



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2018-130

v.

Berkeley Township (Ocean)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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. Because the Custodian in a timely manner made the amount of the special service charge available to the Complainant, and following the Complainant’s refusal to pay the special service charge, delivered to the Council Staff a certified statement confirming the Complainant’s refusal, along with a copy of the 14-point analysis, the Custodian complied with the Council’s June 25, 2019 Interim Order. Moreover, the Custodian is not obligated to disclose responsive records to the Complainant. N.J.S.A. 47:1A-5. See also Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). However, the Custodian did not fully comply with the terms of said Order because the Custodian failed to deliver to the Complainant a copy of the 14-point analysis in a timely manner.
2. Although the Custodian denied the Complainant access to records that the Council subsequently determined should have been made available to the Complainant, and failed to fully comply with the terms of the Council’s June 25, 2019 Interim Order by not delivering to the Complainant the completed 14-point analysis in a timely manner, the Custodian did make the requested records available to the Complainant pending his payment of the estimated special service charge in compliance with the terms of said Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 30th Day of July 2019

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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

Scott Madlinger¹
Complainant

GRC Complaint No. 2018-130

v.

Berkeley Township (Ocean)²
Custodial Agency

Records Relevant to Complaint: “Copies of Form N-RDF, ‘State of New Jersey Nonresidential Development Certification/Exemption,’ that have been completed in full or in part, for all applicable development projects considered and/or approved by the Township, for each year: 2015, 2016, 2017 and 2018. The documents requested should reflect the names and signatures of all parties, as required by law.”

Custodian of Record: Karen Stallings

Request Received by Custodian: June 25, 2018

Response Made by Custodian: June 25, 2018

GRC Complaint Received: July 6, 2018

Background

June 25, 2019 Council Meeting:

At its June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 Findings and Recommendations of the Council Staff 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 Complainant’s OPRA request sought a particular type of document for a specified time period. Therefore, because the Complainant’s OPRA request sought specifically identifiable government records, the request is valid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).
2. The Custodian may have unlawfully denied access to records responsive to the Complainant’s request because the search for such records was insufficient. Therefore, the Custodian must conduct a search for any responsive records. If the Custodian

¹ No legal representation listed on record.

² Purportedly represented by Lauren Staiger, Esq., of Gilmore & Monahan (Toms River, NJ). No representation letter on file.

locates responsive N-RDF forms, she must retrieve and disclose those records to the Complainant. Should the Custodian find that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

3. **The Custodian shall either comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff; or in the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Council Staff certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Council Staff a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. 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:

On June 27, 2019, the Council distributed its June 25, 2019 Interim Order to all parties. On July 5, 2019, the Custodian e-mailed the Complainant, providing him with the methodology the Township followed in calculating the special service charge and informing him that the amount of the special service charge for producing the requested records totaled \$1,968.30. The Custodian also informed the Complainant that the actual time would be tracked, and if preparation of the records took less time than anticipated, the overpayment would be refunded. The Custodian attached spreadsheets from the Finance Department which set forth all development fees paid from 2015 to 2018.

On July 9, 2019, the GRC informed the Custodian that the GRC received a copy of the Custodian's July 5, 2019 e-mail to the Complainant that made the amount of the special service charge available to the Complainant. However, the GRC informed the Custodian that it appeared she failed to provide the Complainant with a copy of the completed 14-point analysis as required by the Council's Order. The GRC advised the Custodian that if she had not already provided the 14-point analysis to the Complainant, she needed to do so directly. On July 9, 2019, the Custodian e-mailed a copy of the 14-point analysis to the Complainant and the GRC.

On July 9, 2019, the Complainant e-mailed the GRC to object to the special service charge. The Complainant stated the requested record, Form N-RDF, is a one page form and therefore it should take less than one (1) minute to redact information on the record. The Complainant also asked the GRC to waive payment of the special service charge because he saved the Township the expense of paying prevailing party attorney fees by not retaining an attorney. By reply e-mail this same date, the GRC informed the Complainant that prevailing party attorney fees are not granted to offset special service charges, but rather, they are intended to pay the successful attorney's fee when a complainant is represented.

On July 17, 2019, the sixth (6th) business day following the Complainant's receipt of the 14-point analysis containing the special service charge amount, the Custodian submitted a certification to the GRC, together with a copy of the 14-point analysis. The Custodian certified that the Complainant did not pay the special service charge.

