



State of New Jersey
GOVERNMENT RECORDS COUNCIL

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER CHALRES RICHMAN
COMMISSIONER LUCILLE DAVY
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FINAL DECISION

September 26, 2007 Government Records Council Meeting

Amelia Spaulding
Complainant

Complaint No. 2006-157

v.

Hudson County Register
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in an e-mail to the GRC dated September 10, 2007.

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 26th Day of September, 2007

Robin Berg Tabakin, Vice Chairman
Government Records Council

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



Kathryn Forsyth
Government Records Council

Decision Distribution Date: October 3, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Amelia Spaulding¹
Complainant**

GRC Complaint No. 2006-157

v.

**Hudson County Register²
Custodian of Records**

Records Relevant to Complaint: The following records for the period of January 1, 1985 to present [December 2004]:

1. Deeds
2. Disclaimers
3. Extensions of mortgages
4. Federal tax liens
5. IN REM
6. Lis Pendens
7. Mortgages
8. Releases/postponements/subordinations
9. Tax sales/IN REM & Releases
10. Cancellation of mortgages³

Request Made: December 13, 2004

Response Made: June 21, 2006

Custodian: Neil J. Carroll, Jr., Assistant County Counsel⁴

GRC Complaint Filed: August 28, 2006

Background

July 25, 2007

Government Records Council's ("Council") Interim Order. At its July 25, 2007 public meeting, the Council considered the July 18, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The

¹ Represented by Yianni Pantis, Esq. (Carmichael, CA) in association with Mary Kay Roberts, Esq. (Trenton, NJ).

² Represented by Chasan Leyner & Lamparello (Secaucus, NJ). (No individual Counsel is named).

³ The Complainant requested additional records; however, said records are not the subject of this complaint.

⁴ The original Custodian was Barbara Donnelly, Hudson County Register. However, the original Custodian was out on sick leave during the time period subject of this complaint and has since left the agency.

Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian certifies that Complainant did not submit her request on an official OPRA request form, the Custodian's attempt to fulfill said request results in the request being considered a valid OPRA request pursuant to John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
2. The Custodian's failure to provide a written response to the Complainant's request 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 and is a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Records that have already been recorded by a recording agency and have already been in the public domain do not require any redactions on the basis of confidentiality. *See* Amelia Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006). As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6. Therefore, the Custodian should release the requested records to the Complainant.
4. **The parties should meet and agree on cost or if they are unable to so agree, they should each submit a brief to the GRC on the cost issue only and the GRC will refer such matter to the Office of Administrative Law. The parties shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
5. **The Custodian shall comply with item #3 above (regarding disclosure of the requested records) within thirty (30) business days after the cost issue is resolved from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. Because the Custodian did not provide a written response to the Complainant's OPRA request until eighteen (18) months following receipt of such request, and unlawfully denied access to the requested records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

7. This complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees along with the determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

July 31, 2007

Council's Interim Order distributed to the parties.

August 13, 2007

Custodian Counsel's response to the Council's Interim Order. Counsel requests a stay of the Council's Interim Order until the next regularly scheduled GRC meeting. Counsel states that the parties have agreed to meet on August 28, 2007 in an attempt to resolve the matter.

August 13, 2007

Letter from GRC to Custodian's Counsel. GRC states that Counsel's request for a stay is granted until August 29, 2007.

August 28, 2007

Letter from Custodian's Counsel to GRC. Counsel states that the parties have reached an amicable settlement and are working out the final details of a settlement agreement. Counsel requests that the stay be extended or a new stay be granted until September 5, 2007.

September 6, 2007

Letter from Custodian's Counsel to GRC. Counsel states that the parties have reached a settlement and requests that this complaint be withdrawn.

September 10, 2007

E-mail from Complainant's Counsel to GRC staff. The Complainant's Counsel states that the parties jointly request that this complaint be withdrawn and dismissed.

