



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Russell J. Litchult, Jr.
Complainant

Complaint No. 2010-159

v.

Borough of Waldwick Police Department (Bergen)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 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. Because Custodian Counsel’s response to the Complainant’s OPRA request failed to address each request item and did not provide a lawful basis for a denial of access, Counsel’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian has certified that no record responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Because the Custodian would have to create government records responsive to request Item No. 2 which she is not required to do under OPRA, and because the Complainant’s request Items No. 3 through No. 6 fail to specify an identifiable government record and instead seek information, the Complainant’s request Items No. 2 through No. 6 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Although the Custodian’s Counsel violated N.J.S.A. 47:1A-5.g. by failing to address each request item individually in the denial of access to the requested records, the Custodian has certified that no records responsive for Items No. 1 through No. 6 exist and the request for Item No. 2 is invalid under OPRA because the Custodian would



have to collect and analyze data and create records responsive, and furthermore, the Complainant's request Items No. 3 through 6 are invalid under OPRA because they seek information and do not specifically identify a government record sought. Moreover, 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 24th Day of May, 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: June 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

Russell J. Litchult, Jr.¹
Complainant

GRC Complaint No. 2010-159

v.

Borough of Waldwick Police Department (Bergen)²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Records destruction forms and approvals from the Waldwick Police Department from 2006-2010.
2. Charts and graphs posted in April 2010 relating to police employees' sick time and number of motor vehicle summonses and arrest statistics issued set forth by offender.
3. Number of motor vehicle summonses issued by each sworn officer from 2000-2010.
4. Number of DWI and criminal arrests for each officer from 2000-2010.
5. Number of times each police officer was sick from 2000-2010.
6. Activities by each squad (A, B, C, D).

Request Made: April 9, 2010

Response Made: April 19, 2010

Custodian: Paula M. Jaegge

GRC Complaint Filed: July 20, 2010³

Background

April 9, 2010

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.⁴

¹ Represented by Christine Carey Lilore, Esq., of the Law Offices of Christine Carey Lilore, (Wyckoff, NJ).

² Represented by Craig Bossong, Esq., of Florio, Perrucci, Steinhardt and Fader LLC. (Rochelle Park, NJ).

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

⁴ The Complainant states in his Denial of Access Complaint that when he submitted his OPRA request, the Custodian said that she believed the requested records should be able to be disclosed.

April 16, 2010

Letter from Craig Bossong, Borough Counsel, to the Custodian. Counsel states that access to the records sought by Complainant is denied. Counsel states that the majority of the records responsive do not exist and the Police Department is under no obligation to recreate those records that may have been destroyed or to create those records if they never existed.

Counsel also states that a majority of the records requested are internal records created for a finite period of time, which are used to evaluate police officers and consult with higher ranking members about performance and productivity. Counsel further states that the requested records are inter-agency or intra-agency advisory, consultative, or deliberative material and are therefore exempt from disclosure. In addition, Counsel states that the records sought by Complainant fall outside the definition of a government record and furthermore, some of these records do not exist.

Lastly, Counsel states that there are no records which can be copied pursuant to the Complainant's request.

April 19, 2010

Telephone call from the Custodian to the Complainant. The Custodian states that the Custodian's Counsel has written a two (2) page letter indicating that the Complainant's OPRA request has been denied.

April 19, 2010

The Complainant goes to Borough Hall to obtain a copy of Counsel's letter to the Custodian dated April 16, 2010.⁵

April 19, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he is in receipt of Custodian Counsel's letter dated April 16, 2010. The Complainant also states that in such letter, Counsel asserted that he has been informed that a "majority" of records the Complainant requested do not exist. The Complainant also states that Counsel asserted in such letter that a majority of the records requested are internal records. The Complainant inquires if the remaining records requested may be disclosed under OPRA. The Complainant also states that any records that currently exist should not be destroyed because he is filing a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant also states that Counsel does not address the Complainant's OPRA request Item No. 1. The Complainant inquires whether, if these destruction forms exist, the police department filed such forms with the New Jersey Division of Archives and Records Management ("DARM") and received approval for the destruction of certain items.

⁵ This date is the sixth (6th) business day following the Custodian's receipt of the Complainant's OPRA request.

April 19, 2010

E-mail from the Custodian to the Complainant. The Custodian states that after speaking with Counsel, Counsel states that the response to the request for records responsive to Item No. 1 was included in Counsel's letter dated April 16, 2010. The Custodian also states that if the Complainant needs an itemized letter from Counsel addressing each individual request, Counsel will supply such letter by April 21, 2010.

