



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

January 31, 2012 Government Records Council Meeting

Jean Mikle
(on behalf of Asbury Park Press)
Complainant

Complaint No. 2010-232

v.
Burlington County Board of Taxation
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 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. Although Ms. Schultz responded to the OPRA request in writing on behalf of the Custodian in a timely manner, said response is insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5.i. because Ms. Schultz failed to provide a specific anticipated date upon which the Burlington County Tax Board would provide the requested records to the Complainant. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).
2. The Custodian certified to the GRC on November 7, 2011 that no responsive list existed at the time of the Complainant’s OPRA request. Additionally, there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the requested Abstract of Ratables pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to Mr. D’Ambrosio’s August 26, 2010 clarification e-mail. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; this portion of the complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).
4. Although Ms. Schultz’s response to the OPRA request was insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and N.J.S.A. 47:1A-5.i., because she failed to provide a date certain upon which the Complainant could expect the Tax Board to grant or deny access to



the requested record, the Custodian did not unlawfully deny access to the Abstract because same did not exist at the time of the request. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that Ms. Schultz's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Schultz'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 31st Day of January, 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: February 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

Jean Mikle
(on behalf of Asbury Park Press)¹
Complainant

GRC Complaint No. 2010-232

v.

Burlington County Board of Taxation²
Custodian of Records

Records Relevant to Complaint: Copy of a list of certified tax rates for all towns in Burlington County that are available for 2010.³

Request Made: August 20, 2010

Response Made: August 25, 2010

Custodian: Margaret Nuzzo

GRC Complaint Filed: September 1, 2010⁴

Background

August 20, 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.

August 25, 2010

Custodian's response to the OPRA request. On behalf of the Custodian, Ms. Mary Schultz ("Ms. Schultz"), Principal Data Control Clerk, responds in writing via e-mail to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. Ms. Schultz states that the Burlington County Board of Taxation ("Tax Board") will forward a copy of the Abstract of Ratables ("Abstract")⁵ upon completion. Ms. Schultz estimates that it will take two (2) to three (3) weeks to finalize the Abstract. Ms. Schultz requests that the Complainant contact the Tax Board in that time if she still wants a copy of the requested records.

August 26, 2010

E-mail from the Custodian to Mr. Paul D'Ambrosio ("Mr. D'Ambrosio"), Investigations Editor for the Asbury Park Press ("APP"). The Custodian states that not

¹ No legal representation listed on record.

² Represented by DAG Heather Anderson, on behalf of the NJ Attorney General.

³ The Complainant requests additional records that are not at issue in the instant complaint.

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

⁵ The Abstract is a table of all certified tax rates for the County of Burlington for a calendar year.

all of the tax rates are certified. The Custodian states that she will provide the rates as soon as all are certified.

August 26, 2010

E-mail from Mr. D'Ambrosio to the Custodian. Mr. D'Ambrosio asks if any of the rates have been certified. Mr. D'Ambrosio further states that the APP will take whatever rates have been certified to date.

August 26, 2010

E-mail from Mr. D'Ambrosio to the Custodian. Mr. D'Ambrosio states that he assumes the Custodian's lack of response equates to a denial of access to certified tax rates for 2010 currently maintained by the Tax Board.

September 1, 2010

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

- Complainant's OPRA request dated August 20, 2010.
- E-mail from Ms. Schultz to the Complainant dated August 25, 2010.
- E-mail from the Custodian to Mr. D'Ambrosio dated August 26, 2010.
- E-mail from Mr. D'Ambrosio to the Custodian dated August 26, 2010.
- E-mail from Mr. D'Ambrosio to the Custodian dated August 26, 2010.

The Complainant states that she submitted an OPRA request to the Tax Board on August 20, 2010. The Complainant states that Ms. Shultz responded to such request on August 25, 2010 advising that the Tax Board would not disclose the Abstract until all towns in Burlington County ("County") were certified, which could take two (2) to three (3) more weeks. The Complainant states that she contacted Ms. Schultz via telephone and explained that the County was the only board to withhold this information.

The Complainant states that Mr. D'Ambrosio exchanged e-mails with the Custodian on August 26, 2010 in which the Custodian again denied access to the requested tax rates.

The Complainant does not agree to mediate this complaint.

September 24, 2010

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

September 24, 2010

E-mail from the Custodian to the Complainant. The Custodian states that attached are the requested certified tax rates. The Custodian reiterates that she was not comfortable disclosing the tax rates until all were certified. The Custodian states that she certified the last municipality on September 20, 2010. The Custodian further states that a copy of the Abstract has been posted to the Tax Board's website.