Analysis

The Complainant voluntarily withdrew his complaint in an e-mail to the GRC dated September 10, 2007 (submitted by the Complainant's Counsel), therefore no analysis is needed.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in an e-mail to the GRC dated September 10, 2007.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

September 19, 2007



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

July 25, 2007 Government Records Council Meeting

Amelia Spaulding
Complainant

Complaint No. 2006-157

v.

Hudson County Register
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council (“Council”) considered the July 18, 2007 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 as amended. The Council, therefore, finds that:

1. Although the Custodian certifies that Complainant did not submit her request on an official OPRA request form, the Custodian’s attempt to fulfill said request results in the request being considered a valid OPRA request pursuant to John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
2. The Custodian’s failure to provide a written response to the Complainant’s request 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 and is a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Records that have already been recorded by a recording agency and have already been in the public domain do not require any redactions on the basis of confidentiality. See Amelia Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006). As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6. Therefore, the Custodian should release the requested records to the Complainant.
4. **The parties should meet and agree on cost or if they are unable to so agree, they should each submit a brief to the GRC on the cost issue only and the GRC will refer such matter to the Office of Administrative Law.**



The parties shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.

5. **The Custodian shall comply with item #3 above (regarding disclosure of the requested records) within thirty (30) business days after the cost issue is resolved from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. Because the Custodian did not provide a written response to the Complainant's OPRA request until eighteen (18) months following receipt of such request, and unlawfully denied access to the requested records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
7. This complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees along with the determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 31, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2007 Council Meeting**

**Amelia Spaulding¹
Complainant**

GRC Complaint No. 2006-157

v.

**Hudson County Register²
Custodian of Records**

Records Relevant to Complaint: The following records for the period of January 1, 1985 to present [December 2004]:

1. Deeds
2. Disclaimers
3. Extensions of mortgages
4. Federal tax liens
5. IN REM
6. Lis Pendens
7. Mortgages
8. Releases/postponements/subordinations
9. Tax sales/IN REM & Releases
10. Cancellation of mortgages³

Request Made: December 13, 2004

Response Made: June 21, 2006

Custodian: Neil J. Carroll, Jr., Assistant County Counsel⁴

GRC Complaint Filed: August 28, 2006

Background

December 13, 2004

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.⁵

February 11, 2005

¹ Represented by Yianni Pantis, Esq. (Carmichael, CA) in association with Mary Kay Roberts, Esq. (Trenton, NJ).

² The Custodian in this matter is representing Hudson County Register in his capacity as Assistant County Counsel (Jersey City, NJ).

³ The Complainant requested additional records; however, said records are not the subject of this complaint.

⁴ The original Custodian was Barbara Donnelly, Hudson County Register. However, the original Custodian was out on sick leave during the time period subject of this complaint and has since left the agency.

⁵ The Complainant's request was in letter form and not on an official OPRA request form.

Letter from Complainant to Barbara Donnelly, Hudson County Register. The Complainant states that she completed her assessment of the Clerk's records during her visits on January 14, 2005 and January 19, 2005. The Complainant states that she is aware that there is a significant number of federal tax liens from 1995 to present that are in paper format which the Complainant states she would like to image. The Complainant also states that she may consider imaging many filed Lis Pendens, as well as other paper documents.

August 15, 2005

Letter from Complainant's Counsel to Custodian. Counsel states that he is writing in regards to the Custodian's concern about the potential redactions of social security numbers from copies of historical microfilm records maintained by the County Register. Counsel claims that the Custodian's concern most likely arises from the recent passage of Assembly Bill 2047⁶ which was signed by the Governor on June 15, 2005. Counsel states that said bill provides that county recording authorities are directed to redact a person's social security number from records being presented for public recording. Counsel asserts that analysis of this bill leads to the following conclusions:

1. The recording authority is only obligated to strike social security numbers strictly on an onward basis, meaning only records to be recorded after the bill takes effect as law.
2. In no event must the recording authority redact any records after they have been recorded, including those records that are recorded after the bill takes effect as law.

