



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

November 19, 2013 Government Records Council Meeting

William Borkowski  
Complainant

Complaint No. 2012-166

v.

Borough of Allentown (Monmouth)  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council ("Council") considered the November 12, 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:

1. The Custodian's failure to respond in writing to the Council's Interim Order within the mandated five (5) 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: that 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Complainant has established that the Council did not consider the April 19 Requests. Based upon the pre-mediation representations of the GRC that the April 19 Request would be considered, the GRC will now address the denial of access to the requested documents. The Council, however, notes that had Complainant properly completed the denial of access complaint, all of his requests would have been adjudicated without the need for the instant motion and the surrounding confusion.
3. The Custodian provided the Complainant with records responsive to item nos. 3 and 5 within the requisite timeframe permitted by OPRA. The Complainant did not specifically allege a denial of access to item nos. 3 and 5 in his Complaint, nor did he object to the assertions made by the Custodian in her SOI. The Custodian certified



that she timely provided the requested records; therefore she has borne her burden of proving that no unlawful denial of access occurred. *See* N.J.S.A. 47:1A-6.

4. Regarding item nos. 2 and 4, the Complainant requested documents regarding a certain parking lot (item no. 2) and an application for a project (item no. 4). The Custodian responded to the Complainant, respectively, that no records were on file with the planning or zoning board, and that no records existed. The Complainant does not challenge the Custodian's response in the SOI or otherwise refute the Custodian's assertion. Regarding, item no. 7 of his April 19 Request, the Complainant alleges that the documents provided in response to his March 28, 2012 request regarding the cost estimate to the sewer plant were not the most current information, and thus he sought the "correct report". In her SOI the Custodian certified that the most current report was the one on file at Borough Hall and it had been provided to the Complainant in response to his March 28, 2012 request. Therefore, the Custodian's denial of access to the records is lawful pursuant to Pusterhofer. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint 2005-49 (July 2005).
5. Although not required pursuant to OPRA, the Custodian responded to requests for information in connection with item nos. 1 and 6. OPRA requires custodians to produce identifiable documents not otherwise exempt; it does not require the production of general information. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537, 549 (N.J. App. Div. 2005) (emphasis added). There were no documents responsive to requests for item nos. 1 and 6, as they were requests for information. Therefore, the Custodian did not deny access to the Complainant of any documents in conjunction with requests item nos. 1 and 6.
6. The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council's June 25, 2013 Interim Order. However, the Custodian provided records to the Complainant on July 8, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did 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 19<sup>th</sup> Day of November, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 21, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**November 19, 2013 Council Meeting**

**William Borkowski<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2012-166**

**v.**

**Borough of Allentown (Monmouth)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:**

- February 14, 2012 OPRA Request: Name of party at April 6, 2011 Executive Session that discussed or recommended that the Borough Attorney investigate a raft on the lake and cement in the Imlay House basement.
- March 28, 2012 OPRA Request:<sup>3</sup>
  1. Any correspondence received from the New Jersey Department of Environmental Protection regarding the New Jersey Pollutant Discharge Elimination System permit or relating to the Sewer Plant, beginning in 2007.
  2. All expenditures paid by the Borough against Lot 28 up to December 2011.
  3. Final approved site plan used by the Borough to construct the Church Street parking lot.
  4. Borough Engineer's report that details the sewer plant improvement costs over \$2M.
  5. OPRA approved training for each current Council member and Mayor, completed to date.
  6. Lot 28 survey schematic used in any open or closed session or discussion prior to November 2011 that was submitted to the Borough Engineer.
- OPRA Request (date unknown): Executive Session minutes for entire 2011 calendar year.

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

<sup>2</sup> Represented by Donald S. Driggers, Esq., of Turp, Coates, Essl & Driggers (Hightstown, NJ).

