State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

RICHARD E. CONSTABLE, III
*Commissioner*

**FINAL DECISION**

**February 24, 2015 Government Records Council Meeting**

David Roundtree
Complainant
v.
NJ Department of State, Division of Elections
Custodian of Record

Complaint No. 2014-155

At the February 24, 2015 public meeting, the Government Records Council ("Council") considered the February 17, 2015 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 Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA request using ". . . the proper form . . ." Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013) (*citing* Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009)). *See* Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2013-257 *et seq.* (June 2014) and Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2013-258 (Interim Order dated June 24, 2014). Thus, the Complainant's OPRA request was appropriately filed and the Custodian should have initially responded to same specifically advising of Elections' policy change regarding the methods by which the Complainant could submit a request.

2. The Custodian bore his burden of proving he did not unlawfully deny access to Item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian's Statement of Information and February 6, 2015 certification stated that he provided the Complainant with the only record responsive to request item No. 1 in his possession and that no other responsive records existed. Furthermore, there is no evidence in the record to refute the Custodian's Statement of Information and certification. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). *See also* Heyman (On behalf of Lisa Richford) v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2011-249 (December 2012).

3. The Custodian did not unlawfully deny access to OPRA request item No. 2 because the Custodian certified in the SOI that no records exist and there is no evidence in the record

to refute his certification. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. Because the Complainant's request item No. 3 failed to seek identifiable government records, the request item is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ 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); Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2011-266 (Interim Order dated May 28, 2013). Thus, the Custodian did not unlawfully deny access to this item. N.J.S.A. 47:1A-6.

5. The Custodian improperly required the Complainant to submit his requests on Elections' official OPRA form. However, the Custodian provided all records responsive to OPRA request item No. 1, no records responsive to item No. 2 exist and item No. 3 failed to specify with reasonable clarity the records sought. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 24th Day of February, 2015

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: February 26, 2015**

**STATE OF NEW JERSEY**
**GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director**
**February 24, 2015 Council Meeting**

**David J. Roundtree**[1] **GRC Complaint No. 2014-155**
**Complainant**

**v.**

**New Jersey Department of State, Division of Elections**[2]
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:

1. Custodian's job title description for his position in the Division of Elections ("Elections") and as the custodian of record.
2. Documents supporting "training in this realm of duty."
3. Policies and procedures for election procedure and Elections.

**Custodian of Record:** Robert Giles
**Request Received by Custodian:** February 19, 2014
**Response Made by Custodian:** February 28, 2014
**GRC Complaint Received:** April 1, 2014

## Background[3]

Request and Response:

On February 19, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 28, 2014, the Custodian responded by advising that the request was not proper. The Custodian further stated that he previously notified the Complainant that a proper request to Elections must be submitted on official OPRA request form.

On the same day, the Complainant disputed the denial. The Custodian responded, advising that Elections is requiring the Complainant to submit his request on the official form per Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009) and Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009).

[1] No legal representation listed on record.
[2] Represented by Deputy Attorney General George N. Cohen.
[3] 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.

Denial of Access Complaint:

On April 1, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant argued that he submitted the subject OPRA request to obtain information for a reconsideration of prior GRC decisions. The Complainant asserted that he was unable to file said reconsiderations because the Custodian failed to provide the requested records.

Supplemental Submissions:

On October 2, 2014, the Complainant contended that in the past, Elections asserted that there is no job description for a "Director" position. To the contrary, the Complainant attached a copy of a job description for said position within Elections.[4] The Complainant did not indicate how he came into possession of this record.

Statement of Information:[5]

On October 6, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 19, 2014 and responded initially on February 28, 2014 denying the request as improperly filed.

The Custodian stated that he initially denied the Complainant's request on the basis that same was not on Elections' official OPRA request form. The Custodian noted that he advised the Complainant on numerous occasions that requests must be submitted on the official OPRA request form per Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009). The Custodian stated that, following his denial, the GRC rendered a decision in Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2013-258 (Interim Order dated June 24, 2014), wherein the Council determined that requiring the complainant to submit his request on Elections' official OPRA request form was improper. Id. at 4-5. The Custodian certified that, based on this decision, he is offering the following response:

1. Job title description: The Custodian provided an "Elections Employee List" that listed his job description for "Division Director" as "no job specification" and his job description for "Designated OPRA coordinator" as "N.J.S.A. 47:1A-1."
2. Training records: The Custodian certified that no records responsive exist.