April 19, 2006

E-mail from Complainant's Counsel to Custodian. Counsel states that pursuant to their telephone conversation, Counsel is following up on the issue of redacting social security numbers from land records. Counsel asserts that the following NJ counties are providing unredacted land records via the internet: Cape May, Gloucester, Sussex, Union, Middlesex, Somerset, Monmouth and Ocean. Counsel states that as discussed, the Custodian expected to have the County's final determination of this issue by the end of next week.

April 24, 2006

E-mail from Complainant's Counsel to Custodian. Counsel states that he is checking up on the status of the County's final determination on the issue of redacting social security numbers.

May 31, 2006

E-mail from Complainant's Counsel to Custodian. Counsel states that he is following up on their conversation of May 24, 2006 regarding the County's official position on the issue of redacting social security numbers.

June 1, 2006

E-mail from Custodian to Complainant's Counsel. The Custodian states that he will provide the County's response by fax and e-mail June 2, 2006.

⁶ N.J.S.A. 47:1-16.

June 16, 2006

E-mail from Complainant's Counsel to Custodian. Counsel requests the Custodian's response to the issue of redacting social security numbers.

June 21, 2006

Memo from Assistant Chief Clerk to Custodian. The Clerk states that the approximate total of images of land data from 1985 to 2006 is 6,250,000, the majority of which the Clerk states would have to be checked for social security numbers. The Clerk states that the Register's Office is understaffed due to a retirement, a termination and five (5) staff members with medical problems, making this task disruptive to the office and may create a conflict in complying with the time frame set forth in the NJ statutes for recording. The Clerk states that it would be necessary to hire temporary clerks at the starting salary of \$9.98 per hour to check all images for social security numbers. The Clerk also states that a test conducted determined that it would take two (2) hours to verify three hundred fifty (350) images or one book to search for social security numbers.

June 21, 2006

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request approximately eighteen (18) months following receipt of such request. The Custodian states that the requested records [subject of this complaint] have to be reviewed for the existence of social security numbers pursuant to N.J.S.A. 47:1A-5.g. and Executive Order No. 21. The Custodian states that he has attached a memo delineating the number of documents involved. The Custodian states that his office calculated the amount of time it would take to review the requested records using the figure supplied in the memo, the result being an excess of fourteen (14) years if the County assigned staff to this task on a full time basis. Additionally, the Custodian states that the Office of the Register is understaffed and that any attempt to accommodate this request in a rational time frame would substantially disrupt the operations of the office. Therefore, the Custodian states that the Complainant's request is denied pursuant to N.J.S.A. 47:1A-5.g.

August 2, 2006

Letter from Complainant's Counsel to Custodian. Counsel states that because there is a discrepancy between the County and the Complainant regarding the requirement of redactions to the requested records, Counsel has no choice but to initiate legal action to resolve the issue. Counsel states that on July 19, 2006, the Government Records Council rendered a decision in *Spaulding v. County of Passaic*, Case No. 2004-199⁷ in which the Council rejected the same redaction arguments made by the County of Passaic. Additionally, Counsel states that this letter is a final attempt to avoid legal action. Based on the GRC's decision in Spaulding, Counsel asserts that the County's continued denial of access to the requested records constitutes a knowing and willful violation of OPRA. Further, Counsel states that as a good faith gesture, after the fulfillment of the OPRA request, the Complainant is willing to inform the County of all occurrences of social security numbers that are found during the review of Hudson County records.

⁷ Amelia Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).
Amelia Spaulding v. Hudson County Register, 2006-157 – Findings and Recommendations of the Executive Director

August 28, 2006

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

- Complainant’s OPRA request dated December 13, 2004
- Federal Express Priority Overnight shipping label dated December 13, 2004
- Letter from Complainant to Barbara A. Donnelly, Hudson County Register dated February 11, 2005
- Letter from Complainant’s Counsel to Custodian dated August 15, 2005
- E-mail from Complainant’s Counsel to Custodian dated April 19, 2006
- E-mail from Complainant’s Counsel to Custodian dated April 24, 2006
- E-mail from Complainant’s Counsel to Custodian dated May 31, 2006
- E-mail from Custodian to Complainant’s Counsel dated June 1, 2006
- E-mail from Complainant’s Counsel to Custodian dated June 7, 2006
- E-mail from Complainant’s Counsel to Custodian dated June 16, 2006
- Memorandum from Assistant Chief Clerk, Hudson County Register to Custodian dated June 19, 2006
- Memorandum from Assistant Chief Clerk, Hudson County Register to Custodian dated June 21, 2006
- Letter from Custodian to Complainant’s Counsel dated June 21, 2006
- Letter from Complainant’s Counsel to Custodian dated August 2, 2006
- Letter from Complainant’s Counsel to GRC dated August 28, 2006
- Senate Bill No. 1772