<sup>3</sup> The six (6) items set forth in the June 18, 2013 Findings and Recommendations as the March 28, 2012 requests are only those requests which were contained in the Complainant's Denial of Access Complaint. The original March 28, 2012 request contained a total of twenty-four (24) separate items. When the Complainant's April 19, 2012 request ("April 19 Request") refers back to his March 28, 2012 request, he denotes the number he assigned to the item in his twenty-four (24) item list to the Custodian, not as in his Complaint.

- April 19, 2012 OPRA Request:<sup>4</sup>
  1. Please provide the names of persons(s) who discussed the letter sent from Upper Freehold regarding Reed Park Improvements either in open or closed session or that initiated council to go into closed session. If a council person brought in a letter into closed session, please provide their name(s). And, provide the source of the Upper Freehold letter that you copied to me to answer item 4 on my Mar [sic] OPRA request.<sup>5</sup>
  2. Item 5 [from the March 28, 2012 request]<sup>6</sup> was not referring to the newly acquired land. Item 5 referred to the existing parking Church St. paved parking lot, and is currently being used for parking cars. Please provide approved site plan by Borough planning/zoning board.
  3. Item 12 [from the March 28, 2012 request]<sup>7</sup> please provide amount bonded to date.
  4. Item 16 [from the March 28, 2012 request]<sup>8</sup> was for 20 not 24 S. Main St. application.
  5. My understanding is that the Borough has agreed to provide maintenance for each phase of Breza purchase. The mayor has stated it publicly. Please provide the contracts signed to purchase, and deed to each property.
  6. Please confirm that no current seated elected Borough official has been trained in OPRA.
  7. Response to Item 11 [from the March 28, 2012 request]<sup>9</sup> is not the most recent \$2M plus cost estimate to upgrade the sewer plant. You provide a portion of the work by HMM, not the total estimate to complete upgrade. Please provide correct report.

**Custodian of Record:** Julie Martin

**Request Received by Custodian:** February 14, 2012; March 28, 2012;  
unknown date and April 19, 2012

**Response Made by Custodian:** February 21, 2012; April 16, 2012  
and April 25, 2012

**GRC Complaint Received:** June 6, 2012

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<sup>4</sup> The April 19 Request is the subject of the Complainant's Motion for Reconsideration. Complainant alleges that his denial of access to the April 19 Request was not adjudicated by the Council in its June 25, 2013 ruling.

<sup>5</sup> Item No. 4 from the Complainant's March 28, 2013 request sought: All letters from Upper Freehold sent to Borough residents that were used to discuss in Closed Session regarding Reed Park Development.

<sup>6</sup> Item No. 5 from the Complainant's March 28, 2013 request sought: The Church St. parking lot final approved site Plan used by Borough to Construct parking lot[.]

<sup>7</sup> Item No. 12 from the Complainant's March 28, 2013 request sought: Borough's Current: bonding capacity, total bonding capacity, current total property tax assessment[.]

<sup>8</sup> Item No. 16 from the Complainant's March 28, 2012 request sought: Copy of planning/zoning for 24 S. Main change of use application including legal correspondence, committee minutes, and final resolution and Eng. Report.

<sup>9</sup> Item No. 11 from the Complainant's March 28, 2012 request sought: The Borough Engineer's report that details the sewer plant improvement costs over \$2 AM [sic][.]

## Background

### June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the Council considered the June 18, 2013 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 did not bear her burden of proof that she timely responded to request item no. 6 of the Complainant's March 28, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that she needed an extension until April 19, 2012, to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007- 124 (March 2008).
2. The Custodian did not unlawfully deny access to the Complainant's February 14, 2012 OPRA request because said request seeks information rather than specifically identifiable government records. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. The Custodian did not unlawfully deny access to request item nos. 1-4 of the Complainant's March 28, 2012 OPRA request because the Custodian has borne her burden of proving that she provided the Complainant with all records responsive, or that the responsive record does not exist. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). *See also* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian has failed to bear her burden of proving a lawful denial of access to request item no. 6 and must disclose the record responsive to the Complainant. N.J.S.A. 47:1A-6.
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

6. The Council declines to determine whether the Custodian unlawfully denied access to the Complainant's request for Executive Session minutes for the 2011 calendar year. When filing a Denial of Access Complaint with the GRC, a complainant is required to provide the GRC with sufficient information to make a determination in the matter. Here, the Complaint is devoid of any evidence that any such OPRA request was submitted. The Complainant fails to include a date the OPRA request was submitted, fails to include a date on which he received a response to the request, and fails to include a copy of the OPRA request.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

OPRA Requests In the Original Complaint: The Complainant filed numerous OPRA requests, including those made on: February 14, 2012; March 28, 2012; a request on an unknown date in 2012 for minutes and April 19, 2012.