Analysis

Compliance

On June 25, 2019, the Council ordered the above-referenced compliance. On June 27, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of the Council's Interim Order by disclosing the responsive records, or in the alternative, by making the amount of any special service charge, together with a completed 14-point analysis, available to the Complainant.

On July 5, 2019, the fifth (5th) business day following receipt of the Council's Interim Order, the Custodian e-mailed the Complainant regarding his request. The Custodian informed the Complainant that there are 248 commercial files containing approximately 20 to 200 documents in each file and 2,940 vacant land files for current projects in progress containing approximately 1 to 5 documents in each file. The Custodian further informed the Complainant that it will take approximately fifteen minutes per commercial file and two minutes per vacant land file to retrieve, review, redact where necessary and reproduce the requested record. The Custodian advised the Complainant that it would therefore require 62 hours at \$15.54 per hour for the commercial files, which would total \$963.48, and 64.66 hours at \$15.54 per hour for the vacant land files, which would total \$1,004.82. The Custodian informed the Complainant that the total estimated special service charges would therefore be \$1,968.30.³ The Custodian informed the Complainant that

³ Based on these calculations, the Custodian reduced the labor required to search the vacant land files from what would have been 98 hours for 2,940 files down to 64.66 hours for 1,940 files. This represented a savings to the Complainant of \$518.10 in special service charges.

Township Administration will track the actual time and refund any money due if the work proceeds faster than anticipated.

On July 9, 2019, the GRC informed the Custodian that she failed to provide the Complainant with a copy of the completed 14-point analysis as required by the Council's Order. Later on this same date, the Custodian e-mailed a copy of the 14-point analysis to the Complainant and the GRC.

On July 9, 2019, the Complainant e-mailed the GRC, objecting to the special service charge. The Complainant expressed his opinion that since the requested record is a one page form, it should take less than one (1) minute to redact information on the form. The Complainant offered no evidence to support his claim. The GRC is not persuaded by the Complainant's opinion concerning the search time because the Complainant is only considering the time it would take to redact information on the form. The total time estimated by the Custodian was for retrieving the file, reviewing the contents to search for the requested record, redacting information from the record if necessary, copying the record, replacing the record and replacing the file. This is a much more laborious and time-consuming process than what the Complainant projected. It is apparent that the Custodian considered the file search task to be a time-consuming part of the process because she distinguished between commercial files (which contained up to 200 documents) and vacant land files (which contained only a few documents) when estimating the total time for file review.

Based upon the terms of the Council's Interim Order, the Complainant had five (5) business days from receipt of the Custodian's special service charge notice to deliver to the Custodian either the payment of the special service charge or a statement declining to purchase the records. The Council's Order further provided that if the Complainant failed to take any action within the five business day period, such failure would be construed the same as a refusal to purchase the records, and the Custodian would no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Pursuant to the terms of the Interim Order, the Custodian had up to twenty (20) business days following the Complainant's constructive refusal to deliver to the Council Staff a certified statement confirming the Complainant's refusal, together with a copy of the completed 14-point analysis. On July 17, 2019, the sixth (6th) business day following the Complainant's receipt of the 14-point analysis containing the special service charge amount, the Custodian submitted a certification to the Council Staff, together with a copy of the 14-point analysis. The Custodian certified that the Complainant did not pay the special service charge.

Therefore, because the Custodian in a timely manner made the amount of the special service charge available to the Complainant, and following the Complainant's refusal to pay the special service charge, delivered to the Council Staff a certified statement confirming the Complainant's refusal, along with a copy of the 14-point analysis, the Custodian complied with the Council's June 25, 2019 Interim Order. Moreover, the Custodian is not obligated to disclose responsive records to the Complainant. N.J.S.A. 47:1A-5. See also Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). However, the Custodian did not fully comply with the terms

of said Order because the Custodian failed to deliver to the Complainant a copy of the 14-point analysis in a timely manner.

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)).

Although the Custodian denied the Complainant access to records that the Council subsequently determined should have been made available to the Complainant, and failed to fully comply with the terms of the Council’s June 25, 2019 Interim Order by not delivering to the Complainant the completed 14-point analysis in a timely manner, the Custodian did make the requested records available to the Complainant pending his payment of the estimated special service charge in compliance with the terms of said Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 Council Staff respectfully recommends the Council find that:

1. Because the Custodian in a timely manner made the amount of the special service charge available to the Complainant, and following the Complainant’s refusal to pay the special service charge, delivered to the Council Staff a certified statement confirming the Complainant’s refusal, along with a copy of the 14-point analysis, the Custodian complied with the Council’s June 25, 2019 Interim Order. Moreover, the

Custodian is not obligated to disclose responsive records to the Complainant. N.J.S.A. 47:1A-5. See also Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). However, the Custodian did not fully comply with the terms of said Order because the Custodian failed to deliver to the Complainant a copy of the 14-point analysis in a timely manner.

