



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**January 25, 2011 Government Records Council Meeting**

Thomas T. Turner, III  
Complainant

Complaint No. 2009-176

v.

Plainfield Municipal Utilities Authority (Union)  
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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 written response to the Complainant’s request Item No. 1, in which the Custodian stated that she was in the process of researching the request item, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, the Complainant’s request Item No. 1 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).
2. Because request Items No. 1 and No. 2 of the Complainant’s request seek information rather than an identifiable government record, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009) and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), and the Custodian has not unlawfully denied access to the Complainant’s request items. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).
3. Because the Complainant’s request items No. 3 and No. 4 are requests for lists of information and not specific, identifiable government records, the Complainant’s two (2)



request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007), and the Custodian has not unlawfully denied access to the Complainant's request items.

4. Although the Custodian's initial response to the Complainant's request Item No. 1 resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i because said response was inadequate, the Complainant's May 15, 2009 request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009) and Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007) because it is overly broad, fails to specify identifiable government records and would require the Custodian to review files to compile information and create a new record in order to respond to the request and the Custodian did not unlawfully denial access to said request. *See also* Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009) and Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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 25<sup>th</sup> Day of January, 2011

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: February 7, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 25, 2011 Council Meeting**

**Thomas T. Turner, III<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2009-176**

v.

**Plainfield Municipal Utilities Authority (Union)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. How many feet of sewer pipe has been replaced since inception?
2. What authority does the Plainfield Municipal Utilities Authority (“PMUA”) use to set shared services fees?
3. A list of all contractors and/or engineering firms that have provided services to the PMUA and all fees paid to same.
4. A list of outstanding bonds, including the original value, current value and interest due.

**Request Made:** May 15, 2009

**Response Made:** May 26, 2009

**Custodian:** Dollie Hamlin

**GRC Complaint Filed:** May 27, 2009<sup>3</sup>

**Background**

**May 15, 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.

**May 26, 2009**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that information responsive to request Item No. 1 is not available and that she is in the process of researching the request item. The Custodian states that the record responsive to request Item No. 2 will be made available to the Complainant on May 29, 2009 for an as yet to be determined copying cost. The Custodian states that the record responsive to request Item No. 3 will be made available

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Michael V. Camerino, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

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

to the Complainant on May 29, 2009. The Complainant states that the record responsive to request Item No. 4 is available for pick-up at a copy cost of \$0.75.

**May 27, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated May 15, 2009.

The Complainant states that he submitted an OPRA request to the PMUA on May 15, 2009. The Complainant states that the Custodian responded in writing on May 26, 2009 stating that she is researching request Item No. 1 and granting access to records for request Items No. 2, No. 3 and No. 4. The Complainant states that he went to the PMUA office around 4:00 p.m. on May 26, 2009 to obtain the information and was informed that it would be provided at a later date.

The Complainant agrees to mediate this complaint.

**June 1, 2009**

Offer of Mediation sent to the Custodian.

**June 4, 2009**

The Custodian agrees to mediate this complaint.

**June 10, 2009**

Complaint referred to mediation.

**November 9, 2009**

Complaint referred back from mediation.

**December 8, 2009**

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

**December 14, 2009**

Custodian’s SOI with the following attachments:

- The Complainant’s Denial of Access Complaint dated May 27, 2009.
- N.J.S.A. 40:14B-21 to 23.<sup>4</sup>

The Custodian states that the Complainant’s OPRA request seeks four (4) items. The Custodian argues that she is not obligated to satisfy the Complainant’s request because the request is invalid under OPRA.

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<sup>4</sup> The Custodian included additional information regarding correspondence between the parties that occurred while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Request Item No. 1, No. 3 and No. 4:

The Custodian argues that the Complainant's request is invalid under OPRA because it is a request for information. The Custodian asserts that the latest GRC decision affirming the above argument is Herron v. Township of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009). The Custodian states that in that complaint, the complainant sought two (2) separate lists of information which the custodian would have needed to create in order to respond appropriately. The Custodian states that the GRC held that:

“[t]he Complainant's OPRA request did not specify an identifiable government record but instead sought information. The Complainant's OPRA request would require the Custodian to create a record specific to the Complainant's request. The Complainant's OPRA request would require the Custodian to conduct research and collate data according to the Complainant's specification. OPRA does not require custodians to conduct research or create new documents to satisfy an OPRA request. MAG, *supra*. OPRA requires a custodian to make available identifiable governments records. Bent, *supra*.

Because the Complainant's request does not specify identifiable government records and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request is invalid pursuant to [MAG, *supra*] and [Bent, *supra*].” *Id.* at pg. 5.