April 19, 2010

E-mail from the Complainant to the Custodian. The Complainant states that after speaking with his Counsel, he is requesting an itemization of the Custodian Counsel's response to the Complainant's OPRA request. The Complainant also states that Custodian's Counsel has indicated that a majority of his requests were denied and does not elaborate as to which specific requests were denied; the Complainant does not want to guess which specific requests were denied. The Complainant also states that he wishes to have this itemization so that he can file an appropriate Denial of Access Complaint with the GRC. The Complainant also states that he is not pursuing mediation and will be seeking attorney's fees. The Complainant further states that he has contacted DARM regarding the requested record destruction forms and it appears that these records may be obtained under OPRA. The Complainant also states that he will note in his Denial of Access Complaint that the Custodian was not the obstacle in trying to obtain the requested records. Lastly, the Complainant states that he does not feel it is appropriate to have to pay for another piece of paper from the Custodian's Counsel or the Custodian that should have been provided in the first place.

April 20, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the Complainant must complete another OPRA request form to obtain an itemized list for his denied OPRA request.

July 20, 2010

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated April 9, 2010
- Letter from Borough Counsel to the Custodian dated April 16, 2010
- E-mail from the Complainant to the Custodian dated April 19, 2010
- E-mail from the Custodian to the Complainant dated April 19, 2010
- E-mail from the Complainant to the Custodian dated April 19, 2010
- E-mail from the Custodian to the Complainant dated April 20, 2010

The Complainant states that he submitted his OPRA request to the Custodian on April 9, 2010. The Complainant states that the Custodian informed him that the requested records should be able to be disclosed. The Complainant also states that on April 19, 2010 the Custodian left the Complainant a telephone message informing him that a two (2) page letter was written by the Custodian's Counsel indicating that access to the records sought in the Complainant's OPRA request was denied. The Complainant further states that he went to Borough Hall and obtained Counsel's letter on April 19,

2010. The Complainant states that after reading Counsel's letter, which stated that the majority of the records responsive to the OPRA request could not be disclosed, he e-mailed the Custodian and inquired which records were disclosable. The Complainant further states that the Custodian responded to his e-mail stating that the Complainant would have to file another OPRA request for a letter responding to each request item. The Complainant asserts that he should not have to file another OPRA request because this should have been clear in Counsel's letter.

The Complainant states that he is a former Police Sergeant for the Borough of Waldwick. The Complainant also states that he is currently engaged in litigation for Conscientious Employee Protection Act ("CEPA") complaints. The Complainant further states that in March 2010, a Superior Court Judge issued an Order to the Police Department to produce productivity records, which the Police Department did not do.⁶ The Complainant asserts that he is familiar with the computer system and these records should be easy to produce. The Complainant also states that records responsive to request Items No. 3 and No. 4 are public records because these records are displayed with defendants' name and charges, as well as the officer who issued the summons in a public area during court proceedings. The Complainant asserts that in response to his request for Items No. 3 and No. 4, he seeks only the total number of summonses for each officer.

In addition, the Complainant states that with regard to request Item No. 5, as per collective bargaining, there is a sick time buyout which impacts the budgets and taxpayers. The Complainant states that records responsive to request Item No. 5 should be disclosed because the costs involved with buyouts and retirements are of public interest. The Complainant further states that he is not requesting the reason why the officer was sick, just how many sick days each officer took.

The Complainant states that with regard to request Item No. 6, on December 1, 2009 the Chief Financial Officer for the Borough discussed at a public Borough Council meeting that the revenue is down due to a decrease in motor vehicle summonses being issued. The Complainant asserts that since the Council made this a public matter, these records should be disclosed. Furthermore, the Complainant asserts that he is not aware of any policy or procedure within the Police Department which states that the records responsive to request Item No. 6 are used in police evaluations. The Complainant states that in the early 1980's police evaluations were eliminated. Finally, the Complainant states that O'Shea v. West Milford was recently decided, thus the records responsive are disclosable.⁷

The Complainant does not agree to mediate this complaint.

July 22, 2010

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

⁶ This order was pursuant to the pending litigation, not the current Denial of Access Complaint.

⁷ The Complainant failed to provide a citation for such case and upon further investigation of the O'Shea case cited by the Complainant, it is unclear to which case the Complainant is referring.

July 27, 2010

E-mail from the Custodian to the GRC. The Custodian confirms a telephone conversation with the GRC regarding a request for an extension to file the SOI until August 5, 2010 because Custodian's Counsel will be on vacation until the next week.

