



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-199

v.

Township of Downe (Cumberland)
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 this complaint be dismissed as part of a stipulation of settlement signed by the Custodian’s Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-199

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of resolution approving contract with Kay & Associates for re-evaluation project
2. Copy of entire contents of re-evaluation project report
3. Copy of all paid invoices and change orders for Kay & Associates for re-evaluation project
4. Onsite inspection of large copy of land value map prepared as noted in re-evaluation project.
5. Copy of proof of license to use the Microsystems – NJ.com, LLC, microcomputer based mass appraisal system.

Request Made: July 16, 2010

Response Made: Unknown

GRC Complaint Filed: August 3, 2010³

Background

September 25, 2012 Council Meeting:

At its September 25, 2012 public meeting, the Council considered the September 18, 2012 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, found that:

“... because the Complainant has failed to establish in her motion for reconsideration of the Council’s June 26, 2012 Interim Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence,

¹ No legal representation listed on record.

² Richard DeVillasanta, Custodian of Records. Represented by John G. Carr, Esq., of Cresse & Carr (Woodbury, NJ).

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

and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Council's decision that the Complainant's OPRA request Item No. 2 was invalid, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, since the Council has denied the Complainant's motion for reconsideration, this complaint shall still be referred to the Office of Administrative Law pursuant to the Council's June 26, 2012 Interim Order."

Procedural History:

On September 27, 2012, the Council distributed its Interim Order to all parties. On January 11, 2013, this complaint was transmitted to the Office of Administrative Law ("OAL"). On May 29, 2013, OAL transmitted this complaint back to the GRC marked as withdrawn pursuant to a stipulation of settlement signed by the Custodian's Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed as part of a stipulation of settlement signed by the Custodian's Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013



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

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-199

v.

Township of Downe (Cumberland)
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant has failed to establish in her motion for reconsideration of the Council’s June 26, 2012 Interim Order that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Council’s decision that the Complainant’s OPRA request Item No. 2 was invalid, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, since the Council has denied the Complainant’s motion for reconsideration, this complaint shall still be referred to the Office of Administrative Law pursuant to the Council’s June 26, 2012 Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-199

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of resolution approving contract with Kay & Associates for re-evaluation project
2. Copy of entire contents of re-evaluation project report
3. Copy of all paid invoices and change orders for Kay & Associates for re-evaluation project
4. Onsite inspection of large copy of land value map prepared as noted in re-evaluation project.
5. Copy of proof of license to use the Microsystems – NJ.com, LLC, microcomputer based mass appraisal system.

Request Made: July 16, 2010

Response Made: Unknown

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010³

Background

June 26, 2012

Government Records Council's ("Council") Interim Order. At its June 26, 2012 public meeting, the Council considered the June 19, 2012 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 Custodian's failure to respond *in writing* to the 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

¹ No legal representation listed on record.

² Represented by John Carr, Esq., of Cresse & Carr (Woodbury, NJ).

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

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 (Interim Order October 31, 2007).

2. Because the Complainant's request for "entire contents of re-evaluation project report" responsive to Item No. 2 fails to identify a specific government record sought, such 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, 37 (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).
3. Because the Custodian conducted an insufficient search for the requested records responsive to request Item No. 3, the Custodian unlawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).
4. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant pursuant to N.J.S.A. 47:1A-7.b.
5. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian unlawfully denied access to the records responsive for request Item No. 1 and Nos. 3 through 5. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

June 27, 2012

Council's Interim Order distributed to the parties.

June 29, 2012

Complainant's Motion for Reconsideration attaching the "Contract for the Revaluation of Downe Township between the Mayor and Committee and Kay & Associates dated November 13, 2007." The Complainant requests that the Council reconsider the June 26, 2012 Interim Order of her Denial of Access Complaint pursuant to N.J.A.C. 5:105-2.0. The Complainant asserts that mistake and new evidence requires the Council to reconsider this matter. The Complainant states that the Council held that her request Item No. 2, "copy of entire contents of re-evaluation project report" failed to specifically identify a government record and is therefore invalid under OPRA. The Complainant asserts that her initial request was for a "copy of the entire contents of Revaluation Project Report." The Complainant states that the "Revaluation Project Report" is the name of the government record being sought. The Complainant asserts

that she identified the name of this government record after reviewing a copy of the Contract for the Revaluation of the Township of Downe (“Township”) between the Township and Kay & Associates, Inc., the firm who was selected to perform the revaluation. The Complainant points to Article four (4) of the contract entitled, “Project Products and Deliverables.” The Complainant also states that Article four (4) details what is contained in the revaluation project report. The Complainant further states that the revaluation project report contains the appraisal policies, the depreciation schedules, all valuation algorithms and indices, all land value formulas and the project sales file. The Complainant further states that Kay & Associates will deliver the revaluation project report along with the final version of the land value map to the Township at the end of the project and it will be retained in the Tax Assessor’s office for future use.