#### April 19, 2012 Requests and Responses Thereto:<sup>10</sup>

On April 19, 2012, the Complainant forwarded a list of seven (7) requests to the Custodian. Some of the items contained in the April 19 Request sought clarification or follow-up of the Complainant's March 28, 2012 request. On April 25, 2012, the fourth (4) business day following receipt of said request, the Custodian responded in writing to all of the individual items in Complainant's April 19 Request. The Custodian provided the Complainant with records responsive to item nos. 3 and 5. She denied access to items nos. 2 and 4, stating, respectively, that no records were on file with the planning or zoning board, and that none existed. In response to item nos. 1 and 6, which sought information as opposed to identifiable documents, the Custodian provided answers to the Complainant's inquiries. Finally, in item no. 7, the Complainant alleges that the documents provided in response to his March 28, 2012 request regarding the cost estimate to the sewer plant were not the most current information, and thus he sought the "correct report." The Custodian replied that the most current report was the one on file at Borough Hall and that it had been provided to the Complainant in response to his March 28, 2012 request.

#### Denial of Access Complaint:

On May 31, 2012, the Complainant filed a denial of access complaint (the "Complaint"). The Complainant indicates that his request was made to the Custodian on March 28, 2012. He

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<sup>10</sup> The Requests and Responses will address only the April 19 Request as the balance of the requests were adjudicated by the Council and memorialized in its June 25, 2013 Interim Order.  
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does not, as required by the denial of access complaint form,<sup>11</sup> provide the dates of his other requests. The Complainant neglected to list the February 14, 2012, the April 19 Request, or request of unknown date.

The Complainant completed the “Records Denied List” chart provided in the denial of access complaint form. The Complainant’s chart lists individual requests and denials concerning his February 14, 2012 and March 28, 2012 requests, as well as his request of the unknown date. The Complainant, however, failed to include in his chart the individual documents demanded by, and the Custodian’s responses to, his April 19 Request. Rather, the Complainant included a two (2) page document with the notation “W. BORKOWSKI OPRA REQUEST OF 4/19/2012” with his May 31, 2013 Complaint. This document lists the April 19 Request and the Custodian’s responses thereto. The Complainant provided no additional explanation as to the meaning of the included document, nor does he set forth in his Complaint which of the individual items of the April 19 Request were denied and, if so, the reason the Custodian provided for the denial. Complainant’s improper completion of the denial of access form led to confusion as to what requests were at issue.

#### Statement of Information:

On January 18, 2013, the Custodian supplied a Statement of Information (“SOI”). The Custodian acknowledges receipt of the Complainant’s April 19 Request. The Custodian certifies that the response to the Complainant’s April 19 Request was provided on April 25, 2012, four (4) business days after its receipt. The Custodian certifies that there were no documents responsive to the Complainant’s April 19 Request item no. 2. Item no. 2, which clarified a previous request, sought documents relating to the “existing Church Street . . . lot.” Similarly, the Custodian provided, in response to item no. 7, that documents were provided in connection with the Complainant’s March 28, 2012 request item no. 11. The Custodian explains that the Complainant is mistaken that the documents previously provided contained only the engineer’s labor cost estimate, not the plan estimate. The Custodian further certifies that the previously provided documents included both the engineer’s estimate and the construction estimate. Thus, there were no additional documents responsive to the Complainant’s April 19 Request, item no. 7.

