



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

October 26, 2010 Government Records Council Meeting

Rory Moore
Complainant

Complaint No. 2009-186

v.

Township of Nutley (Essex)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the requested records to the Complainant as required by the Council’s Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the extended deadline to comply with the Council’s Interim Order, the Custodian has complied with the Council’s June 29, 2010 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately grant or deny access to the requested salary and overtime information and failed to provide access to the records responsive to the Complainant’s OPRA request Item No. 1, because request Item No. 2 is invalid under OPRA and the Custodian complied with the Council’s June 29, 2010 Interim Order, 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 26th Day of October, 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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Rory Moore¹
Complainant**

GRC Complaint No. 2009-186

v.

**Township of Nutley (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. The salary for Ms. Eleni Pettas (“Ms. Pettas”), Administrative Assistant to the Commissioner of Revenue & Finance, from 2005 through 2009, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.
2. A copy of the plan required to be created pursuant to the Americans with Disabilities Act (“ADA”), which provides that: “[i]f a city that employs 50 or more persons decides to make structural changes to achieve program access, it must develop a transition plan that identifies those changes and set a schedule for implementing them. Both the self-evaluation and transition plans must be available to the public.” 28 C.F.R. 35.105, 35.150(d).³

Requests Made: May 18, 2009

Responses Made: May 28, 2009

Custodian: Evelyn Rosario

GRC Complaint Filed: June 4, 2009⁴

Background

June 29, 2010

Government Records Council’s (“Council”) Interim Order. At its June 29, 2010 public meeting, the Council considered the June 22, 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:

1. The Complainant’s OPRA request for “... salary and overtime information, including all stipends, bonuses, overtime, expenses and any

¹ No legal representation listed on record.

² Represented by Kevin P. Harkins, Esq. (Nutley, NJ).

³ The Custodian certifies in the Statement of Information that she received this OPRA request on March 19, 2009.

⁴ The GRC received the Denial of Access Complaint on said date.

other form of financial or non-financial compensation.” is a valid OPRA request pursuant to N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004).

2. Because the Custodian failed to immediately grant or deny access to the requested salary and overtime information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
3. The Custodian has failed to provide records responsive to the Complainant’s OPRA request. **The Complainant must disclose records for the years 2005 through 2009 showing Ms. Pettas’s “salary, overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.” If no records exist which pertain to one of the requested criteria relating to Ms. Pettas, the Custodian must certify to such.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**
5. Because the Complainant’s second (2nd) request would require the Custodian to research her records to locate “a plan required to be created...pursuant to the Americans with Disabilities Act” that may be responsive which is not required pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), 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), and Bart v. County of Passaic Public housing Authority, GRC Complaint No. 2008-59 (September 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

July 12, 2010

Council's Interim Order distributed to the parties.

July 12, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until July 30, 2010 to respond to the Council's June 29, 2010 Interim Order because the Custodian will be away until July 26, 2010.

July 13, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until July 30, 2010 to respond to the Council's Interim Order.

June 29, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that the attached records were prepared by the Township's payroll department for the purpose of complying with the Council's June 29, 2009 Interim Order. The Custodian certifies that the record format was generated from the information gathered and collected from the employee payroll files.

The Custodian certified that a copy of this correspondence is being simultaneously sent to the Complainant with all attachments. The Custodian further states that the Employee ID Range No. was redacted as information not considered part of Ms. Pettas's personnel record under N.J.S.A. 47:1A-10. Moreover, the Custodian states that the deferred compensation contribution has also been redacted for the foregoing reasons.

Analysis**Whether the Custodian complied with the Council's June 29, 2010 Interim Order?**

The Council's June 29, 2010 Interim Order specifically directed the Custodian to "disclose records for the years 2005 through 2009 showing Ms. Pettas's 'salary, overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.' If no records exist which pertain to one of the requested criteria relating to Ms. Pettas, the Custodian must certify to such." Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

The Custodian's Counsel e-mailed the GRC on July 12, 2010 requesting an extension until July 30, 2010 to respond to the Council's June 29, 2010 Interim Order because the Custodian would be away until July 26, 2010. The GRC responded on July 13, 2010 granting an extension until June 30, 2010. The Custodian certified on July 29, 2010, that the requested records were sent to the Complainant.