September 24, 2010

E-mail from the Custodian to the Complainant. The Custodian states that attached is a copy of the Abstract.

September 29, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel states that she has been assigned to represent the Tax Board in this matter. Counsel states that it is her understanding that the Custodian must submit an SOI by October 1, 2010. Counsel requests an extension of time to submit the requested SOI.

September 29, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC states that it will ordinarily grant one (1) extension of five (5) business days to submit the requested SOI. The GRC grants Counsel an extension of time until October 8, 2010 to submit the requested SOI.

October 7, 2010

Custodian's incomplete SOI with the following attachments:

- E-mail from the Custodian to Mr. D'Ambrosio dated August 26, 2010.
- E-mail from Mr. D'Ambrosio to the Custodian dated August 26, 2010.
- Complainant's Denial of Access Complaint (first page).
- Tax Board Meeting minutes dated September 28, 2010.

October 7, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel states that her office is forwarding an amended SOI no later than October 7, 2010.

October 8, 2010⁶

Custodian's amended SOI with the following attachments:

- Complainant's OPRA request dated August 20, 2010.
- E-mail from Ms. Schultz to the Complainant dated August 25, 2010.
- E-mail from the Custodian to Mr. D'Ambrosio dated August 26, 2010.
- E-mail from Mr. D'Ambrosio to the Custodian dated August 26, 2010.
- E-mail from Mr. D'Ambrosio to the Custodian dated August 26, 2010.
- Complainant's Denial of Access Complaint.
- Letter from the GRC to the Custodian dated September 24, 2010.
- Tax Board Meeting minutes dated September 28, 2010.

The Custodian certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

⁶ The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
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The Custodian certifies that the Tax Board received the Complainant's OPRA request on August 20, 2010. The Custodian certifies that on August 25, 2010, Ms. Schultz e-mailed the Complainant explaining that the Abstract would not be completed for another two (2) or three (3) weeks.

The Custodian certifies that on August 26, 2010, she confirmed with Mr. D'Ambrosio that the tax rates were not yet certified. The Custodian certifies that she further advised that the rates would be provided once all certifications were completed. The Custodian certifies that Mr. D'Ambrosio then asked for any tax rates that were available at that time. The Custodian certifies that before she could respond, Mr. D'Ambrosio sent another e-mail stating that he presumed that the Tax Board would not be providing any records.

The Custodian certifies that on September 18, 2010, the final municipality sent its tax rates to the Tax Board. The Custodian certifies that the rates were scheduled to be certified at the Tax Board's next meeting on September 28, 2010. The Custodian certifies the Tax Board received this Denial of Access Complaint on September 24, 2010. The Custodian certifies that on the same day, the Custodian provided the Complainant with all tax rates. The Custodian certifies that the Tax Board subsequently certified all tax rates at the September 28, 2010 meeting.

The Custodian asserts that Mr. D'Ambrosio erroneously presumed that the Tax Board would not provide access to the tax rates. The Custodian asserts that, as she advised in her August 26, 2010 e-mail to Mr. D'Ambrosio, the rates would be provided as soon as they were all certified. The Custodian certifies that until tax rates are certified by the Tax Board, any municipality may recall its budget, open it up for discussion and change its budget amount. The Custodian notes that if this happens, the tax rate will change. The Custodian certifies that once the Tax Board certifies the tax rates, municipalities may not alter their tax rates. The Custodian asserts that based on the foregoing, the tax rates are preliminary until the Tax Board certifies same.

Counsel submits a legal brief in support of the Tax Board's position. Counsel recapitulates the facts of this complaint. Counsel states that OPRA provides that "all government records shall be subject to public access unless exempt from such access by [OPRA] ..." N.J.S.A. 47:1A-1. Counsel further states OPRA mandates that custodians respond in writing to an OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel states that here, the Tax Board responded within the statutorily mandated time frame and in fact provided access to records not at issue in this complaint. Counsel states that the Tax Board also advised the Complainant that the tax rates as listed on the Abstract were not available, but would be within two (2) to three (3) weeks. Counsel states that the Custodian confirmed this extension of time to Mr. D'Ambrosio via e-mail on August 26, 2010.