#### Council’s June 5, 2013 Interim Order and Complainant’s Motion for Reconsideration:

At its June 25, 2013 public meeting, the Council considered the June 18, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council issued an Interim Order with the findings and rulings as set forth above. On June 27, 2013, the Council distributed its Interim Order to all parties.

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<sup>11</sup> In order to facilitate the filing of a complaint, the GRC on its website provides a denial of access complaint form. Requestors challenging a denial of access can, as the Complainant did, complete the form and file it with the GRC. The form affords space for the complainant to denote the date the request was made. Specifically the form requires completion of the following: About the Record Request: Date your records request was provided to the custodian. William Borkowski v. Borough of Allentown (Monmouth), 2012-166 – Supplemental Findings and Recommendations of the Executive Director 5



The record indicates that the April 19 Request was not identified by the Complainant as being included in his May 31, 2012 Complaint, causing confusion to the GRC. This confusion prompted the Complainant to request the case manager to accept an “amendment” to his Complaint to include the April 19 Requests. As the April 19 Requests were included as submissions with the filing of his Complaint, although not properly documented, the GRC granted said request in an attempt to fully adjudicate the matter. This resulted in references to an “amendment” appearing in the file; however, the record demonstrates that the Complainant did not actually file an amended complaint properly memorializing his request for adjudication of the denial of access to the April 19 Requests.

Following mediation, the file was transferred back to the GRC for adjudication and assigned to a new case manager. The improper completion/preparation of the denial of access complaint and the resulting “amendment” added to the utter confusion in the adjudication of the case. The case manager not having an amended complaint in the file, prepared findings and recommendations based upon the Complainant’s deficient original filing. Consequently, the Council did not consider the denial of the April 19 Request.

On July 10, 2013, the Complainant filed a request for reconsideration of the Council’s June 25, 2013 Final Decision based on a mistake. The Complainant argues in his motion for reconsideration that the Council failed to consider the April 19 Request which he states were included in his “amended” complaint.

The Custodian did not object or otherwise reply to the Complainant’s request for reconsideration.

### Analysis

#### Compliance

On June 25, 2013, the Counsel ordered the Custodian to disclose a copy of item no. 6 of the March 28, 2012 request: “[l]ot survey schematic used in any closed or opened meeting or discussion prior to Nov 11 that was submitted by the Borough Engineer” to the Complainant and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 27, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order.

On July 8, 2013, the eighth (8) business day after receipt of the Interim Order, the Custodian filed a certification with the GRC and simultaneously with the Complainant, advising that she ordered the record and it was available for collection. Although, the Custodian provided the Complainant with the responsive document and submitted certified confirmation of compliance to the Executive Director, she failed to do so within the time frame required by the Interim Order.

As such, the Custodian’s failure to respond in writing to the Council’s Interim Order within the mandated five (5) 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

### **Reconsideration**

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 Order dated June 25, 2013 on July 10, 2013, nine (9) business days from the issuance of the Council's Order.

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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. System In The City Of Atl. City, County Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: that 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 401. The Complainant has established that the Council did not consider the April 19 Request. Based upon the pre-mediation representations of the GRC that the April 19 Request would be considered, the GRC will now address the denial of access to the requested documents. The Council, however, notes that had Complainant properly completed the denial of access complaint, all of his requests would have been adjudicated without the need for the instant motion and the surrounding confusion.

## Unlawful Denial of Access

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

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537, 549 (N.J. App. Div. 2005) (emphasis added).

The Court reasoned that:

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.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>12</sup> N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). OPRA does not obligate a records custodian to create a document in response to a document request. *See* Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006) (finding request for list of all employees paid by

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<sup>12</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

county invalid because fulfilling request required creation of new document based on existing data).

April 19 Requests:

On April 25, 2012, the fourth (4) business day following receipt of said request, the Custodian responded, in writing, to all of the individual items in the Complainant's April 19 Request.