[4] The Complainant also requested that the Council perform an "*in camera*" review of Elections based on "alleged lying." However, the GRC does not have the authority to adjudicate any extent issues/questions that may arise from either the Denial of Access Complaint process or that may be gleaned from records provided pursuant to OPRA requests, including but not limited to alleged misconduct, ethics violations, misconduct, violations of any other State or Federal statutes, possible failure to adhere to retention schedules, alteration of records, content of records, accuracy of records, disclosure of records otherwise exempt, *etc*. The GRC's sole purview is determining whether a complainant was unlawfully denied access to requested records. N.J.S.A. 47:1A-7(b).

[5] Both parties agreed to mediate this complaint; however, the GRC did not refer same to mediation because the Complainant altered the GRC's mediation form and failed to resubmit same without alterations.

3. Procedures: The Custodian asserted that this request item is overly broad because it failed to identify specific records. However, information on elections process could be located at http://www.nj.gov/state/dos_statutes-elections-1-29.shtml.[6]

The Custodian argued that he has now complied with the Complainant's OPRA request in providing a response. The Custodian certified that Elections has provided all records in its possession for item No. 1, no records exist for item No. 2, and item No. 3 is invalid.

Additional Submissions:

On February 3, 2015, the GRC sought additional information from the Custodian. Specifically, the GRC stated that the Complainant e-mailed the GRC on October 2, 2014, attaching a copy of a job description for the title of "Director" within Elections (presumably responsive to the Complainant's OPRA request item No. 1). Further, the GRC stated that the Custodian certified in the SOI that no such record existed and did not address the Complainant's e-mail. Based on the foregoing, the GRC requested that the Custodian submit a legal certification answering the following:

1. Whether Elections possesses a copy of the "job description" that the Complainant provided to the GRC attached to his October 2, 2014 e-mail?
2. If Elections does possess the job description, please provide a detailed explanation of the search you conducted to locate this record.

The GRC required the Custodian to submit his legal certification by February 6, 2015.

On February 6, 2015, the Custodian responded to the GRC's request for additional information. The Custodian certified that he did not locate any record responsive to item No. 1 when conducting a search for same. Further, the Custodian affirmed that he had never seen the "Director" job description prior to the Complainant producing same. The Custodian certified that, to the extent that the job description was used by Elections in the past, he did not locate same. Additionally, the Custodian affirmed that, since becoming the Director of Elections in 2008, the job description was not and is not currently in use.

The Custodian noted that the job description referenced to the year 1996 several times; thus, the description may have been from that time period. The Custodian also noted that he has no knowledge of where the job description is from or who drafted it.

On February 8, 2015, the Complainant alleged that the Custodian's certification was false.[7] The Complainant asserted that the Custodian, as a State employee, has a Performance Assessment Review ("PAR") that would likely include a job description.[8] The Complainant requested that the GRC contact other Elections employees to verify the Custodian's certification.

[6] Accessed November 26, 2014.
[7] The Complainant based on his argument on a prior interaction he had with the Custodian that is not relevant to the existence of the "Director" job description.
[8] The GRC notes that it has previously determined that PARs are exempt from disclosure under OPRA. *See* Lotito v. NJ Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014).

## Analysis

### Valid OPRA Request

OPRA provides that:

> The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:
>
> 1) specific directions and procedures for requesting a record;
> 2) a statement as to whether prepayment of fees or a deposit is required;
> 3) the time period within which the public agency is required by [OPRA] to make the record available;
> 4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
> 5) space for the custodian to list reasons if a request is denied in whole or in part;
> 6) space for the requestor to sign and date the form;
> 7) space for the custodian to sign and date the form if the request is fulfilled or denied.

N.J.S.A. 47:1A-5(f).

Furthermore, OPRA states that "a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g).

In Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies' OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. Id. In effect, this permits requestors to write their own correspondence seeking records from a custodian, as long as the request properly invokes OPRA.

However, in Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009),[9] the Appellate Division stated that "N.J.S.A. 47:1A-5(f)(1) expressly delegates authority to each custodian of government records to adopt a form for use in making OPRA requests that includes 'specific directions and procedures for requesting a record.'" The Court went on to state that:

[9] On appeal from Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008).