Counsel disputes the Complainant's argument that the records showing individual district certified tax rates were not provided. Counsel argues that the facts indicate that the Tax Board timely responded to the OPRA request seeking an extension of time, promptly fulfilled the OPRA request as soon as the records were available and therefore

complied with N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel argues that at no time did the Custodian unlawfully deny access to the requested tax rates. *See* Castro v. New Jersey Department of Corrections, GRC Complaint No. 2009-290 (August 2010)(holding that OPRA Liaison Cris Rodriguez did not unlawfully deny access to the requested records because he certified that he provided same to Complainant).

Counsel further asserts that the Complainant filed this complaint seeking a determination that the Tax Board unreasonably denied access to the tax rates sought and that in doing so, the Custodian knowingly and willfully violated OPRA. Counsel argues that this complaint is moot because the Complainant received the responsive rates. Counsel further argues that the Custodian's actions do not constitute a knowing and willful violation of OPRA under the totality of the circumstances.

Counsel asserts that the instant complaint is moot because the tax rates were provided to the Complainant. Counsel states that controversies that have become moot or academic prior to judicial resolution ordinarily will be dismissed. Cinque v. New Jersey Department of Corrections, 261 N.J. Super. 242 (App. Div. 1993). Counsel states that in Cinque, the Court stated that "for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest." *Id.* at 243. Counsel states that in order for an appeal to be moot, the appellant must have a sufficient stake in the outcome of the appeal through some adversarial relationship with the other party. Application of Boardwalk Regency Corp. for Casino License, 90 N.J. 361, appeal dismissed by Perlman v. Attorney General of New Jersey, 459 U.S. 1081, 103 S. Ct. 562, 74 L. Ed.2d 927 (1982). Counsel states that some mooted matters have been entertained in cases where the issue is of public importance and there is a strong likelihood of recurrence. State v. Gartland, 149 N.J. 456, 464 (1997).

Counsel argues that this matter was mooted when the Custodian provided the tax rates at issue. Counsel argues that the Tax Board's actions were consistent with its August 25, 2010 and August 26 2010 e-mail responses to the Complainant.

Moreover, Counsel states that prior case law "[makes] it clear that there can be no presumption of 'willful' misconduct arising simply from the failure of a public official to respond in a timely fashion to a request for production of a public record." Haelig v. Seaside Heights Business Improvement District, GRC Complaint No. 2005-50 (December 2006)(citing Alston v. City of Camden, 168 N.J. 170 (2001); Fielder v. Stonack, 141 N.J. 101 (1995); State v. DiPaolo, 34 N.J. 279, cert. denied, 368 U.S. 880, 82 S. Ct. 130, 7 L. Ed.2d 80 (1961); ECES v. Salmon, 295 N.J. Super. 86 (App. Div. 1996)). Counsel states that:

"mere negligence or heedlessness of the need to comply with the statute in a timely manner is not enough to label the failure as 'willful.' There must be some other element of proof to demonstrate that the official acted ~ in reckless disregard of the statutory command, that the lack of response was 'intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional,'..." (Internal citations omitted.) Haelig, *supra*.

Counsel states that the GRC has consistently held that in order for a custodian's conduct to rise to the level of a knowing and willful violation of OPRA, the following must be true:

“... the Custodian's actions must have been much more than negligent conduct ([Alston]); the Custodian must have had some knowledge that his actions were wrongful ([Fielder]) 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]).” Castro, supra, at pg. 6-7. See also Haelig, supra; Paff v. Cumberland County Sheriff's Office, GRC Complaint No. 2005-159 (January 2006); Osterman v. City of Trenton and Trenton Police Department, GRC Complaint No. 2004-96 & 2004-107 (January 2006); Renna v. County of Union, GRC Complaint No. 2005-172 (December 2005); and Beaver v. Township of Middletown, GRC Complaint No. 2003-111 (February 2004).

Counsel argues that in this complaint, the Tax Board responded in a timely manner on August 25, 2010 providing access to records not at issue in this complaint and advising that the tax rates would be provided in two (2) weeks. Counsel argues that on August 26, 2010 the Custodian confirmed the extension in an e-mail to Mr. D'Ambrosio. Counsel further argues that the Custodian provided access to the requested tax rates as soon as all rates were properly certified. Counsel argues that the Custodian did not knowingly and willfully violate OPRA.

Counsel asserts that the GRC should hold that the Custodian properly responded to the Complainant's OPRA request and did not unlawfully deny access to the requested tax rates. Counsel further asserts that the GRC should hold that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA.

October 24, 2011

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the evidence of record in the instant complaint and is in need of additional information. The GRC states that the Custodian certified in the SOI that prior to a tax rate being certified by the Tax Board, a municipality has the ability to amend its budget and change its tax rate. The GRC states that the Custodian further certified that the tax rates are preliminary until the Tax Board certifies them.