The Custodian states that a recitation of the court's holding in MAG, *supra*, as articulated by the GRC, is worth noting:

“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, *supra*]. 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.

The Custodian states that the Appellate Division then described the voluminous information and documentation sought in MAG:

“... all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident,” and “all documents or records evidencing that the ABC sought, obtained or

ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.”

The Custodian states that the Appellate Division determined that the request should have been denied based on the foregoing:

“... [OPRA] 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 ...* The [GRC], the administrative body charged with adjudicating OPRA disputes ... has explained that OPRA *does not require record custodians to conduct research among its records for a requestor* and correlate data from various government records in the custodian’s possession...

Under OPRA, agencies are required to disclose only "identifiable" governmental 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 ...* the request failed to identify with any specificity or particularity the governmental records sought.

Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

While OPRA may provide access to governmental records otherwise unavailable, MAG's 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.” (Emphasis added.) *Id.* at 546-551.

The Custodian states that the guidelines set forth in MAG, supra, were reaffirmed by the Appellate Division in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian states that in NJ Builders, the Appellate Division set forth specific guidelines to be considered when determining whether a Custodian must comply with an OPRA request:

“[t]he purpose of OPRA "is to make identifiable [nonexempt] government records 'readily accessible for inspection, copying, or examination.' ... "Thus, OPRA requires a party requesting access to a public record to specifically describe the document sought," Gannett, supra, 379 N.J. Super. at 211-12 ... OPRA does not contemplate "[w]holesale requests for

general information to be analyzed, collated and compiled by the responding government entity." MAG, supra, 375 N.J. Super. at 546-49." (Citation omitted.)

#### Request Item No. 2:

The Custodian argues that this request item is not a request for government records, rather, it seeks information. Specifically, the request item seeks the legal authority under which the PMUA sets fees. The Custodian asserts that under OPRA, a custodian is not required to educate a requestor on a particular law. The Custodian contends that based on the foregoing, the Custodian lawfully denied access to the Complainant's request Item No. 2.<sup>5</sup>

Finally, the Custodian asserts that based on seven (7) years of GRC and court decisions, it is clear that the Complainant's request is invalid under OPRA. The Custodian contends that the Complainant request seeks information of an overly broad range of records over an open-ended time period, requiring research and the creation of new records in order to satisfy the Complainant's request items. The Custodian requests that the GRC determine that the Complainant's four (4) request items are invalid.<sup>6</sup>

### Analysis

#### **Whether the Custodian unlawfully denied access to the Complainant's OPRA request?**

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.

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<sup>5</sup> The Custodian asserts that the Custodian acted in good faith by entering into mediation. The Custodian then details various accommodations that the PMUA attempted to make with the Complainant while this complaint was in mediation. See Footnote No. 4 for the GRC's explanation of mediation documentation.

<sup>6</sup> In regards to the search conducted, the Custodian refers to letters composed during mediation. Additionally, the Custodian certifies that whether any records responsive may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") is not applicable.

OPRA also provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not *later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived....” (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.

The GRC first turns to the issue of whether the Custodian’s response to request Item No. 1 was inadequate under OPRA.

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 a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

In this complaint, the Custodian provided the Complainant with a written response to his OPRA request on the sixth (6<sup>th</sup>) business day following receipt of said request stating that the Custodian requested an extension of time to respond to item No. 1 because the requested information was not available and the Custodian was in the process of researching same. However, the evidence of record indicates that the Custodian did not provide the Complainant with an anticipated deadline date upon which she would provide the requested information.

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 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 in Hardwick are similar to the facts in this instant complaint because the Custodian herein provided a written response to the Complainant’s OPRA requests within the statutorily mandated seven (7) business days in which the Custodian essentially requested an extension of time to respond to request Item No. 1 but failed to provide an anticipated deadline upon which the records would be made available.

Therefore, the Custodian’s written response to the Complainant’s request Item No. 1, in which the Custodian stated that she was in the process of researching the request item, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, supra, because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, 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, supra.

The GRC next turns to the issue of whether the Complainant’s request is overly broad and unclear and is therefore invalid under OPRA.

The Complainant’s request items No. 1 and No. 2 seeks “[h]ow many feet of sewer pipe has been replaced since inception” and “[w]hat authority does the [PMUA] used to set shared service fees.” These request items seek information rather than specific identifiable government records; as such, these request items are invalid under OPRA. 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>7</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>8</sup>

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

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), the Council held that “[b]ecause the Complainant’s OPRA requests [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

In LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that:

“because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)...” *Id.* at pg. 6.