Item Nos. 3 and 5:

The Custodian provided the Complainant with records responsive to item nos. 3 and 5 within the requisite timeframe permitted by OPRA. The Complainant did not specifically allege a denial of access to item nos. 3 and 5 in his Complaint, nor did he object to the assertions made by the Custodian in her SOI. The Custodian certified that she timely provided the requested records and therefore has borne her burden of proving that no unlawful denial of access occurred. *See N.J.S.A. 47:1A-6.*

Item Nos. 2, 4 and 7:

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Pusterhofer custodian certified in the SOI that no responsive records existed. The GRC determined that where the custodian certified that there were no responsive records, there was no unlawful denial of access.

Here, regarding item nos. 2 and 4, the Complainant requested documents regarding a certain parking lot (item no. 2) and an application for a project (item no. 4). The Custodian responded to the Complainant, respectively, that no records were on file with the planning or zoning board, and that no records existed. The Complainant does not challenge the Custodian's response in his denial of access complaint or otherwise refute the Custodian's assertion. Therefore, the Custodian's denial of access to the records is lawful pursuant to Pusterhofer. Id.

Finally in regards to item no. 7 of his April 19 Request, the Complainant alleges that the documents provided in response to his March 28, 2012 request regarding the cost estimate to the sewer plant were not the most current information, and thus he sought the "correct report". In her SOI the Custodian certified that the most current report was the one on file at Borough Hall and that it had been provided to the Complainant in response to his March 28, 2012 request. Therefore, the Custodian's denial of access to the records is lawful pursuant to Pusterhofer. Id.

Item Nos. 1 and 6

In addition, although not required pursuant to OPRA, the Custodian responded to requests for information in connection with item nos. 1 and 6. OPRA requires custodians to produce identifiable documents not otherwise exempt; it does not require the production of

general information. MAG, 375 N.J. Super. at 546. There were no documents responsive to requests for item nos. 1 and 6, as they were requests for information. Therefore, the Custodian did not deny access to the Complainant of any documents in conjunction with requests for item nos. 1 and 6.

### **Knowing & Willful**

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 “... [i]f 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)).

### **March 28, 2012 Request, Item No. 6**

The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council’s June 25, 2013 Interim Order. However, the Custodian provided records to the Complainant on July 8, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Council's Interim Order within the mandated five (5) 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: that 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Complainant has established that the Council did not consider the April 19 Requests. Based upon the pre-mediation representations of the GRC that the April 19 Request would be considered, the GRC will now address the denial of access to the requested documents. The Council, however, notes that had Complainant properly completed the denial of access complaint, all of his requests would have been adjudicated without the need for the instant motion and the surrounding confusion.
3. The Custodian provided the Complainant with records responsive to item nos. 3 and 5 within the requisite timeframe permitted by OPRA. The Complainant did not specifically allege a denial of access to item nos. 3 and 5 in his Complaint, nor did he object to the assertions made by the Custodian in her SOI. The Custodian certified that she timely provided the requested records; therefore she has borne her burden of proving that no unlawful denial of access occurred. *See N.J.S.A. 47:1A-6*.
4. Regarding item nos. 2 and 4, the Complainant requested documents regarding a certain parking lot (item no. 2) and an application for a project (item no. 4). The Custodian responded to the Complainant, respectively, that no records were on file with the planning or zoning board, and that no records existed. The Complainant does not challenge the Custodian's response in the SOI or otherwise refute the Custodian's assertion. Regarding, item no. 7 of his April 19 Request, the Complainant alleges that the documents provided in response to his March 28, 2012 request regarding the cost estimate to the sewer plant were not the most current information, and thus he sought the "correct report". In her SOI the Custodian certified that the most current report was the one on file at Borough Hall and it had been provided to the Complainant in response to his March 28, 2012 request. Therefore, the Custodian's denial of access to the records is lawful pursuant to Pusterhofer. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint 2005-49 (July 2005).
5. Although not required pursuant to OPRA, the Custodian responded to requests for information in connection with item nos. 1 and 6. OPRA requires custodians to produce identifiable documents not otherwise exempt; it does not require the

production of general information. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537, 549 (N.J. App. Div. 2005) (emphasis added). There were no documents responsive to requests for item nos. 1 and 6, as they were requests for information. Therefore, the Custodian did not deny access to the Complainant of any documents in conjunction with requests item nos. 1 and 6.