August 4, 2010

Custodian's SOI with the following attachments:

- Affidavit from Lieutenant Edward Weber dated April 7, 2010
- Complainant's OPRA request dated April 9, 2010
- Letter from the Counsel to the Custodian dated April 16, 2010
- Order from Honorable Mark M. Russello, J.S.C., dated April 16, 2010

The Custodian certifies that no records responsive to the Complainant's request have been destroyed. The Custodian certifies that her search for the requested records included distributing a letter to all departments and department heads with a deadline to submit any records responsive to the Complainant's OPRA request. The Custodian also certifies that generally speaking, if she does not receive a response to such letter, the Custodian makes a personal telephone call to the heads of the departments for a response. The Custodian further certifies that if there is a legal question, privacy or redaction issue, the Custodian contacts the Borough Counsel for an opinion letter to be supplied to the Complainant. The Custodian certifies that no records exist which are responsive to the request.

The Custodian certifies that the records responsive to request Items No. 2 through No. 6 have already been determined by the Superior Court not to exist and therefore the Complainant is barred under the doctrine of *res judicata* from seeking such records; the Custodian asserts that the GRC should abide by the Superior Court's decision. The Custodian certifies that the pending case of Russell J. Litchult Jr. v. The Borough of Waldwick, Waldwick Police Department, Docket No. BER-L-2828-08, is not specifically about the records sought, but concerns other allegations regarding the Complainant's interaction with the Waldwick Police Department. The Custodian also certifies that the subject and discoverability of the records requested was the subject of the Complainant's discovery motion in that litigation. The Custodian further certifies that during the course of discovery, the Complainant sought the majority of the same records and had issued his request for same via Answers to Interrogatories and Request for Production of Documents. The Custodian also certifies that the Borough responded to the Complainant's request for production of documents and Interrogatories with supporting affidavits. The Custodian certifies that the Affidavit of Lieutenant Edward Weber certified:

“the information regarding the productivity of officers is stored as raw data, and is not available as statistical information regarding officer productivity in the Department. Such documents were created in order to motivate officers to increase numbers of arrests and summons. As a general policy, after such statistical records are utilized, they are destroyed

since they depict confidential information regarding officer productivity which should not be made available to parties outside the Department as a matter of course.”

The Custodian certifies that the Honorable Mark M. Russello, J.S.C., issued an order dated April 16, 2010 declaring that the records requested do not exist and therefore cannot be provided. Therefore, the Custodian argues that the Complainant should be barred from re-litigating this matter with the GRC.

The Custodian also argues that the records requested in the matter before the Council either do not exist or are not government records as defined under OPRA. The Custodian certifies that records responsive to Item No. 1, copies of records destruction forms from 2006-2010 do not exist. The Custodian certifies that the most recent record destruction form is dated April 3, 2001, well before the time period requested by the Complainant. The Custodian also certifies that the reason for such a lapse is that after 2001, the Police Department moved into a new building and has dramatically increased storage space for such records. The Custodian further certifies that no records responsive to this request have been destroyed. Furthermore the Custodian certifies that there are no records responsive to this request. Additionally, the Custodian certifies that the Police Department has not made a request to DARM to destroy any additional records.

The Custodian also certifies that in response to request Item No. 2 seeking copies of charts and graphs posted in April 2010 relating to police employees’ sick time and the number of motor vehicle summonses, the records responsive do not exist. The Custodian further certifies that these are the exact records that Judge Russello ruled do not exist. The Custodian also certifies that pursuant to Lieutenant Weber’s affidavit, there is no physical record that currently exists in response to this request. In addition, the Custodian certifies that in order to create these records Lieutenant Weber must pull together different data and create such charts and graphs. The Custodian argues that any information that is pulled together and utilized to motivate officers and is used as advisory evaluative and consultative material within the department itself is considered advisory, consultative and deliberative prior to it being destroyed.

The Custodian also certifies that the records responsive to request Items No. 2 through No. 5 do not exist. The Custodian also certifies that she would have to create such records in order to provide a numerical summary per officer for the information requested. The Custodian certifies that OPRA does not require a public agency to collect information, analyze information and create or manufacture records pursuant to a request pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (2005).

Furthermore, the Custodian certifies that there are no records responsive to request Item No. 6 (copies of activities by each squad). The Custodian also certifies that she would have to collect and analyze the conduct of each squad to manufacture a record that identifies their activities.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

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

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (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 will first address the issue of whether Custodian Counsel's response is sufficient under OPRA.

