the Custodian therefore requested that the Complainant's Counsel submit a revised OPRA request. A revised OPRA request was submitted on April 29, 2009; the Custodian telephoned the Custodian's Counsel to inform him that the requested records were available for pickup. After the Custodian was informed that Counsel no longer represented the Complainant, the Custodian telephoned the Complainant to inform him that the requested records were available. The parties agree that the Complainant picked up the records responsive to the April 29, 2009 OPRA request on June 30, 2009.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>8</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Moreover, the Council has previously held that a custodian's response that the records requested were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the November 1, 2005, November 14, 2005 and December 8, 2005 records requests pursuant to N.J.S.A. 47:1A-6. Caggiano v. Borough of Stanhope, GRC # 2005-211 (February 2006).

Therefore, the Custodian's failure to respond in writing to the Complainant's March 13, 2009 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).

The Council notes that the Custodian provided a copy of the November 18, 2008 OPRA request with her SOI. A review of this request discloses that it is not, in fact, identical to the Complainant's March 13, 2009 OPRA request. Although the signature pages of both requests bear the typewritten date of November 10, 2008, the records sought in each of the OPRA requests are different. Because the Custodian is vested with the legal authority of granting and denying access to government records under OPRA, she should have been aware that the March 13, 2009 OPRA request was materially different from the November 18, 2008 OPRA request.

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<sup>8</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.



Moreover, the Council notes that item No. 2 of the March 13, 2009 OPRA request sought “[c]opies of any and all reports, memoranda, etc. from the engineering firm Douglas Mace to the Township of Mansfield regarding Block 2201.02, Lot 11 (2 Hemlock Court).” This request item is invalid under OPRA because it is overly broad and fails to specify an identifiable government record since no specific individually named parties to the communications are listed.

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. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. 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>9</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>10</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 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...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

In the matter currently before the Council, Item No. 2 of the Complainant’s March 13, 2009 request sought reports and memoranda from the Mace engineering firm regarding the Complainant’s property. The Complainant’s request did not specify particular dates of such reports and memoranda or name individual recipients or senders of such communications; this request would have required the Custodian to search

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

<sup>10</sup> As stated in Bent, *supra*.

through every report or memoranda from the Mace engineering firm for references to the Complainant's property. As the Appellate Division determined in MAG, "[s]uch an open-ended demand [would have] required the ... records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein[.]...While OPRA may provide access to governmental records otherwise unavailable, [this] request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit." *Id.* at 449-50. *See also Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007)(holding that a Custodian is obligated to search her files to find identifiable government records listed in the Complainant's OPRA request, but is not required to research files to figure out which records, if any, might be responsive to a broad and unclear OPRA request).

Therefore, because Item No. 2 of the Complainant's March 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency's files and analyze, compile and collate the information contained therein, it is invalid under OPRA. *See New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

The Council declines to order disclosure of the remainder of the records sought in the Complainant's March 13, 2009 OPRA request (copies of vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006), because these records were the subject of the revised April 29, 2009 OPRA request which the Complainant received on June 30, 2009.

**Whether the Custodian's unlawful deemed denial of 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.

In the matter before the Council, the Custodian failed to respond to the Complainant's March 13, 2009 OPRA request in writing within the statutorily-mandated seven (7) business days. Moreover, the Custodian should have been aware that the March 13, 2009 OPRA request was materially different from the November 18, 2008 OPRA request.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian provided the Complainant with all records responsive to the April 29, 2009 request and request Item No. 2 of the Complainant's March 13, 2009 request is invalid because it is overly broad and fails to specify an identifiable government record. 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.

### **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 March 13, 2009 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. Because Item No. 2 of the Complainant's March 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency's files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

3. The Council declines to order disclosure of the remainder of the records sought in the Complainant's March 13, 2009 OPRA request (copies of vouchers submitted to Mansfield Township from the engineering firm of Douglas Mace from August 1, 2006 through December 31, 2006), because these records were the subject of the revised April 29, 2009 OPRA request which the Complainant received on June 30, 2009.
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian provided the Complainant with all records responsive to the April 29, 2009 request and request Item No. 2 of the Complainant's March 13, 2009 request is invalid because it is overly broad and fails to specify an identifiable government record. 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.

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In House Counsel

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Executive Director

April 21, 2010