> [T]he procedures adopted by a custodian of government records for transmittal of OPRA requests, like any other action by a public official or agency, must be reasonable. *See* N.J. Builders Ass'n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 181-84 (App. Div. 2007). Consequently, a custodian may not exercise his authority under N.J.S.A. 47:1A-7(f)(1) in a manner that would impose an unreasonable obstacle to the transmission of a request for a governmental record, such as, for example, by requiring any OPRA request to be hand-delivered.

Id. at 229.

Thus, although a custodian is not permitted to deny a request for records under OPRA simply because it is not on the agency's form, an agency does have the authority to dictate the methods by which a requestor can transmit an OPRA request. *See also* Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013).

As noted by the Custodian in the SOI, the Council previously ruled on a similar issue in Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2013-257 *et seq.* (June 2014) and Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2013-258 (Interim Order dated June 24, 2014). There, the Custodian certified that he did not respond to the requests at issue because the Complainant failed to adhere to earlier e-mails in which he advised the Complainant ". . . to use the proper OPRA form . . ." In both cases, the Council determined that the Custodian improperly required the Complainant to submit his request on Elections' official form.

Here, the threshold issue remains the same as in Roundtree, GRC 2013-257 and 2013-258: whether the Custodian clearly articulated to the Complainant that Elections had instituted a new policy of transmittal methods for OPRA requests. Although adjudicated during the pendency of this complaint, the Council's decisions in Roundtree, GRC 2013-257 and 2013-258 are instructive. Specifically, as in Roundtree, his response did not articulate that Elections instituted a transmittal policy barring requestors from submitting requests via e-mail. However, this complaint differs from Roundtree, in that the Custodian responded to the subject OPRA request. Further, after being pressed by the Complainant, the Custodian cited to Paff, 407 N.J. Super. 221, but then required submission of the request on the form without an explanation of a new transmittal policy.

For these reasons, the GRC is not satisfied that the Custodian sufficiently advised the Complainant of a change in Elections' transmittal policy. To be clear, under Paff, 407 N.J. Super. 221, a public agency does have latitude to institute a transmittal policy so long as same does not impose an unreasonable limitation on access (*e.g.*, hand delivery only) and provides adequate notice of same to the public. Thus, the Council's prior decisions in Roundtree should not be seen as prohibiting such an action; rather, the Custodian's responses there did not definitively indicate that such a policy was in place or that the public was adequately noticed of same. The Custodian's response here is similar, and thus the requirement to submit an OPRA request on the official form was improper. However, the GRC notes that subsequent to its decisions in Roundtree, GRC 2013-257 and 2013-258, the Custodian responded to the subject OPRA request on October 6, 2014 as part of the SOI.

Thus, although Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA request using ". . . the proper form . . ." Paff, 407 N.J. Super. 221; Paff, GRC 2012-158 (*citing* Renna, 407 N.J. Super. 230). *See* Roundtree, GRC 2013-257 and 2013-258. Thus, the Complainant's OPRA request was appropriately filed and the Custodian should have initially responded to same specifically advising of Elections' policy change regarding the methods by which the Complainant could submit a request.

**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.

OPRA request item No. 1

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant's March 2, 2005, OPRA request, and stated that no other responsive records existed. The complainant argued that more responsive records existed. Id. The GRC asked the custodian to certify as to whether all responsive records were produced. Id. On August 1, 2005, the custodian certified that the provided document was the only responsive record. Id. The GRC held that:

> The 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.

Id.

Here, the Complainant argued that he was denied access to OPRA request item No. 1. On October 2, 2014, the Complainant e-mailed the GRC a copy of a "Director" job description purportedly responsive to his request. However, in the SOI, the Custodian certified that the only record showing his job description was an employment list that he provided as part of his submission. The Custodian did not address the Complainant's October 2, 2014 e-mail at the time. On February 6, 2015, in response to the GRC's request for additional information, the Custodian certified that he did not locate a "Director" job description. Further, the Custodian certified that he had never seen the job description that the Complainant possessed, did not know who composed it, and did not know where it originated. The Custodian also surmised that, based on repeated references to 1996, it is possible that Elections utilized the job description prior to his tenure. However, Elections no longer used the description.

On February 8, 2015, the Complainant objected to the Custodian's certification. However, he provided no arguments that successfully refute the Custodian's certification.