Therefore, because the Custodian provided the requested records to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the

Executive Director within the extended deadline to comply with the Council's Interim Order, the Custodian has complied with the Council's June 29, 2010 Interim Order.

Whether the Custodian's actions rise 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 violated N.J.S.A. 47:1A-5.e. by failing to immediately grant or deny access to the requested salary and overtime information and failed to provide access to the records responsive to the Complainant's OPRA request Item No. 1, because request Item No. 2 is invalid under OPRA and the Custodian complied with the Council's June 29, 2010 Interim Order, 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. Because the Custodian provided the requested records to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the extended deadline to comply with the Council's Interim Order, the Custodian has complied with the Council's June 29, 2010 Interim Order.

2. Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately grant or deny access to the requested salary and overtime information and failed to provide access to the records responsive to the Complainant's OPRA request Item No. 1, because request Item No. 2 is invalid under OPRA and the Custodian complied with the Council's June 29, 2010 Interim Order, 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010



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CHRIS CHRISTIE
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INTERIM ORDER

June 29, 2010 Government Records Council Meeting

Rory W. Moore
Complainant

Complaint No. 2009-186

v.

Township of Nutley (Essex)
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 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 Complainant’s OPRA request for “... salary and overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.” is a valid OPRA request pursuant to N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004).
2. Because the Custodian failed to immediately grant or deny access to the requested salary and overtime information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
3. The Custodian has failed to provide records responsive to the Complainant’s OPRA request. **The Complainant must disclose records for the years 2005 through 2009 showing Ms. Pettas’s “salary, overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.” If no records exist which pertain to one of the requested criteria relating to Ms. Pettas, the Custodian must certify to such.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and**



simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²

5. Because the Complainant's second (2nd) request would require the Custodian to research her records to locate "a plan required to be created...pursuant to the Americans with Disabilities Act" that may be responsive which is not required pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), 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), and Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-59 (September 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 12, 2010

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Rory W. Moore¹
Complainant**

GRC Complaint No. 2009-186

v.

**Township of Nutley (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. The salary for Ms. Eleni Pettas (“Ms. Pettas”), Administrative Assistant to the Commissioner of Revenue & Finance, from 2005 through 2009, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.
2. A copy of the plan required to be created pursuant to the Americans with Disabilities Act (“ADA”), which provides that: “[i]f a city that employs 50 or more persons decides to make structural changes to achieve program access, it must develop a transition plan that identifies those changes and set a schedule for implementing them. Both the self-evaluation and transition plans must be available to the public.” 28 C.F.R. 35.105, 35.150(d).³

Requests Made: May 18, 2009

Responses Made: May 28, 2009

Custodian: Evelyn Rosario

GRC Complaint Filed: June 4, 2009⁴

Background

May 18, 2009

Complainant’s first (1st) and second (2nd) Open Public Records Act (“OPRA”) requests. The Complainant requests the records relevant to this complaint listed above on two (2) official OPRA request forms.

May 28, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s two (2) OPRA requests on the seventh (7th) and sixth (6th) respective business days following receipt of such request. The Custodian states that she is

¹ No legal representation listed on record.

² Represented by Kevin P. Harkins, Esq. (Nutley, NJ).

³ The Custodian certifies in the Statement of Information that she received this OPRA request on March 19, 2009.

⁴ The GRC received the Denial of Access Complaint on said date.

providing photocopies of salary ordinance No. 2875 (2005), No. 2964 (2006), No. 3015 (2007) and No. 3080 (2008) in response to the Complainant's first (1st) request for the salary of Ms. Pettas. The Custodian states that the Complainant's second (2nd) request is unclear and therefore denied.