The Complainant states that she is submitting her Denial of Access Complaint after a substantial amount of time during which many attempts were made to resolve the matter directly with the County. The Complainant states that the County received her OPRA request on or about December 14, 2004. The Complainant states that on January 14, 2005 and January 19, 2005 she had meetings with the County which were reflected in the Complainant’s letter to the Hudson County Register on February 11, 2005. The Complainant states that no follow up meetings were held until July 2005 when the Complainant was directed to communicate directly with the Custodian who is Assistant County Counsel for Hudson County. The Complainant also states that in August 2005, approximately eight (8) months following the Custodian’s receipt of the Complainant’s OPRA request, the redaction issue was first raised. The Complainant states that despite several communications between the Complainant’s Counsel and the Custodian, the Custodian did not alter his position that the County had to redact the social security numbers from the requested records, which the Custodian contends would take an excess of fourteen (14) years to complete and thus denied the request.

The Complainant asserts that the redactions claimed by the County are not required based on the GRC’s decision in Spaulding. The Complainant requests that the GRC order the County to comply with her OPRA request without any requirement for redaction, as well as order the County to reimburse the Complainant’s Counsel for attorney’s fees pursuant to N.J.S.A. 47:1A-6.

September 11, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

April 20, 2006

Request for the Statement of Information sent to the Custodian.

April 26, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated December 13, 2004
- Letter from Complainant's Counsel to Custodian dated August 15, 2005
- Senate Bill No. 1772, Introduced March 21, 2006
- Memorandum from Assistant Chief Clerk, Hudson County Register to Custodian dated June 19, 2006
- Memorandum from Assistant Chief Clerk, Hudson County Register to Custodian dated June 21, 2006
- Letter from Custodian to Complainant's Counsel dated June 21, 2006
- N.J.S.A. 47:1-16

The Custodian certifies that the Hudson County Register's relationship with the Complainant began in 2004 when the Complainant submitted a request for records maintained by the County Clerk and the County Register. The Custodian certifies that on January 14, 2005, the Complainant met with Barbara Donnelly, County Register, to discuss the Complainant's OPRA request. The Custodian certifies that after said meeting, Ms. Donnelly was absent for extended periods of time due to health reasons. The Custodian also certifies that in August 2005, the Deputy Register notified the Custodian that he had been contacted by the Complainant regarding her OPRA request and was requesting advice on how to proceed with the matter. The Custodian certifies that he advised the Deputy Register that the requested records were government records subject to disclosure following the redaction of any social security numbers.

Additionally, the Custodian certifies that the Complainant did not submit a request on an official OPRA request form. The Custodian claims that the Complainant verbally agreed to waive the time frames established under OPRA because of the size of her request.⁸ The Custodian certifies that he became involved in this request in August of 2005 when he was contacted by the Complainant's Counsel regarding the redaction of social security numbers of the requested records. The Custodian certifies that in June 2006 the Complainant's Counsel requested that the Custodian reduce the agency's position on the redaction of social security numbers to writing so that the Complainant could file a complaint with the GRC. The Custodian certifies that he provided said response on June 21, 2006 that contained a list of requested records totaling six (6) million pages that would have to be reviewed for the existence of social security numbers.

The Custodian certifies that from that point on, all communications regarding the OPRA request subject of this complaint were directed to his office. The Custodian certifies that Barbara Donnelly had very little contact with the Complainant, was out on sick leave virtually for the entire time period subject of this complaint, and has since left

⁸ The Custodian states in her OPRA request that because her request is for a large number of records, she is "...more than willing to discuss a reasonable time frame for their delivery..."

the agency. Additionally, the Custodian certifies that the Deputy Register retired in December 2006.