The Complainant asserts that her request Item No. 2 does specifically identify a government record sought because the name of the government record is the “Revaluation Project Report.” The Complainant also asserts that by asking for the entire contents of this report, she is referring to the items listed in Article four (4) of the revaluation contract. The Complainant further states that she specifically included the wording “entire contents” so that the Township would not pick and choose which portions of the report to give her. The Complainant additionally asserts that she did not think she had to ask for each piece individually because all of these items together make up the entire Revaluation Project Report.

The Complainant states that it is possible that a misunderstanding might have occurred after her request for the Revaluation Project Report was referred to as “revaluation project report” and as “revaluation project.” Lastly, the Complainant states that her initial request did specify the government record being sought (Revaluation Project Report).

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council’s June 26, 2012 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council’s June 26, 2012 Interim Order on June 29, 2012, two (2) business days after the distribution of the Council’s decision on June 27, 2012. Such a request for reconsideration was made within the ten (10) business days mandated by *N.J.A.C. 5:105-2.10*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ Ibid.” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of her motion for reconsideration, the Complainant submitted the “Contract for the Revaluation of Downe Township between the Mayor and Committee and Kay & Associates dated November 13, 2007.” The Complainant stated that the Council erred in holding that her request Item No. 2 “copy of entire contents of re-evaluation report” failed to specifically identify a government record. The Complainant asserted that the “Revaluation Project Report” is the name of the government record being sought. The Complainant pointed to Article four (4) of the contract entitled “Project Products and Deliverables.” The Complainant stated that Article four (4) details what is contained in the revaluation project report. The Complainant failed to submit any new evidence in support of her motion. The Complainant stated that she did not think she had to ask for each item individually because all the items together make up the entire Revaluation Project Report. The Complainant also asserted that she specifically included the wording “entire contents” so that the Township would not pick and choose which portions of the report to give her.

However, the Complainant’s submission fails to establish that request Item No. 2 was valid under OPRA. The Complainant stated that she believed she did not have to ask for each item individually. However, OPRA requires that a complainant specifically identify each government record sought. The Custodian is not required to reference the “Contract for the Revaluation of Downe Township between the Mayor and Committee and Kay & Associates dated November 13, 2007” in order to determine which government records the Complainant is seeking. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007) and Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-89 (September 2009).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint. *See D'Atria, supra*. Notably, the Complainant failed to submit any evidence to contradict the Custodian's certification that all records responsive to the Complainant's OPRA request were provided to her within the statutorily required response time. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision.

Therefore, because the Complainant has failed to establish in her motion for reconsideration of the Council's June 26, 2012 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Council's decision that the Complainant's OPRA request Item No. 2 was invalid, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, since the Council has denied the Complainant's motion for reconsideration, this complaint shall still be referred to the Office of Administrative Law pursuant to the Council's June 26, 2012 Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in her motion for reconsideration of the Council's June 26, 2012 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, and failed to submit any evidence to contradict the Council's decision that the Complainant's OPRA request Item No. 2 was invalid, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, since the Council has denied the Complainant's motion for reconsideration, this complaint shall still be referred to the Office of Administrative Law pursuant to the Council's June 26, 2012 Interim Order.

Prepared By: Harlynn A. Lack, Esq.

Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-199

v.

Township of Downe (Cumberland)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond *in writing* to the Complainant’s 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 (Interim Order October 31, 2007).
2. Because the Complainant’s request for “entire contents of re-evaluation project report” responsive to Item No. 2 fails to identify a specific government record sought, such 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, 37 (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).
3. Because the Custodian conducted an insufficient search for the requested records responsive to request Item No. 3, the Custodian unlawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).
4. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant pursuant to N.J.S.A. 47:1A-7.b.



5. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian unlawfully denied access to the records responsive for request Item No. 1 and Nos. 3 through 5. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-199

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of resolution approving contract with Kay & Associates for re-evaluation project
2. Copy of entire contents of re-evaluation project report
3. Copy of all paid invoices and change orders for Kay & Associates for re-evaluation project
4. Onsite inspection of large copy of land value map prepared as noted in re-evaluation project.
5. Copy of proof of license to use the Microsystems – NJ.com, LLC, microcomputer based mass appraisal system.

Request Made: July 16, 2010

Response Made: Unknown

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010³

Background

July 16, 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.

July 23, 2010

Telephone call from the Complainant to the Custodian. The Custodian states that he does not have the records responsive to request Item No. 2 because Ms. Doris Sanza, Tax Assessor, ("Ms. Sanza"), did not provide such records to him. The Custodian also states that he had to search for the records responsive to request Item No. 3.

¹ No legal representation listed on record.

² Represented by John Carr, Esq., of Cresse & Carr (Woodbury, NJ).

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

July 23, 2010

Complainant visits the Custodian's Office. The Complainant picks up records responsive to request Item No. 1.⁴ The Custodian informs the Complainant that the report responsive to request Item No. 2 is not located at the Township Office. The Complainant conducts an on-site inspection of the record responsive to request Item No. 4.

July 26, 2010

E-mail from Ms. Sanza to the Custodian.⁵ Ms. Sanza states that the records responsive to request Items No. 2 and No. 3 were submitted to the Finance Officer, but she will check to see if she maintains a copy of these records responsive in her office. Ms. Sanza states that the Complainant must request the record responsive to request Item No. 5 from Kay & Associates because the Township might not have a copy of this record.

August 3, 2010

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

- Complainant's OPRA request dated July 16, 2010⁶
- E-mail from Ms. Sanza to the Custodian dated July 26, 2010.

The Complainant states that she has repeatedly encouraged the Custodian to contact the GRC to determine which records are disclosable under OPRA. The Complainant states that the Custodian was working for the Township for only four (4) weeks when she filed her OPRA request.

The Complainant argues that she believes that the Township is not cooperating with her OPRA requests because she appealed her property taxes to the county and to the State. The Complainant also argues that the trial in state tax court is scheduled for September 8, 2010. The Complainant states that the Township was ordered to provide discovery and to answer certain questions. The Complainant argues that the Township did not provide certain records and did not answer some questions. The Complainant also argues that the records requested herein will provide her with the information needed to support her claims and prepare her case. The Complainant further argues that the Township believes it can withhold certain records until after trial, which amounts to a knowing and willful violation of OPRA. The Complainant requests that the GRC order the Custodian to disclose the information. The Complainant also requests that the GRC fine the Custodian if he has knowingly and willfully violated OPRA. Lastly, the Custodian requests that the GRC develop and monitor a corrective action plan for the Township regarding to the Custodian's responsibilities and the handling of and responses to OPRA requests.

⁴ The Complainant asserts in her Denial of Access Complaint that on July 23, 2010, the Custodian noted on her OPRA request that he needed additional time to search for the records responsive to request Item No. 1.

⁵ The Complainant asserts in the Denial of Access Complaint that she received a copy of this e-mail on July 29, 2010.

⁶ The Complainant also includes a copy of her OPRA request with the Custodian's notations thereon dated July 23, 2010.

Item No. 1: Copy of resolution approving contract with Kay & Associates for re-evaluation project

The Complainant states that the Custodian noted on her OPRA request on July 23, 2010 that he needed additional time to search for these records responsive.

Item No. 2: Copy of entire contents of re-evaluation project report

The Complainant states that the Custodian verbally informed her that this request would be forwarded to Ms. Sanza for completion on July 22, 2010.⁷ The Complainant also states that she informed the Custodian that she would be available to pick up these records on July 22, 2010 and to telephone her when the records were ready.⁸ The Complainant further states she called the Custodian the morning of July 23, 2010, because the Custodian did not contact her on July 22, 2010. The Complainant additionally states that the Custodian informed her that he did not have the records responsive because Ms. Sanza did not provide such records to him. The Complainant states that on July 27, 2010 the Custodian telephoned the Complainant and informed her that he received an e-mail from Ms. Sanza dated July 26, 2010, which states that these records are advisory, consultative and deliberative and cannot be disclosed. The Complainant also states that according to Ms. Sanza's e-mail, Ms. Sanza stated that the record was submitted to the Finance Officer and that she will check if she has a copy of this record responsive in her office.