June 4, 2009

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

- Letter from the Custodian to the Complainant dated May 28, 2009
- Salary Ordinance No. 2875 (2005), No. 2964 (2006), No. 3015 (2007) and No. 3080 (2008)

The Complainant states that he submitted two (2) OPRA requests to the Custodian on May 18, 2009. The Complainant states that the Custodian responded in writing on May 28, 2009 providing access to four (4) ordinances and denying access to the Complainant's request for a plan required to be created pursuant to the ADA.

The Complainant agrees to mediate this complaint.

July 29, 2009

Offer of Mediation sent to both parties.

August 4, 2009

The Custodian declines mediation.

August 10, 2009

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

August 12, 2009

Custodian's SOI with the following attachments:

- Complainant's two (2) OPRA requests dated May 18, 2009
- Letter from the Custodian to the Complainant dated May 28, 2009
- Salary Ordinance No. 2875 (2005), No. 2964 (2006), No. 3015 (2007) and No. 3080 (2008)

The Custodian certifies that no records that may have been responsive to the two (2) requests 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").

The Custodian certifies that she handled each of the Complainant's OPRA requests as follows:

OPRA Request No. 1 for salary of Ms. Pettas from 2005 through 2009:

The Custodian certifies that she received the Complainant's first (1st) OPRA request on May 18, 2009. The Custodian certifies that her search for responsive records included locating salary ordinances because the Complainant did not identify a specific government record, but made a wholesale request for general information that would need to be compiled. The Custodian certifies that she photocopied the salary ordinances from 2005 through 2008 and provided them to the Complainant on May 28, 2009.

OPRA Request No. 2 for a plan required to be created under the ADA:

The Custodian certifies that she received the Complainant's second (2nd) OPRA request on May 19, 2009. The Custodian certifies that she responded to the Complainant on May 28, 2009 stating that the Complainant's request was denied because it was unclear.

The Custodian avers that the Complainant submits numerous OPRA requests to the Township, a majority of which are unclear. The Custodian avers that each of the Complainant's requests in the instant complaint were reviewed with Counsel and records were provided based on the Township's interpretation of the Complainant's request. The Custodian contends that the two (2) requests which are the subject of this complaint fail to identify specific government records and are therefore invalid under OPRA.⁵

August 18, 2009

Letter from the Complainant to the GRC. The Complainant states that he is in receipt of the Custodian's SOI submitted to the GRC. The Complainant requests that this complaint be sent to mediation. The Complainant states that he wants the opportunity to explain his requests before a mediator. The Complainant further states that he requested salary, stipends and overtime for Ms. Pettas; however, he received records that he never requested.⁶

Analysis

Whether the Complainant's records requests are invalid under OPRA?

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.

⁵ The Custodian's Counsel submitted a letter to the GRC on August 13, 2009 requesting that this complaint be dismissed because the Superior Court of New Jersey, Essex County, enjoined the Complainant from filing any criminal or civil complaints against the Township. Counsel attached the Order and Opinion of the Honorable Patricia K. Costello, Assignment Judge. Although the Complainant may be enjoined from filing criminal or civil complaints against the Township, complaints filed with the GRC are considered administrative complaints and therefore do not fall under the Order and Opinion of the Honorable Patricia K. Costello.

⁶ Because the Custodian previously declined to mediate the instant complaint, the Complainant's request to send this complaint to mediation cannot be honored.

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.

Further OPRA provides that:

“[i]mmediate access *ordinarily shall be granted to* budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and *public employee salary and overtime information.*” N.J.S.A. 47:1A-5.e.

OPRA provides that:

“...the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record ... *except that ... an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received ... shall be a government record[.]*” (Emphasis added.) N.J.S.A. 47:1A-10.

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.