6. The Custodian unlawfully denied access to the responsive records and failed to fully comply with the Council's June 25, 2013 Interim Order. However, the Custodian provided records to the Complainant on July 8, 2013, and further submitted certified confirmation of compliance to the Executive Director thereafter. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Dawn R. SanFilippo, Esq.  
Senior Attorney

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

November 12, 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

June 25, 2013 Government Records Council Meeting

William Borkowski  
Complainant

Complaint No. 2012-166

v.

Borough of Allentown (Monmouth)  
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 did not bear her burden of proof that she timely responded to request item no. 6 of the Complainant’s March 28, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that she needed an extension until April 19, 2012, to respond to same, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007- 124 (March 2008).
2. The Custodian did not unlawfully deny access to the Complainant’s February 14, 2012 OPRA request because said request seeks information rather than specifically identifiable government records. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. The Custodian did not unlawfully deny access to request item nos. 1-4 of the Complainant’s March 28, 2012 OPRA request because the Custodian has borne her burden of proving that she provided the Complainant with all records responsive, or that the responsive record does not exist. See Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). See also Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian has failed to bear her burden of proving a lawful denial of access to request item no. 6 and must disclose the record responsive to the Complainant. N.J.S.A. 47:1A-6.





5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
6. The Council declines to determine whether the Custodian unlawfully denied access to the Complainant's request for Executive Session minutes for the 2011 calendar year. When filing a Denial of Access Complaint with the GRC, a complainant is required to provide the GRC with sufficient information to make a determination in the matter. Here, the Complaint is devoid of any evidence that any such OPRA request was submitted. The Complainant fails to include a date the OPRA request was submitted, fails to include a date on which he received a response to the request, and fails to include a copy of the OPRA request.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> 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 26, 2013**

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<sup>1</sup> "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."

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**William Borkowski<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-166**

v.

**Borough of Allentown (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup>**

- February 14, 2012 OPRA Request: Name of party at April 6, 2011 Executive Session that discussed or recommended that the Borough Attorney investigate a raft on the lake and cement in the Imlay House basement.
- March 28, 2012 OPRA Request:
  1. Any correspondence received from the New Jersey Department of Environmental Protection regarding the New Jersey Pollutant Discharge Elimination System permit or relating to the Sewer Plant, beginning in 2007.
  2. All expenditures paid by the Borough against Lot 28 up to December 2011.
  3. Final approved site plan used by the Borough to construct the Church Street parking lot.
  4. Borough Engineer's report that details the sewer plant improvement costs over \$2M.
  5. OPRA approved training for each current Council member and Mayor, completed to date.
  6. Lot 28 survey schematic used in any open or closed session or discussion prior to November 2011 that was submitted to the Borough Engineer.
- Unknown OPRA Request: Executive Session minutes for entire 2011 calendar year.

**Requests Made:** February 14, 2012; March 28, 2012; and unknown date.

**Responses Made:** February 21, 2012 and April 16, 2012

**GRC Complaint Filed:** June 6, 2012<sup>4</sup>

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

<sup>2</sup> Julie Martin, Custodian of Records. Represented by Donald S. Driggers, Esq., of Turp, Coates, Essl & Driggers (Hightstown, NJ).

<sup>3</sup> As listed in the Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

## Background<sup>5</sup>

### Request and Response:

On February 14, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On February 21, 2012, the fourth (4<sup>th</sup>) business day following receipt of said request, the Custodian notified the Complainant that the responsive record was available for pickup. On March 28, 2012, the Complainant submitted another OPRA request seeking the above-listed records. On April 9, 2012, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian sought an extension of time until April 19, 2012, to respond to the Complainant’s OPRA request. On April 16, 2012, within the extended time period, the Custodian provided the Complainant with the records responsive to request item nos. 1-5. On April 19, 2012, the Complainant indicated that the record provided in response to request item no. 3 was not the record requested because he is seeking records for the old parking lot, not the new lot. On April 20, 2012, the Custodian denied access to the records responsive to request item no. 6 on the basis that said records are exempt as “closed/contractual” records. On April 25, 2012, the Custodian denied access to request item no. 3 on the basis that she is unable to locate the site plan for the old parking lot.