Similar to Burns, the Custodian certified that he provided all responsive records. Further, the Custodian adequately addressed the GRC's request for additional information. The GRC is thus satisfied that the Custodian provided the only record he located. Additionally, the GRC is satisfied that the job description that the Complainant possessed is either no longer maintained by the Custodian or could not reasonably be located.

Therefore, the Custodian bore his burden of proving he did not unlawfully deny access to Item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian's SOI and February 6, 2015 certification stated that he provided the Complainant with the only record responsive to request item No. 1 in his possession and that no other responsive records existed. Furthermore, there is no evidence in the record to refute the Custodian's SOI and certification. *See* Burns, GRC 2005-68. *See also* Heyman (On behalf of Lisa Richford) v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2011-249 (December 2012).

OPRA request item No. 2

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. 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.

In the instant matter, the Custodian certified in the SOI that no records supporting "in this realm of duty" existed. Additionally, there is no evidence in the record to refute the certification.

Accordingly, the Custodian did not unlawfully deny access to OPRA request item No. 2 because the Custodian certified in the SOI that no records exist and there is no evidence in the record to refute his certification. *See* Pusterhofer, GRC 2005-49.

OPRA request item No. 3

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 ABC, 375 N.J. Super. 534, 546 (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 (emphasis added).

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. (emphasis added). Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005),[10] NJ Builders Assoc. v. NJ 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).

Moreover, in Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2011-266 (Interim Order dated May 28, 2013), the complainant sought, among other records, "policy and procedure rules." The Council determined that this request was overly broad, reasoning that "[a]lthough the Custodian directed the Complainant to NJ State websites to assist the Complainant in finding the requested information sought, the Complainant still failed to identify government records." Id. at 8. *See also* Cavanagh v. NJ Dep't of Law & Public Safety, NJ State Police, GRC Complaint No. 2009-302 (July 2010).

Here, the Complainant's request item No. 3 sought policies and procedures for the election process and for Elections. This request item is similar to the one in Roundtree, because both failed to identify with specificity those records sought. Also, the Custodian similarly responded providing a link to Elections' website. Thus, the GRC is satisfied that request item No. 3 is invalid.

Therefore, because the Complainant's request item No. 3 failed to seek identifiable government records, the request item is invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Roundtree, GRC 2011-266. Thus, the Custodian did not unlawfully deny access to this item. N.J.S.A. 47:1A-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

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

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

The Custodian improperly required the Complainant to submit his requests on Elections’ official OPRA form. However, the Custodian provided all records responsive to OPRA request item No. 1, no records responsive to item No. 2 exist, and item No. 3 failed to specify with reasonable clarity the records sought. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA request using “. . . the proper form . . .” Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013) (*citing* Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009)). *See* Roundtree v. NJ Dep’t of State, Div. of Elections, GRC Complaint No. 2013-257 *et seq.* (June 2014) and Roundtree v. NJ Dep’t of State, Div. of Elections, GRC Complaint No. 2013-258 (Interim Order dated June 24, 2014). Thus, the Complainant’s OPRA request was appropriately filed and the Custodian should have

initially responded to same specifically advising of Elections' policy change regarding the methods by which the Complainant could submit a request.

2. The Custodian bore his burden of proving he did not unlawfully deny access to Item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian's Statement of Information and February 6, 2015 certification stated that he provided the Complainant with the only record responsive to request item No. 1 in his possession and that no other responsive records existed. Furthermore, there is no evidence in the record to refute the Custodian's Statement of Information and certification. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). *See also* Heyman (On behalf of Lisa Richford) v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2011-249 (December 2012).

3. The Custodian did not unlawfully deny access to OPRA request item No. 2 because the Custodian certified in the SOI that no records exist and there is no evidence in the record to refute his certification. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. Because the Complainant's request item No. 3 failed to seek identifiable government records, the request item is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ 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); Roundtree v. NJ Dep't of State, Div. of Elections, GRC Complaint No. 2011-266 (Interim Order dated May 28, 2013). Thus, the Custodian did not unlawfully deny access to this item. N.J.S.A. 47:1A-6.

5. The Custodian improperly required the Complainant to submit his requests on Elections' official OPRA form. However, the Custodian provided all records responsive to OPRA request item No. 1, no records responsive to item No. 2 exist and item No. 3 failed to specify with reasonable clarity the records sought. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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