Complainant’s OPRA request Item No. 1:

In the matter before the Council, on May 18, 2009 the Complainant requested “[t]he salary for Ms. Eleni Pettas, Administrative Assistant to the Commissioner of Revenue & Finance, for the years 2005 through 2009, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.” In response to the Complainant’s OPRA request for salary information, the Custodian provided photocopies of salary ordinance No. 2875 (2005), No. 2964 (2006), No. 3015

(2007) and No. 3080 (2008). The Custodian certified in the SOI that she provided copies of salary ordinances from 2005 through 2008 to the Complainant on May 28, 2009, but contended in the SOI that the Complainant failed to identify a specific government record. Further, the Custodian argued in the SOI that the Complainant's request was a wholesale request for information to be compiled.

OPRA provides that, "immediate access shall ...be granted to ... *public employee salary and overtime information.*" (Emphasis added.) N.J.S.A. 47:1A-5.e. Salary and overtime information are expressly subject to immediate access pursuant to N.J.S.A. 47:1A-5.e. While the court in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) held that "*agencies are required to disclose only 'identifiable' government records* not otherwise exempt," the plain language of OPRA has identified certain types of information that fall under the definition of a government record. Pursuant to N.J.S.A. 47:1A-5.e., salary and overtime information are expressly identified as an immediate access record.

OPRA further provides that "personnel ... records ... shall not be considered a government record ... except that ... an individual's name, title, position, salary, *payroll record*, length of service, date of separation and the reason therefor, and the amount and type of any pension received ... *shall be a government record[.]*" N.J.S.A. 47:1A-10.

Although salary and overtime information is specifically disclosable as a government record under OPRA pursuant to N.J.S.A. 47:1A-10, the Complainant's request for "... all stipends, bonuses ... expenses and any other form of financial or non-financial compensation," does not clearly identify a specific type of information which is disclosable under N.J.S.A. 47:1A-10. However, such information as that requested by the Complainant could be encompassed within a payroll record, which is specifically referenced as disclosable in N.J.S.A. 47:1A-10. The GRC previously addressed the definition of a payroll record for purposes of OPRA. In Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Council defined the term "payroll record" as follows:

"Neither OPRA nor Executive Order #11² defines the term 'payroll record.' Thus, we look to the ordinary meaning of that term, and are informed by other regulatory provisions defining that phrase. 'Payroll' is defined as a list of employees to be paid and the amount due to each of them. Black's Law Dictionary (7th Ed., 1999). It is also clear that documents included within the payroll record exception are, in part, records required by law to be maintained or reported in connection with payment of salary to employees and is adjunct to salary information required to be disclosed. In this regard, N.J.A.C. 12: 16-2.1, a Department of Labor regulation entitled 'Payroll records,' requires the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an "employer" as defined in the Unemployment Compensation Law, shall keep *payroll records that shall show*, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. *The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;*
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.

The State of New Jersey, as well as its constituent agencies, is an employing unit. (See N.J.S.A. 43:21-19, a statute entitled ‘Definitions’ in Article 1 of the Unemployment Compensation Law, which defines ‘employing unit’ to mean the State or any of its instrumentalities or any political subdivisions.) Therefore, the State is required to keep payroll records in accordance with N.J.A.C. 12:16-2. By the same token, Kean University, as an instrumentality of the State, is an employing unit. See N.J.S.A. 18A:62-1 and 18A:64-21-1 (Governor continues as public employer for purposes of negotiation by state colleges.)

Additionally, because certain types of sick leave payments are treated as wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws for both tax and benefit entitlement purposes, the payroll record should include the type of leave so that it may be treated appropriately for tax and benefit purposes. See N.J.A.C. 12:16-4.2.

Based upon the above, an employee's payroll records should include information that will allow a person to determine whether an employee took a leave of absence, the dates of the leave, whether it was paid, and if so, the amount of salary received for the paid leave of absence. For example, if a payroll record is for a two week period, and the employee is paid \$52,000.00 a year³, and has taken a paid leave of absence of one week for that pay period, the payroll record should show that the employee actually worked one week, took one week of leave and received \$2,000.00. The fact that the employee received her full salary during the pay period, even though she took a week of leave, shows that it was a paid leave of absence. Therefore, the relevant law supports a conclusion that the requested information should be disclosed.⁴” (Emphasis added.) *Id.* at

As previously stated, although the court in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) held that “agencies are required to disclose only ‘identifiable’ government records not otherwise exempt,” OPRA has clearly identified certain types of information that fall under the definition of a government record. Payroll records are a type of information subject to disclosure as a government record pursuant to N.J.S.A. 47:1A-10.