The GRC also decided a similar issue in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Specifically, the complainant submitted an OPRA request to the Borough on September 13, 2007 seeking answers to five (5) questions regarding a property named the Villa Maria. The GRC held that the Complainant’s request was invalid because it failed to identify a specific government record. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

Therefore, because request Items No. 1 and No. 2 of the Complainant’s request seek information rather than identifiable government records, the request items are invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*,

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<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>8</sup> As stated in Bent, *supra*.

LaMantia, *supra*, and Watt, *supra*, and the Custodian has not unlawfully denied access to the Complainant's request items. *See also Ohlson*, *supra*

Additionally, the Complainant's request items No. 3 and No. 4 sought "a list of all contractors and/or engineering firms that have provided services to the PMUA and all fees paid to same," and a "list of outstanding bonds to include original value, current value and interest due."

Initially, the Custodian responded to these request items on May 26, 2009 stating that access would be provided to the Complainant's request Item No. 3 on May 29, 2009 and No. 4 on May 26, 2009. However, the Custodian asserted in the SOI that the GRC previously held in Herron v. Township of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009) that the complainant's request for lists containing types of information about juvenile offenders was invalid under OPRA pursuant to MAG, *supra* and Bent, *supra*. The Custodian argued that extensive case law renders the Complainant's request items No. 3 and No. 4 invalid under OPRA.

In Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007), the complainant sought a "list of all of Lakewood Township's counter tax appeals (sic) filed for 2007," to contain certain types of information, such as defendant name, property address, block and lot number and so on. The custodian initially responded stating that the requested information would be available by the end of June 2007 because tax appeals were currently being scheduled. The custodian then argued in the SOI that the complainant's request was an invalid request for information and would compel the Board to review several hundred appeals to compile data and generate a new record. The GRC agreed with the custodian's assessment of the OPRA request, noting that:

"[t]he Complainant ... seeks a "list" of certain information, not specific identifiable records. Further, the Complainant specifies precisely how he wants the Custodian to prepare the record responsive to his request, which contemplates the creation of a new document rather than the production of an existing record ... Because the Complainant's request was for information and not for specific identifiable records, and because agencies are required to disclose only identifiable government records not otherwise exempt, the Custodian has lawfully denied the Complainant access to the requested records pursuant to the Superior Court's decision in MAG, *supra*, and has met her burden of proof that access to the requested information was not unlawfully denied pursuant to N.J.S.A. 47:1A-6." *Id.* at pg. 5.

In the instant complaint, the Complainant's request items No. 3 and No. 4 seek lists with certain information to be provided as part of said lists; moreover, these request items fail to identify a time frame within which said lists should fall. The Custodian thus would likely have to review files to compile information and create a new record in order to respond to the request. Under OPRA, the Custodian is not obligated to perform such a task. *See MAG*, *supra*, Bent, *supra*, and New Jersey Builders, *supra*.

Therefore, because the Complainant's request items No. 3 and No. 4 are requests for lists of information and not specific, identifiable government records, the Complainant's two (2) request items are invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and Shain, supra, and the Custodian has not unlawfully denied access to the Complainant's request items.

**Whether the Custodian's "deemed" denial of access rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

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

Although the Custodian's initial response to the Complainant's request Item No. 1 resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i because said response was inadequate, the Complainant's request is invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, LaMantia, supra, and Shain, supra, because it is overly broad, fails to specify identifiable government records and would require the Custodian to review files to compile information and create a new record in order to respond to the request and the Custodian did not unlawfully denial access to said request. *See also* Watt, supra, and Ohlson, supra. Additionally, the evidence of record does not indicate that the Custodian's

violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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 written response to the Complainant's request Item No. 1, in which the Custodian stated that she was in the process of researching the request item, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, the Complainant's request Item No. 1 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).
2. Because request Items No. 1 and No. 2 of the Complainant's request seek information rather than an identifiable government record, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009) and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), and the Custodian has not unlawfully denied access to the Complainant's request items. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).
3. Because the Complainant's request items No. 3 and No. 4 are requests for lists of information and not specific, identifiable government records, the Complainant's two (2) request items are invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007), and the Custodian has not unlawfully denied access to the Complainant's request items.
4. Although the Custodian's initial response to the Complainant's request Item No. 1 resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because said response was inadequate, the Complainant's May 15, 2009 request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey

Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009) and Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007) because it is overly broad, fails to specify identifiable government records and would require the Custodian to review files to compile information and create a new record in order to respond to the request and the Custodian did not unlawfully denial access to said request. *See also* Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009) and Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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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Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 18, 2011