2. Although the Custodian denied the Complainant access to records that the Council subsequently determined should have been made available to the Complainant, and failed to fully comply with the terms of the Council's June 25, 2019 Interim Order by not delivering to the Complainant the completed 14-point analysis in a timely manner, the Custodian did make the requested records available to the Complainant pending his payment of the estimated special service charge in compliance with the terms of said Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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: John E. Stewart
Staff Attorney

July 23, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 25, 2019 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2018-130

v.

Berkeley Township (Ocean)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 Findings and Recommendations of the Council Staff 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 Complainant’s OPRA request sought a particular type of document for a specified time period. Therefore, because the Complainant’s OPRA request sought specifically identifiable government records, the request is valid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).
2. The Custodian may have unlawfully denied access to records responsive to the Complainant’s request because the search for such records was insufficient. Therefore, the Custodian must conduct a search for any responsive records. If the Custodian locates responsive N-RDF forms, she must retrieve and disclose those records to the Complainant. Should the Custodian find that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
3. **The Custodian shall either comply with paragraph 2 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Council Staff;² or in the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis³ and calculate the appropriate special service charge. The Custodian shall**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

³ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Council Staff certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Council Staff a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

4. 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 25th Day of June 2019

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: June 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2018-130

v.

**Berkeley Township (Ocean)²
Custodial Agency**

Records Relevant to Complaint: “Copies of Form N-RDF, ‘State of New Jersey Nonresidential Development Certification/Exemption,’ that have been completed in full or in part, for all applicable development projects considered and/or approved by the Township, for each year: 2015, 2016, 2017 and 2018. The documents requested should reflect the names and signatures of all parties, as required by law.”

Custodian of Record: Karen Stallings
Request Received by Custodian: June 25, 2018
Response Made by Custodian: June 25, 2018
GRC Complaint Received: July 6, 2018

Background³

Request and Response:

On June 25, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On June 25, 2018, the Custodian responded in writing citing MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005) as providing that “. . . OPRA . . . 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.” The Custodian referred the Complainant to an attachment prepared by Tax Assessor Eric Zanetti. The attachment stated:

“N-RDF is not a record required to be maintained by the Assessor’s Office. While we may possess a copy of the N-RDF in an individual property

¹ No legal representation listed on record.

² Purportedly represented by Lauren Staiger, Esq., of Gilmore & Monahan (Toms River, NJ). No representation letter on file.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

record file, this request is too broad in nature and the requester must be specific as to each individual property they are seeking the N-RDF for.” (Emphasis in original.)

Denial of Access Complaint:

On July 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that “[o]n June 23, I sent OPRA request (sic) for form N-RDF[.] On June 25, Zanetti denied it.” The Complainant further stated that the Custodian informed him that the Township may have the requested records, but the request was too broad.⁴

Statement of Information:

On July 17, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 25, 2018, and responded in writing on the same day. The Custodian certified that her search for the records entailed checking with the Tax Assessor’s Office because that is where the requested records are filed. The Custodian further certified that the Tax Assessor responded to her and she, in turn, forwarded the response to the Complainant. The Custodian certified that she attached the Tax Calculation report to the SOI to show the number of exempt properties.⁵

The Custodian certified that the records responsive to the request are copies of all Form N-RDF, completed from 2015 to the date of the request, one page per parcel. The Custodian certified that the Township has 28,000 parcels. The Custodian further certified that the requested records are not required to be maintained or kept by the municipality. The Custodian certified that the Tax Assessor’s Office may possess a copy as part of an individual property file; however, they do not maintain a file specific to the N-RDF form.

The Custodian certified that in order to satisfy the Complainant’s request someone from the office staff would have to determine which files have N-RDF forms, and then check approximately 28,000 files to determine whether there was an N-RDF form contained therein. The Custodian stated that the form was not required for some of the requested years. The Custodian stated that she “. . . asked the requester to specify the properties he was interested in and that ‘any’ and ‘all’ was too broad of a request to fulfill.”