In the instant complaint, the Complainant’s OPRA request for “... all stipends, bonuses ... expenses and any other form of financial or non-financial compensation,” comprises several pieces of information that are subject to disclosure under OPRA pursuant to the GRC’s definition of a payroll record. Pursuant to the Council’s decision in Jackson, *supra* and N.J.A.C. 12:16-2.1, the Complainant’s OPRA request for other types of compensation seeks a type of information which comprises payroll records, which are subject to disclosure pursuant to N.J.S.A. 47:1A-10.

Therefore, based on the forgoing, the Complainant’s first (1st) OPRA request for “... salary and overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.” is a valid OPRA request pursuant to N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10 and Jackson, *supra*.

Moreover, the salary and overtime information the Complainant seeks is specifically classified as an “immediate access” record pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The evidence of record indicates that the Custodian in this complaint failed to respond immediately to the Complainant’s OPRA request for Ms. Pettas’s salary and overtime information. As in Herron, *supra*, the Custodian had a duty to respond to the Complainant’s request for these items immediately because the Complainant’s request was for an immediate access record pursuant to N.J.S.A. 47:1A- 5.e. Therefore, because the Custodian failed to immediately grant or deny access to the requested salary and overtime information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, *supra*.

The evidence of record further indicates that the Custodian responded to the Complainant’s first (1st) OPRA request providing access to salary ordinances for 2005, 2006, 2007 and 2008. The ordinances contain a base salary, longevity (what appears to be a pay raise based on percentage) and the total yearly salaries (adding together base salary and pay raise where applicable). However, staff positions are listed by job title and not employee name; therefore, it is difficult to determine the specific salary for Ms. Pettas. Given that the Complainant has specifically identified an employee of the Township, it is unreasonable for the Complainant to sift through the salary ordinances to

determine which job title the employee may fall under. Additionally, the Custodian failed to provide the Complainant with any salary information for 2009, nor any information regarding “overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.”

Therefore, based on the foregoing, the Custodian has failed to provide records responsive to the Complainant’s OPRA request. The Complainant must disclose records for the years 2005 through 2009 showing Ms. Pettas’s “salary, overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation.” If no records exist which pertain to one of the requested criteria relating to Ms. Pettas, the Custodian must certify to this.

Complainant’s OPRA request Item No. 2:

The Complainant submitted a second (2nd) request on May 18, 2009 for “[a] copy of the plan required to be created pursuant to the ADA.” The Complainant’s request included the following language from the ADA, which states that:

“[i]f a city that employs 50 or more persons decides to make structural changes to achieve program access, it must develop a transition plan that identifies those changes and set a schedule for implementing them. Both the self-evaluation and transition plans must be available to the public.” 28 C.F.R. 35.105, 35.150(d).

The Custodian certified in the SOI that she responded to the Complainant in writing on May 28, 2009 stating that the request was denied because it was unclear.

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.

In determining that MAG Entertainment’s request for “all documents or records” from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. 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.” *Id.*

The Appellate Division later noted that “[r]esearch is not among the custodian’s responsibilities” under OPRA. New Jersey Builders’ Ass’n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007).

Moreover, in Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, 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.’⁷ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’⁸”.

Additionally, in Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-89 (September 2009), one of the Complainant’s request items sought “[r]ecords and data from February 2002 to present that document the basis on which utility allowance and surcharge schedules and revisions thereof were established...” to include records and data required pursuant to several federal regulations. The GRC contemplated past case law regarding an OPRA request in which the requestor sought records required to be made pursuant to other statutes:

“... in Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), the Complainant submitted numerous requests for records which may have been required to be created under federal rules. The Council held that:

“[b]ecause the Complainant’s OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the

⁷ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

⁸ “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Rory W. Moore v. Township of Nutley (Essex), 2009-186 – Findings and Recommendations of the Executive Director

Complainant's 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 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)..."