The evidence of record indicates that Custodian's Counsel responded in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business day response period stating that the majority of the records responsive do not exist and further stating that the Police Department is under no obligation to recreate those records that may have been destroyed, or to create those records, if they never existed on April 16, 2010. The evidence of record also indicates that Counsel also stated that a majority of the records requested are internal records created for a finite period of time, which are used to evaluate police officers and consult with higher ranking members about performance and productivity. The evidence of record further states that Counsel stated that the requested records are inter-agency or intra-agency advisory, consultative, or deliberative material. In addition, the evidence of record indicates that Counsel stated that the Complainant's requested records falls outside the definition of a government record and furthermore, some of these records do not exist.

The evidence of record shows that upon receipt of Custodian Counsel's denial of access to the requested records, the Complainant requested an itemization of the Custodian Counsel's response to the records sought in the Complainant's OPRA request. Furthermore, the evidence of record indicates that the Custodian responded to the Complainant by informing the Complainant that he must complete another OPRA request form in order to obtain such an itemized list.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant's Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian's initial response stating that the Complainant's request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) *and* Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Because Custodian Counsel's response to the Complainant's OPRA request failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record, Counsel's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Furthermore, a Custodian is obligated under OPRA to provide a complete and sufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. As previously discussed, Custodian Counsel's response was insufficient because it failed to address each request item. In addition, when the Complainant asked for clarification as to which records were disclosable, the Custodian informed the Complainant that he would have to complete another OPRA request. The requirement that the Complainant file another OPRA request to receive a sufficient denial of access is a limitation on access pursuant to N.J.S.A. 47:1A-1.

Although Custodian Counsel's response is insufficient under OPRA, the Custodian has certified in her SOI that no records responsive to Items No. 1 through No. 6 of the OPRA request exist. The Complainant has not provided any credible evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records responsive to Items No. 1 through No. 6 of the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Furthermore, the Custodian certified that she would have to gather data from various sources to create records responsive to request Item No. 2, and further certified with regard to request Items No. 3 through No. 5 she would have to create such records in order to provide a numerical summary per officer for the information requested. The Custodian also certified that she would have to collect and analyze the conduct of each squad to manufacture a record that identifies their activities which would be responsive to the request for Item No. 6.

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.

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.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ 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."⁹

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

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent, *supra*.

of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 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)."

Therefore, because the Custodian would have to create government records responsive to request Item No. 2 which she is not required to do under OPRA, and because the Complainant's request Items No. 3 through No. 6 fail to specify an identifiable government record and instead seek information, the Complainant's request Items No. 2 through No. 6 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether the Custodian Counsel's insufficient response to the Complainant's OPRA request 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 evidence of record indicates that the Custodian Counsel responded to the Complainant's OPRA request within the statutorily mandated seven (7) business day response period but failed to address each request item individually in violation of N.J.S.A. 47:1A-5.g. However, the Custodian certified in her SOI that the records responsive to request Items No. 1 through No. 6 do not exist and further the Custodian certifies that she would have to create government records responsive to the request for Items No. 2 through 6.

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 Counsel violated N.J.S.A. 47:1A-5.g. by failing to address each request item individually in the denial of access to the requested records , the Custodian has certified that no records responsive for Items No. 1 through No. 6 exist and the request for Item No. 2 is invalid under OPRA because the Custodian would have to collect and analyze data and create records responsive, and furthermore, the Complainant's request Items No. 3 through 6 are invalid under OPRA because they seek information and do not specifically identify a government record sought. Moreover, 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. Because Custodian Counsel's response to the Complainant's OPRA request failed to address each request item and did not provide a lawful basis for a denial of access, Counsel's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian has certified that no record responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Because the Custodian would have to create government records responsive to request Item No. 2 which she is not required to do under OPRA, and because the Complainant's request Items No. 3 through No. 6 fail to specify an

identifiable government record and instead seek information, the Complainant's request Items No. 2 through No. 6 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

4. Although the Custodian's Counsel violated N.J.S.A. 47:1A-5.g. by failing to address each request item individually in the denial of access to the requested records, the Custodian has certified that no records responsive for Items No. 1 through No. 6 exist and the request for Item No. 2 is invalid under OPRA because the Custodian would have to collect and analyze data and create records responsive, and furthermore, the Complainant's request Items No. 3 through 6 are invalid under OPRA because they seek information and do not specifically identify a government record sought. Moreover, 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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Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011