Item No. 3: Copy of all paid invoices and change orders for contract with Kay & Associates for re-evaluation project:

The Complainant states that the Custodian verbally informed her that this request would be forwarded to Ms. Sanza on July 22, 2010.⁹ The Complainant also states that on July 23, 2010, the Custodian informed her that he had to look for these records. The Complainant additionally states that the Custodian noted on her OPRA request that these records were located in the vault.¹⁰ The Complainant further states that the Custodian provided her with Ms. Sanza's e-mail dated July 26, 2010, which indicates that invoices responsive were submitted to the Finance Officer. Lastly, the Complainant states that she received this e-mail on July 29, 2010.

⁷ The Complainant does not provide a date when this conversation occurred.

⁸ The Complainant does not provide a date when this conversation occurred.

⁹ The Complainant does not provide a date when this conversation occurred.

¹⁰ The Complainant does not state when the Custodian made this note on her OPRA request. However, a review of the Complainant's OPRA request form submitted to the GRC as part of the Denial of Access Complaint indicates that the Custodian wrote "Need additional time" on the request form on July 23, 2010. Mary Steinhauer-Kula v. Township of Downe (Cumberland), 2010-199 – Findings and Recommendations of the Executive Director 3

Item No. 4: Onsite inspection of large copy of land value map prepared as noted in re-evaluation project:

The Complainant states that this record was created in 1989 and was last updated in 2006. The Complainant also states that the Custodian noted on the OPRA request that he needed clarification for this request.¹¹

Item No. 5: Copy of proof of license to use the Microsystems – NJ.com, LLC, micro-computer based mass appraisal system:

The Complainant states that she requested a status of her request in writing from the Custodian on July 23, 2010. The Complainant also states that the Custodian marked “Ed Kay” next to her request. The Complainant further states that according to Ms. Sanza’s e-mail dated July 26, 2010, the Township does not have this record.

The Complainant does not agree to mediate this complaint.

August 3, 2010

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

August 9, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation requesting a five (5) business day extension to complete the SOI.

August 13, 2010

E-mail from the GRC to the Custodian. The GRC states that one (1) more extension to complete the SOI will be granted. The GRC also states that the SOI must be submitted by August 27, 2010.

August 27, 2010¹²

Custodian’s incomplete SOI.¹³

The Custodian argues that the Complainant was not denied access to any records. The Custodian certifies that at time the Complainant filed her OPRA request he was new to the Municipal Clerk’s position. The Custodian also certifies that the Township of Downe is extremely small with a population of less than 2,000 people. The Custodian further certifies that he is the only full time employee in the office from Monday through

¹¹ The Complainant does not state when the Custodian wrote this on her OPRA request. However, a review of the Complainant’s OPRA request form submitted to the GRC as part of the Denial of Access Complaint indicates that the Custodian wrote “Viewed 2006, Need Clarification” on the request form on July 22, 2010.

¹² The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA 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 as is required pursuant to *Paff v. NJ Department of Labor*, 392 N.J. Super. 334 (App. Div. 2007).

¹³ The Custodian attaches additional material not relevant to the adjudication of this complaint.

Wednesday. The Custodian additionally certifies that Ms. Sanza is a part-time employee with the Township with office hours from 10:00 a.m. through 6:00 p.m. on Thursdays.

The Custodian certifies that the Complainant requested several records and that he cooperated with her request. The Custodian also certifies that he was unfamiliar with the immediate location of some of the records requested since he was relatively new to the Municipal Clerk's position. The Custodian further certifies that some of the records requested were not immediately accessible because such records needed to be obtained from Ms. Sanza. The Custodian also certifies that at the time of the Complainant's requests, the Township was in the process of inventorying its records and some records were not readily accessible. The Custodian also certifies that he informed the Complainant of Ms. Sanza's hours and of the records inventory. The Custodian further certifies that he explained to the Complainant that no records were intentionally being withheld from her and his office was complying with her OPRA requests as quickly and efficiently as possible.