The Council reasoned that:

"[w]hile some of the requests may provide a certain level of specific information as to the record sought (such as identifying a federal regulation under which a record should be created), there is still not enough information for the Custodian to identify with reasonable clarity the records sought. In fact, item # 2 of the Complainant's requests cites to a definitional regulation rather than a regulation that requires the creation of a record. In actuality, many of the regulations cited by the Complainant do not specifically require that a record be created and thus such records may not even exist. More importantly, *the fact that the Custodian would have to research the federal regulations cited by the Complainant to determine whether said regulations require that a record be created places an undue burden on the Custodian.*" (Emphasis added).

Additionally, in Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Complainant sought access to the Passaic County Housing Agency signs posted in conformance with N.J.S.A. 47:1A-5.j., an OPRA provision which mandates that a custodian post a specific sign in his/her office. The Council stated that:

"[c]ustodians are required to be familiar with all provisions of OPRA as custodians must grant or deny access in accordance with the law.... However, the court cases listed above specifically state that a custodian is not required to conduct research in response to an OPRA request. The court in MAG, *supra*, does not qualify the extent of research [a] custodian may or may not do in response to requests. The court simply states that custodians are not required to conduct research and that only identifiable government records shall be accessible. MAG, *supra*, at 546, 549. The Complainant here fails to explain in his request what N.J.S.A. 47:1A-5.j. provides and thus leaves it to the Custodian to conduct research in order to determine what said provision of OPRA mandates. Thus, the Complainant's request as currently written does not seek an identifiable government record without requiring the Custodian to research a New Jersey State statute. Although the Public Information Officer ultimately provided the Complainant with the

requested records, neither she nor the Custodian were required to conduct research in order to fulfill the Complainant's requests."

The Complainant appealed the Council's decision that his OPRA request was invalid because it failed to identify with reasonable clarity the records sought. In Bart v. Passaic County Public Housing Agency, 406 N.J.Super. 445 (App. Div. 2009), the Appellate Division stated that:

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

Based on the foregoing, the GRC held that:

"... because [Item No. 4] of the Complainant's OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant's request requires an open-ended search of the PHA's files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, Schuler, *supra*, Taylor, *supra*, and Bart, *supra*."

The instant complaint differs only marginally from the complaints cited in Bart in that the Complainant here included the relevant language from the ADA in his request. However, although the Complainant's request for a "plan required to be created pursuant to the ADA" identifies a type of government record and specific language from the ADA, the request contains insufficient qualifiers such as the date of the requested plan or to what building or project such plan would refer; OPRA does not require that a Custodian conduct research in order to fulfill a request. As such, the Complainant's request for a plan required to be created pursuant to the ADA invalid under OPRA. MAG, *supra*, NJ Builders, *supra*, Donato, *supra* and Bart, *supra*.

Therefore, because the Complainant's second (2nd) request would require the Custodian to research her records to locate "a plan required to be created...pursuant to the ADA" that may be responsive, and such research is not required pursuant to Donato, the request is invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, and Bart, *supra*.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's OPRA request for "... salary and overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation." is a valid OPRA request pursuant to N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004).
2. Because the Custodian failed to immediately grant or deny access to the requested salary and overtime information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
3. The Custodian has failed to provide records responsive to the Complainant's OPRA request. **The Complainant must disclose records for the years 2005 through 2009 showing Ms. Pettas's "salary, overtime information, including all stipends, bonuses, overtime, expenses and any other form of financial or non-financial compensation." If no records exist which pertain to one of the requested criteria relating to Ms. Pettas, the Custodian must certify to such.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰**
5. Because the Complainant's second (2nd) request would require the Custodian to research her records to locate "a plan required to be created...pursuant to the Americans with Disabilities Act" that may be responsive which is not required pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), 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), and Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-59 (September 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010