### Denial of Access Complaint:

On June 6, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian unlawfully denied access to records requested on May 28, 2012. Specifically, the Complainant asserts the following regarding the May 28, 2012 OPRA request:

- Request item no. 1: The Custodian failed to provide all records responsive.
- Request item no. 2: The Custodian failed to provide a specific list, yet the Mayor made public comment acknowledging that he had knowledge of the specific expenditures regarding Lot 28.
- Request item no. 3: The Custodian claimed the record could not be located.
- Request item no. 4: The record provided was not the record requested.
- Request item no. 5: The Custodian claimed no records responsive exist.
- Request item no. 6: The Custodian failed to respond to this request, despite indicating she would respond by April 19, 2012.

The Complainant also asserts a denial of access to a request made on February 14, 2012, stating the Custodian informed him that the requested name was not available. Finally, the Complainant asserts a denial of access to an OPRA request for executive session minutes for the entire 2011 calendar year. However, the Complainant fails to include any additional information in his complaint regarding the date he submitted this alleged request, or the date the Custodian responded to said request.

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<sup>5</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On December 14, 2012, the Complainant amended his complaint to delete request item no. 5 of the May 28, 2012 OPRA request.

#### Statement of Information:

On January 18, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s February 14, 2012 OPRA request on said date and on February 21, 2012, notified the Complainant that the responsive record, closed session minutes, was ready for pickup. The Custodian also certifies that she received the Complainant’s March 28, 2012 OPRA request on April 2, 2012.

- Request item no. 1: The Custodian certifies that she provided the Complainant with 67 pages of responsive records and there are no other records responsive to the request.
- Request item no. 2: The Custodian certifies that she provided the Complainant with 380 pages of invoices and purchase orders, which the Mayor signs and thus “had knowledge of specific expenditures” as the Complainant states in his complaint.
- Request item no. 3: The Custodian certifies that she misunderstood the Complainant’s request since there are two Church Street parking lots, thus she provided the Complainant with the records regarding the new lot. However, the Custodian certifies that after searching the files of archives, engineering, planning and zoning, Mayor and Attorney, she determined that the records for the original lot could not be located.
- Request item no. 4: The Custodian certifies that she provided the Complainant with 14 pages of responsive records, which include the cost figures the Complainant seeks.
- Request item no. 6: The Custodian certifies that she denied access to said request on April 20, 2012, because the records relate to the possible purchase of property and are therefore exempt as contractual records. N.J.S.A. 47:1A-1.1.

#### Analysis<sup>6</sup>

#### Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>7</sup> 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).

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<sup>6</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

<sup>7</sup> 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.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's OPRA request seeking an extension of time until April 20, 2007, to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.”

*Id.*

Here, the Custodian responded to the Complainant's March 28, 2012 OPRA request on the seventh (7<sup>th</sup>) business day following receipt of said request, seeking an extension of time to respond until April 19, 2012. In the Denial of Access Complaint, the Complainant asserts that the Custodian failed to respond to request item no. 6 by April 19, 2012, the extended deadline. The Custodian certified in her SOI that she denied access to request item no. 6 on April 20, 2012, one (1) day after the extended time period expired.

Therefore, the Custodian did not bear her burden of proof that she timely responded to request item no. 6 of the Complainant's March 28, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing advising that she needed an extension until April 19, 2012, to respond to same, the Custodian's failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i) and Kohn, supra.

### **Invalid OPRA Request**

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.* at 549.

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

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.”