As the legal reason for denial the Custodian cited MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005) as providing that “. . . OPRA . . . 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.”

⁴ The Complainant also made reference to a June 6, 2018 e-mail sent to him from Tax Assessor Eric Zanetti; however, the e-mail predated the date of the request which formed the basis of this complaint and is therefore not relevant to this complaint.

⁵ The attached report reveals that there are 2,023 exempt properties.

Analysis

Validity of Request

The threshold issue here is whether the request itself is valid. The Custodian argued that the request was not a valid request because “. . . ‘any’ and ‘all’ was too broad of a request to fulfill.” The Custodian also referenced a statement made by the Tax Assessor which asserted that “. . . the requester must be specific as to each individual property [he is] seeking the N-RDF for.” The Custodian cited MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005) in support of her argument.

The request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number.

The Appellate Division 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, 375 N.J. Super. at 546.]

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.

In making its finding, 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.]

In short, as the Council articulated in Potts v. Ewing Twp. Bd. of Educ., GRC Complaint No. 2013-232 (July 2014), “[t]he test under MAG is whether a requested record is a specifically identifiable government record. Id. If so, the record shall be disclosed barring any exemptions contained in OPRA.”

Here, the Complainant specifically identified the record he was seeking by both title and form number. Further, he specified the particular years for which he was seeking the records. He did not request “any and all” unidentified records, as was alleged by the Custodian.

Moreover, the facts of the instant case are similar to the facts in Burnett v. Cnty. 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. 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 (emphasis added). Likewise, the court in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), found a request for the E-Z Pass benefits of Port Authority retirees to be valid because it was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. Id. at 176.

Here, the Complainant’s OPRA request sought a particular type of document for a specified time period. Therefore, because the Complainant’s OPRA request sought specifically identifiable government records, the request is valid. Burnett, 415 N.J. Super. 506; Burke, 429 N.J. Super. 169.

Insufficient Search/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 the instant complaint, the Custodian stated that the requested records are not required to be maintained or kept by the municipality; however, she also certified that she knew the requested records were filed in the Tax Assessor’s Office. The Custodian further certified that the Tax Assessor’s Office may possess said records as part of an individual property file.

The provisions of OPRA are not restricted to records that are required to be maintained or kept by a municipality. Rather, OPRA provides that any record that *is* maintained or kept on file in the course of official business is subject to access. It is clear from the evidence of record that the requested records could be found in the Tax Assessor’s Office because, not only did the Custodian certify that that office may possess them, but also the Tax Assessor admitted that “we may possess a copy of the N-RDF in an individual property record file.”

The Council has maintained that it is among a custodian's duties to do a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. See Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014) at 3 (citing Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008)).

Here, however, the Custodian certified that to satisfy the Complainant's request the office staff would have to determine which files have N-RDF forms, and then check approximately 28,000 files to determine whether there was an N-RDF form contained therein. Although this would be a daunting task, OPRA provides for such eventuality by providing that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section ... involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ..." N.J.S.A. 47:1A-5(c). (Emphasis added.)

The determination of what constitutes an "extraordinary expenditure of time and effort" under OPRA must be made on a case by case basis and requires an analysis of the variety of factors discussed in The Courier Post v. Lenape Reg'l High Sch, 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the "extraordinary burden" placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate" pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place.

Id. at 199.

The court determined that in the context of OPRA, the term "extraordinary" will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. Id. at 202.

In the instant matter, the Custodian may have unlawfully denied access to records responsive to the Complainant's request because the search for such records was insufficient. Therefore, the Custodian must conduct a search for any responsive records. If the Custodian locates responsive N-RDF forms, she must retrieve and disclose those records to the Complainant. Should the Custodian find that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

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 Council Staff respectfully recommends the Council find that:

1. The Complainant's OPRA request sought a particular type of document for a specified time period. Therefore, because the Complainant's OPRA request sought specifically identifiable government records, the request is valid. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).
2. The Custodian may have unlawfully denied access to records responsive to the Complainant's request because the search for such records was insufficient. Therefore, the Custodian must conduct a search for any responsive records. If the Custodian locates responsive N-RDF forms, she must retrieve and disclose those records to the Complainant. Should the Custodian find that a special service charge is warranted, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
3. **The Custodian shall either comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Council Staff;⁷ or in the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁸ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point**

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁸ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Council Staff certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Council Staff a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

4. 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: John E. Stewart
Staff Attorney

June 18, 2019