The Custodian certifies that the requirement that social security numbers be redacted prior to disclosure is set forth in N.J.S.A. 47:1A-1.1. The Custodian certifies that a preliminary review by County Register staff revealed that tens of thousands of the requested records would contain social security numbers that were placed on said records by third parties such as bank officers, attorneys, and mortgage brokers without the knowledge of the individual to whom the social security number belonged. Thus, the Custodian asserts that these entries cannot be said to have been placed there in response to a legal requirement. The Custodian contends that one would be hard pressed to consider that a person in this circumstance had waived his/her reasonable expectation of privacy.

Further, the Custodian asserts that even when a social security number is required to be placed on a record, Executive Order (“EO”) No. 21 prohibits its disclosure. The Custodian states that EO No. 21 provides that:

[i]n order to effectuate the legislative directive that a governmental agency has the responsibility and the obligation to safeguard from the public access a citizen’s personal information with which it had been entrusted, an individual’s...social security number shall not be disclosed by a public agency at any level of government to anyone other than a person duly authorized by the State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest...

The Custodian states that the Complainant claims that OPRA satisfies the “except as otherwise provided by law” provision in EO No. 21 meaning the County should release the unredacted records. The Custodian asserts that that the Complainant’s claim ignores the fact the EO No. 21 was issued in response to OPRA’s failure to “afford county and local governments with any means for exempting access to their records, even where the public interest or a citizen’s reasonable expectation of privacy would clearly be harmed by disclosure of these records.”

Additionally, the Custodian states that the Complainant relies on Spaulding v. County of Passaic (GRC # 2004-199)⁹ as supporting the contention that there is no requirement to redact social security numbers when dealing with records maintained by a County’s Register’s Office. The Custodian states that in Spaulding, the Council failed to meet the burden of proving that the redactions were necessary. The Custodian states that in said complaint, the Custodian did not provide any detail as to what was intended to be redacted. The Custodian also states that the Council’s decision pointed out that the agency had no confidentiality interest in the filed records, which are similar to the records subject of the complaint at issue here. The Custodian asserts that in this complaint, the County claims a legal obligation to protect the interest of the filing party.

The Custodian requests that the GRC uphold the County’s position with respect to the necessity of redacting the social security numbers prior to releasing the requested

⁹ Amelia Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).
Amelia Spaulding v. Hudson County Register, 2006-157 – Findings and Recommendations of the Executive Director

records. The Custodian also requests that the GRC deny the Complainant's request for attorney's fees.

Analysis

What constitutes a valid OPRA records request?

The Custodian certifies that the Complainant did not submit a request on an official OPRA request form. The Custodian claims that the Complainant verbally agreed to waive the time frames established under OPRA because of the size of her request. However, the Custodian also certifies that he provided the Complainant with a written response to her request on June 21, 2006 that contained a list of requested records totaling six (6) million pages that would have to be reviewed for the existence of social security numbers.

Review of the OPRA statute and its legislative intent leads the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) 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;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

Id.

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that "each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). See also G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its

provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt an OPRA request form and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If the custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor on the request form and promptly return it to the requestor.* The custodian *shall sign and date the form and provide the requestor with a copy thereof.* (Emphasis added.)
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing in 5.g. that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See Harvey v. Essex Cty. Bd. Of Freeholders*, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA’s central purpose of making government records “readily accessible” to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute’s form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See Mag Entertainment LLC v. Div. of ABC*, 375 N.J. Super 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In *Bent v. Twp. of Stafford Police Dept.*, 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor’s general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a “brief description” of the record request. *Id.* Similarly, in *Gannett New Jersey Partners L.P. v. County of Middlesex*, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Additionally, in *NJ Builders Association v. NJ Council on Affordable Housing*, 390 N.J. Super. 166 (App. Div. 2007), the court held that the requestor’s “...five (5)

page, thirty nine (39) paragraph request bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form...”