The Custodian certifies that he provided the Complainant with a copy of the records responsive to request Item No. 1.¹⁴ The Custodian also certifies that the project reports responsive to request Item No. 2 will be provided to the Complainant at a later date because such records are in storage. The Custodian further certifies that the project reports responsive to request Item No. 2 were attached to the invoices responsive to request Item No. 3 and submitted for payment by Kay & Associates. The Custodian additionally certifies that Ms. Sanza's office does not retain the project reports responsive to request Item No. 2, rather such reports would have been filed with the Finance Office. The Custodian certifies that Ms. Sanza's office does not retain the invoices responsive to request Item No. 3 and furthermore, the Custodian is unaware of any change orders responsive to request Item No. 3. The Custodian certifies that the record responsive to request Item No. 4 was the actual map provided by Kay & Associates to the assessors. Lastly, the Custodian certifies that Ms. Sanza's office would not maintain the record responsive to request Item No. 5.

August 30, 2010

Letter from the GRC to the Custodian. The GRC states that that the Custodian's SOI is incomplete and is being returned to him for completion. The GRC also states that the Custodian must complete pages three (3) and four (4) of the SOI form and provide a copy of the Complainant's OPRA request and the Custodian's response to the OPRA request. The GRC further states that the Custodian's cover letter will be used as Item No. 12. Lastly, the GRC states that the completed SOI must be submitted by September 2, 2010.

September 3, 2010

Facsimile from the Custodian to the GRC. The Custodian attaches the Complainant's OPRA request dated July 16, 2010. The Custodian certifies that the

¹⁴ The Custodian did not certify in the incomplete Statement of Information when he provided a copy of the records responsive to request Item No. 1 to the Complainant. However, the Custodian later certified on September 3, 2010 that the Complainant picked up copies of the records responsive to request Item No. 1 on July 23, 2010.

records search was difficult because he was the only person in the office and was not familiar with the file system. The Custodian also certifies that the records responsive to the Complainant's OPRA request have not been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the Complainant came to his office on July 23, 2010 to pick up copies of the record responsive to request Item No. 1. The Custodian also certifies that the Complainant was informed that the reports responsive to request Item No. 2 were not located at the Township Office.¹⁵ The Custodian further certifies that the Complainant conducted an onsite inspection of the record responsive to request Item No. 4 on July 23, 2010. Lastly, the Custodian certifies that the Complainant was informed that the Township does not have the license responsive to request Item No. 5.

December 2, 2011

E-mail from the GRC to the Custodian. The GRC states that upon reviewing the complaint and the SOI, it is unclear when the Custodian responded to the Complainant's OPRA request. The GRC requests that the Custodian provide a legal certification as to when the Custodian responded to the Complainant's OPRA request and in the manner in which he responded. The GRC also requests that if the Custodian's response was in writing, he must provide a copy of that correspondence. The GRC further requests the Custodian to provide the legal certification within five (5) business days.

December 7, 2011

E-mail from the Custodian to the GRC. The Custodian states that he arranged a meeting with Custodian's Counsel on December 9, 2011 to respond to the requested legal certification.

December 14, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification.¹⁶ The Custodian certifies that a copy of the records responsive to request Item Nos. 1, No. 2 and No. 3 were provided to the Complainant on or about July 23, 2010.¹⁷ The Custodian certifies that the Complainant conducted an on-site inspection of the record responsive to request Item No. 4 on or about July 22, 2010. The Custodian certifies that he requested a copy of the record responsive to request Item No. 5 from Kay & Associates. The Custodian also certifies that he has no knowledge of the steps taken by Kay & Associates to produce the record. The Custodian further certifies that this record is not on file at the Township.

¹⁵ The Custodian certified in the SOI that the record responsive to request Item No. 2 will be provided at a later date because said records are in storage.

¹⁶ The Custodian does not certify as to when he responded to the Complainant's OPRA request.

¹⁷ The Custodian certified on September 3, 2010 that the Township does not maintain the record responsive to request Item No. 2. The Custodian also certified in the SOI that Ms. Sanza's office does not retain the invoices responsive to request Item No. 3 and furthermore, the Custodian is unaware of any change orders responsive to request Item No. 3.

January 9, 2012

E-mail from the GRC to Custodian's Counsel. The GRC informs Counsel that after review of this Complaint, it is unclear as to the specific date when the Custodian initially responded to each request. The GRC states that it needs a legal certification from the Custodian as to the specific date and in what format he responded to the Complainant's OPRA request. The GRC also states that it does not need the date when the records were provided or made available for inspection to the Complainant. The GRC requests the legal certification be provided within three (3) business days.