The GRC states that although the Tax Board did not officially vote to approve the municipal tax rates until September 28, 2010, the Custodian provided the tax rates to the Complainant on September 24, 2010 after “certifying” the final municipality's rate on September 20, 2010. The GRC requests that the Custodian certify whether a tax rate is officially certified by the Custodian (as Tax Board Administrator) or by official vote of all rates at once in a Tax Board meeting.

The GRC states that if the Custodian officially certified to tax rates prior to the September 28, 2010 Tax Board meeting, the Custodian must identify those tax rates that were officially certified at the time of the Complainant's OPRA request. The GRC requests that the Custodian provide the requested certification by October 26, 2011.

October 26, 2010⁷

Custodian's legal certification with the following attachments:

- Burlington County Municipal Checklist.
- Tax Board Meeting minutes dated September 28, 2010.

The Custodian certifies that as Tax Administrator, she has the authority to strike the tax rates of those municipalities whose budgets have been certified and release them to tax assessors for the purpose of sending tax bills (even if the Abstract has not yet been adopted) pursuant to Resolution No. 2010-3. The Custodian certifies that this is done so that any delays by a few municipalities will not delay timely preparation of tax bills.

The Custodian certifies that as of August 20, 2010, the tax rates of thirty-five (35) of forty (40) municipalities in Burlington County were certified. The Custodian certifies that the Tax Board approved the Abstract on September 28, 2010. The Custodian certifies that September 28, 2010 represents the official release date of all municipal tax rates.

November 3, 2011

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the evidence of record and is in need of additional information. The GRC states that it is not clear whether a list of tax rates existed at the time of the Complainant's OPRA. The GRC further states that it is unclear whether the Abstract is the record ultimately responsive to the Complainant's OPRA request. The GRC thus requests that the Custodian legally certify to the following:

1. Whether a list of tax rates existed at the time of the Complainant's OPRA request?
2. Is so, whether said list was an incomplete list of certified tax rates?
3. Whether the Abstract is the record responsive to the Complainant's OPRA request?

The GRC requests that the Custodian provide the requested certification by close of business on November 7, 2011.

⁷ The Custodian initially responded on this day submitting an invalid certification excluding the following language pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005): "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment." *Id.* The GRC immediately contacted the Custodian via e-mail advising that the Custodian had failed to include the required certification language. The Custodian amended her submission to include the required language and resubmitted same.

November 7, 2011

Custodian's legal certification. The Custodian certifies that she received the Complainant's OPRA request on August 20, 2010. The Custodian certifies that the record sought by the Complainant is commonly known as the Abstract. The Custodian certifies that the Abstract is a table of all certified tax rates for the County for a particular year.

The Custodian certifies that at the time of the Complainant's OPRA request, no list of certified tax rates for 2010 existed. The Custodian further certifies that at the time of the OPRA request there was not even an incomplete list. The Custodian certifies that the Tax Board certified the Abstract on September 28, 2010. The Custodian certifies that accordingly, the record requested by the Complainant did not exist until September 28, 2010.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (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.

Ms. Schultz’s response to the Complainant’s OPRA request:

OPRA provides that a custodian may request an extension of time to respond to a complainant’s OPRA request, but a specific date when the custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the custodian requested an extension of time to fulfill said request but failed to notify the complainant of when the requested records would be provided. The Council held that the Custodian response was insufficient:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA ...” *Id.*

In the instant complaint, the evidence of record indicates that Ms. Schultz responded to the Complainant’s OPRA request in writing in a timely manner on behalf of the Custodian stating that the Abstract would be provided upon completion, an estimated two (2) to three (3) weeks. However, “two (2) to three (3) weeks” is a non-specific time frame and not a date certain upon which the Complainant could expect responsive records to be provided. Thus, Ms. Schultz’s response is insufficient under OPRA

because in her response to the OPRA request she failed to provide a date certain on which the Tax Board would grant or deny access to the requested records. N.J.S.A. 47:1A-5.i.

Therefore, although Ms. Schultz responded to the OPRA request in writing on behalf of the Custodian in a timely manner, said response is insufficient pursuant to Hardwick, supra, and N.J.S.A. 47:1A-5.i. because Ms. Schultz failed to provide a specific anticipated date upon which the Tax Board would provide the responsive record to the Complainant. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).