*Id.*

Further, in Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005),<sup>8</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.” *Id.*

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

Here, in the Complainant’s February 14, 2012 OPRA request the Complainant sought access to the name of the person who recommended that the Borough Attorney take certain action at the Borough meeting. In response to the request, the Custodian provided the closed session minutes, which indicate the parties present at the meeting. However, the Complainant asserts that the Custodian denied him access to the requested name.

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

Here, the Complainant did not request a specific type of document, but rather requested a piece of information and sought just the name of a person.

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

Therefore, the Custodian did not unlawfully deny access to the Complainant's February 14, 2012 OPRA request because said request seeks information rather than specifically identifiable government records. See MAG, *supra*, Bent, *supra*, and NJ Builders, *supra*.

### **Unlawful Denial of Access**

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.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant's March 2, 2005 OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified on August 1, 2005, that the record provided to the complainant was the only record responsive. The GRC held that:

"[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access."

In the case of nonexistent records, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Complainant asserts that the Custodian failed to provide him with all of the records responsive to request item nos. 1-4 of the Complainant's March 28, 2012 OPRA request. However, the Custodian certified in her SOI that she provided the Complainant with all records responsive to request item nos. 1, 2 and 4, and that she is unable to locate the record responsive to request item no. 3 after searching the files of archives, engineering, planning and zoning, Mayor and Attorney. Additionally, the Complainant failed to submit any competent, credible evidence to contradict the Custodian's certification.

Therefore, the Custodian did not unlawfully deny access to request item nos. 1-4 of the Complainant's March 28, 2012 OPRA request because the Custodian has borne her burden of proving that she provided the Complainant with all records responsive, or that the responsive record does not exist. See Burns, *supra*. See also Pusterhofer, *supra*.

Additionally, the Custodian denied access to the record responsive to request item no. 6 pursuant to N.J.S.A. 47:1A-1.1 as a “closed/contractual matter.” The Custodian certifies in her SOI that the record pertains to the possible purchase of property.

N.J.S.A. 47:1A-1.1 contains 17 categories of records which are exempt from public access, none of which specifically exempt “closed/contractual matters.”

Therefore, the Custodian has failed to bear her burden of proving a lawful denial of access to request item no. 6 and must disclose the record responsive to the Complainant. N.J.S.A. 47:1A-6.

Further, the Council declines to determine whether the Custodian unlawfully denied access to the Complainant’s request for Executive Session minutes for the 2011 calendar year. When filing a Denial of Access Complaint with the GRC, a complainant is required to provide the GRC with sufficient information to make a determination in the matter. Here, the Complaint is devoid of any evidence that any such OPRA request was submitted. The Complainant fails to include a date the OPRA request was submitted, fails to include a date on which he received a response to the request, and fails to include a copy of the OPRA request.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to request item no. 6 of the Complainant’s March 28, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing advising that she needed an extension until April 19, 2012, to respond to same, the Custodian’s failure to respond in writing within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007- 124 (March 2008).
2. The Custodian did not unlawfully deny access to the Complainant’s February 14, 2012 OPRA request because said request seeks information rather than specifically identifiable government records. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).



3. The Custodian did not unlawfully deny access to request item nos. 1-4 of the Complainant's March 28, 2012 OPRA request because the Custodian has borne her burden of proving that she provided the Complainant with all records responsive, or that the responsive record does not exist. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005). *See also Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian has failed to bear her burden of proving a lawful denial of access to request item no. 6 and must disclose the record responsive to the Complainant. N.J.S.A. 47:1A-6.
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
6. The Council declines to determine whether the Custodian unlawfully denied access to the Complainant's request for Executive Session minutes for the 2011 calendar year. When filing a Denial of Access Complaint with the GRC, a complainant is required to provide the GRC with sufficient information to make a determination in the matter. Here, the Complaint is devoid of any evidence that any such OPRA request was submitted. The Complainant fails to include a date the OPRA request was submitted, fails to include a date on which he received a response to the request, and fails to include a copy of the OPRA request.
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara L. Barry  
Communications Manager

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

June 18, 2013

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<sup>9</sup> "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."

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