January 12, 2012

E-mail from the Custodian to the GRC. The Custodian attaches the document index from the SOI with the Custodian's uncertified notations thereon. The Custodian states that he provided a copy of the record responsive to request Item No. 1 to the Complainant. The Custodian also states that a copy of all of the records responsive to request Item No. 2 was provided to the Complainant sometime in August 2010.¹⁸ The Custodian further states that he was unable to locate any of the records responsive to request Item No. 3.¹⁹ The Custodian states that the inspection of the record responsive to request Item No. 4 was provided to the Complainant on August 10, 2010.²⁰ Lastly, the Custodian states that a copy of the record responsive to request Item No. 5 was provided to the Complainant on August 10, 2010.²¹

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request?

OPRA 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:

¹⁸ The Custodian certified in the SOI that the Township does not maintain the record responsive to request Item No. 2.

¹⁹ The Custodian certified in the SOI that Ms. Sanza's office does not retain the invoices responsive to request Item No. 3 and furthermore, that he is unaware of any change orders responsive to request Item No. 3. The Custodian also certified on December 14, 2011 that a copy of the records responsive to request Item No. 3 was provided on or about July 23, 2010.

²⁰ The Custodian certified in the SOI that the Complainant conducted an inspection of the record responsive to request Item No. 4 on July 23, 2010. The Custodian also certified on December 14, 2011 that an inspection of the record responsive to request Item No. 4 occurred on or about July 22, 2010.

²¹ The Custodian certified in the SOI that Ms. Sanza's office does not maintain this record responsive. The Custodian also certified on December 14, 2011 that he requested the record from Kay & Associates and that he has no knowledge of what steps were taken by Kay & Associates to provide this record. The Custodian further certified on December 14, 2011 that the Township does not maintain this record responsive.

“[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 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.²² 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 (Interim Order October 31, 2007).

In the instant complaint, there is no evidence in the record to establish when or in what manner the Custodian responded to the Complainant’s OPRA request. Indeed, neither the Complainant nor Custodian could identify when the Custodian initially responded to the OPRA request. The GRC twice requested a legal certification from the Custodian as to when he responded to the OPRA request. However, the Custodian failed to provide a specific date when he responded to the Complainant’s OPRA request and failed to state the manner in which he responded to same. Therefore, Custodian has failed to bear his burden of proof that he responded to the Complainant’s OPRA request in writing within the statutorily mandated seven (7) business days from receipt of the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

Therefore, the Custodian’s failure to respond *in writing* to the 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, supra.

Whether the Complainant’s request for “entire contents of re-evaluation project report” responsive to Item No. 2 is valid 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*

²² It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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). As the court noted in invalidating MAG's request under OPRA:

"Most 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.* at 549.

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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),²³ 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."²⁴

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i).

²³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

²⁴ As stated in Bent, *supra*.

Research is not among the custodian's responsibilities.” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Further, the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant’s request, the Council found 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).

In the instant complaint, the Complainant requested copies of the entire contents of the re-evaluation project report in request Item No. 2. The Complainant’s request Item No. 2 is invalid under OPRA because the Complainant does not specifically identify a government record sought. The Complainant failed to identify if she wanted a copy of the report or any specific government records related to the re-evaluation project. Rather, the Complainant made a blanket request for the entire contents of the re-evaluation project.

Therefore, because the Complainant's request for "entire contents of re-evaluation project report" responsive to Item No. 2 fails to identify a specific government record sought, such 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, 37 (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 sufficiently searched for the records responsive to the Complainant's OPRA request Item No. 3?

The Custodian informed the Complainant via telephone on July 23, 2010 that he would have to search for the records responsive to request Item No. 3. The Custodian certified in the SOI that the records responsive to request Item No. 3 were submitted for payment by Kay & Associates. The Custodian also certified on December 14, 2011 that he provided the records responsive to request Item No. 3 on July 23, 2010. However, the Custodian also provided an uncertified statement to the GRC on January 12, 2012 that he was unable to locate any records responsive to request Item No. 3.

In Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails which were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records.

The facts in the instant complaint differ slightly from Schneble, *supra*. In Schneble, the custodian eventually conducted a search and located the records responsive to the complainant's OPRA request. In the instant matter, it appears that the Custodian failed to conduct any search for the records responsive to request Item No. 3. Further, based upon the Custodian's conflicting certification dated December 14, 2011 and statement dated January 12, 2012, the Custodian seems unaware if the records responsive to request Item No. 3 even exist.