The GRC notes that Ms. Schultz was under no obligation to provide the requested record to the Complainant following her response that Abstract was not completed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007). *See Driscoll v. School District of the Chathams (Morris)*, GRC Complaint No. 2007-303 (June 2008). However, Ms. Schultz chose to keep the request open by requesting an extension of time; thus, the request extension is still improper because it does not identify an anticipated date upon which the Abstract would be provided.

Tax Board's denial of "a list of certified tax rates" for all County municipalities:

The evidence of record indicates that on August 26, 2010, the Custodian e-mailed Mr. D'Ambrosio advising that she would not disclose the certified tax rates until all were certified. The Custodian subsequently certified in the SOI that the tax rates were preliminary until being certified by the Tax Board because they were subject to change in the event that a municipality reworked its budget. On October 26, 2011, the Custodian certified that the last municipality's tax rate was certified on September 20, 2010, the requested tax rates were disclosed to the Complainant on September 24, 2010 and the Tax Board approved the Abstract on September 28, 2010.

On November 3, 2011, the GRC requested a certification identifying whether a list existed at the time of the Complainant's OPRA request and whether said record was the Abstract. The Custodian certified on November 7, 2011 that the responsive list, commonly known as the Abstract, did not exist until the Tax Board voted to approve same on September 28, 2011 and that no responsive list existed at the time of the Complainant's OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

In this complaint, the Custodian certified to the GRC on November 7, 2011 that no responsive list existed at the time of the Complainant's OPRA request. Additionally,

there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested Abstract of Ratables pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Mr. D'Ambrosio's e-mail dated August 26, 2010 clarifying the OPRA request

In the instant complaint, the initial OPRA request sought a list of all certified tax rates, which did not exist at the time of submission of the OPRA request. However, Mr. D'Ambrosio e-mailed the Custodian on August 26, 2010 advising that the APP would accept all tax rates that were already certified. This e-mail effectively changed the nature of the OPRA request by clarifying that the APP would take all tax rates that were certified in place of a list of rates. Mr. D'Ambrosio followed this clarifying e-mail with another e-mail on the same day stating that the Custodian's lack of response was considered to be a denial of access. This complaint was subsequently filed with the GRC on September 1, 2010, or four (4) business days after Mr. D'Ambrosio's clarification e-mail.

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.⁸ Should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Moreover, as one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed a complaint with the GRC prior to being denied access to any responsive tax rates and before the statutorily mandated seven (7) business day time frame for the Custodian to respond to Mr. D'Ambrosio's clarification e-mail expired.

Therefore, because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to Mr. D'Ambrosio's August 26, 2010 clarification e-mail. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; this portion of the complaint is materially defective and therefore should be dismissed. *See* Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009).

⁸ 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.

Additionally, the GRC notes that Mr. D'Ambrosio's clarification e-mail failed to specify identifiable government records, but merely stated that he would accept those tax rates that had been certified as of the date of the request. Mr. D'Ambrosio's clarification e-mail is therefore invalid under OPRA because it failed to specify identifiable government records. A valid OPRA request must identify specific government records and not "useful information." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (March 2005). See also LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009) and LaRosa v. Plainfield Municipal Utilities Authority (Union), GRC Complaint No. 2009-220 (June 2010).

Whether Ms. Schultz's insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

Although Ms. Schultz's response to the OPRA request was insufficient pursuant to Hardwick, *supra* and N.J.S.A. 47:1A-5.i., because she failed to provide a date certain upon which the Complainant could expect the Tax Board to grant or deny access to the requested record, the Custodian did not unlawfully deny access to the Abstract because same did not exist at the time of the request. *See Pusterhofer*, *supra*. Additionally, the evidence of record does not indicate that Ms. Schultz's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Schultz'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. Although Ms. Schultz responded to the OPRA request in writing on behalf of the Custodian in a timely manner, said response is insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5.i. because Ms. Schultz failed to provide a specific anticipated date upon which the Burlington County Tax Board would provide the requested records to the Complainant. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).
2. The Custodian certified to the GRC on November 7, 2011 that no responsive list existed at the time of the Complainant's OPRA request. Additionally, there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested Abstract of Ratables pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to Mr. D'Ambrosio's August 26, 2010 clarification e-mail. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; this portion of the complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).
4. Although Ms. Schultz's response to the OPRA request was insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and N.J.S.A. 47:1A-5.i., because she failed to provide a date certain upon which the Complainant could expect the Tax Board to grant or deny access to the requested record, the Custodian did not unlawfully deny access to the Abstract because same did not exist at the time of the request. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does

not indicate that Ms. Schultz's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Schultz'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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Executive Director

January 24, 2012