Because the Custodian conducted an insufficient search for the requested records responsive to request Item No. 3, the Custodian unlawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).

Whether the GRC has the authority under OPRA to establish and/or monitor a corrective action plan for the Township?

OPRA provides that the Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied.

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints filed under OPRA.

In this complaint, the Complainant requested that the GRC develop and monitor a corrective action plan for the Township, with specific attention to the Custodian's responsibilities and the handling of and responses to OPRA requests.

Thus, the Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant pursuant to N.J.S.A. 47:1A-7.b.

Whether the Custodian unlawfully denied access to the records responsive to request Items No. 1 and No. 3 through No. 5?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

There is conflicting evidence in the record regarding the records responsive to request Item Nos. 1 and 3 through 5. Such evidence is detailed as follows:

Item No. 1: Copy of resolution approving contract with Kay & Associates for re-evaluation project:

The Complainant stated in her Denial of Access Complaint filed on August 3, 2010 that the Custodian noted on her OPRA request on July 23, 2010 that he needed additional time to locate these records responsive. Conversely, the Custodian certified on September 3, 2010 that the Custodian provided copies of these records responsive on July 23, 2010.

Item No. 3: Copy of all paid invoices and change orders for contract with Kay & Associates for re-evaluation project:

As previously stated above, based on the Custodian’s conflicting certification dated December 14, 2011 and statement dated January 12, 2012, the Custodian does not seem to know where the records responsive to request Item No. 3 are located or if said records even exist since the Custodian failed to search for said records. Furthermore, the evidence of record is unclear whether the Complainant ever received copies of the records responsive because of the conflict between the Custodian’s conflicting

certification dated December 14, 2011 and his statement to the GRC dated January 12, 2012.

Item No. 4: Onsite inspection of large copy of land value map prepared as noted in re-evaluation project:

The evidence of record indicates that the Complainant stated in her Denial of Access Complaint that the Custodian wrote “need clarification” on her OPRA request on July 22, 2010. Conversely, the Custodian certified to the GRC on December 14, 2011 that the Complainant conducted an onsite inspection of the map on July 22, 2010. However, the Custodian also stated to the GRC in an e-mail on January 12, 2012 that the Complainant conducted an onsite inspection of the map on August 10, 2010.

Item No. 5: Copy of proof of license to use the Microsystems – NJ.com, LLC, micro-computer based mass appraisal system:

The Complainant asserted in her Denial of Access Complaint that the Custodian wrote “Ed Kay” next to request Item No. 5 on her OPRA request form. The evidence of record also indicates that according to Ms. Sanza’s e-mail dated July 26, 2010 the Township may not maintain a copy of this record. Conversely, the Custodian certified that in the SOI that the Township does not maintain a copy of this record responsive. The Custodian also certified to the GRC on December 14, 2011 that he requested a copy of this record from Kay & Associates.²⁵ The Custodian also certified to the GRC on December 14, 2011 that he does not know what steps Kay & Associates took to produce this record.²⁶ Lastly, the Custodian stated to the GRC in an e-mail on January 12, 2012 that he provided a copy of this record to the Complainant on August 10, 2010.

Thus, the parties provided conflicting evidence regarding whether access to the records responsive to request Item Nos. 3 through 5 was unlawfully denied.

Therefore, based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian unlawfully denied access to the records responsive for request Item No. 1 and Nos. 3 through 5. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond *in writing* to the Complainant’s OPRA request either granting access, denying access, seeking clarification or

²⁵ The Custodian fails to certify when he requested a copy of this record from Kay & Associates.

²⁶ The Custodian does not certify if Kay & Associates was supposed to be providing the copy of the license to the Custodian.

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 (Interim Order October 31, 2007).

2. Because the Complainant’s request for “entire contents of re-evaluation project report” responsive to Item No. 2 fails to identify a specific government record sought, such 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, 37 (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).
3. Because the Custodian conducted an insufficient search for the requested records responsive to request Item No. 3, the Custodian unlawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).
4. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant pursuant to N.J.S.A. 47:1A-7.b.
5. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian unlawfully denied access to the records responsive for request Item No. 1 and Nos. 3 through 5. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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Acting Executive Director

June 19, 2012