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency’s official OPRA records request form. OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form. Additionally, the GRC requires that custodians direct requestors to the agency’s official OPRA request form when denying a letter request on the basis that said request is not submitted on an official request form.

However, in John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006), the Custodian initially denied the Complainant’s request for records because said request was not submitted on the agency’s official OPRA request form; however, the Custodian subsequently chose to fulfill the Complainant’s request. The Council held that: “[t]he Custodian was not obligated to fulfill the Complainant’s request, however she chose to do so and certifies that she notified the Complainant of such on January 9, 2006 and is awaiting payment of \$2.25.” Thus, in Paff, the Council concluded that while the Complainant’s request was not submitted on an official OPRA request form, because the Custodian attempted to fulfill said request, OPRA’s provisions come into play.

Therefore in this instant matter, although the Custodian certifies that Complainant did not submit her request on an official OPRA request form, the Custodian’s attempt to fulfill said request results in the request being considered a valid OPRA request pursuant to John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *A government record shall not include* that portion of any document which discloses the *social security number, credit card number, unlisted telephone number or driver license number* of any person... except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is

not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.” (Emphasis added.) N.J.S.A. 47:1A-1.1.
OPRA provides that:

“...[i]f the custodian is *unable to comply with a request* for access, the custodian shall *indicate the specific basis therefore* on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ... If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

Executive Order 21 states, in part, that:

“... an individual's home address and home telephone number, as well as his or her *social security number, shall not be disclosed by a public agency* at any level of government to anyone other than a person duly authorized by this State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest...” (Emphasis added). N.J. Exec. Order No. 21 (McGreevey, July 8, 2002).

Additionally, N.J.S.A. 47:1-16 provides that:

1. a. No person, including any public or private entity, shall print or display in any manner an individual's Social Security number on any

document *intended for public recording* with any county recording authority.

b. *Whenever a document is presented for public recording* with any county recording authority and that document displays a person's Social Security number, *the recording authority shall delete, strike, obliterate or otherwise expunge that number prior to recording the document.* The fact that such a document is recorded without deleting, striking, obliterating or otherwise expunging that Social Security number shall not render the document invalid, void, voidable or in any way defective..." (Emphasis added). N.J.S.A. 47:1-16.

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. 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.

Further, pursuant to N.J.S.A. 47:1A-5.i., a custodian must either grant or deny access to a government record within seven (7) business days of receiving said request. Additionally, N.J.S.A. 47:1A-5.g. provides that if a custodian is unable to comply with a records request, he/she must indicate so in writing and provide said response to the requestor.

In John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a "deemed" denial of the request.

In this complaint, the Complainant submitted her request on December 13, 2004. The Custodian certifies providing a written response on June 21, 2006, approximately eighteen (18) months following receipt of said request. While the Custodian also certifies that within those eighteen (18) months, communication occurred between himself and the Complainant's Counsel regarding the OPRA request, the fact remains that the Custodian failed to provide a written response granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days.

Therefore, the Custodian's failure to provide a written response to the Complainant's request 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 and is a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that if a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency. N.J.S.A. 47:1A-5.g.

The Custodian certifies that he denied the Complainant's request on June 21, 2006 on the basis that fulfilling the request would substantially disrupt the operations of the Register's Office because the Custodian asserts that over six (6) million records would have to be checked for the redaction of social security numbers pursuant to N.J.S.A. 47:1A-1.1 and EO No. 21. In order for the Council to rule on whether the fulfillment of such request would substantially disrupt the operations of the Register's Office, the Council must decide whether the redactions anticipated by the Custodian are warranted by law.

The Custodian relies on N.J.S.A. 47:1A-1.1. in support of his assertion that social security numbers are not considered government records and must therefore be redacted. However, N.J.S.A. 47:1A-1.1 provides that:

“a social security number contained in a record required by law to be made, maintained or kept on file shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.” N.J.S.A. 47:1A-1.1.

The records requested are required by law to be made, maintained or kept on file. Additionally, the Custodian relies on EO No. 21 which also provides that social security numbers shall not be released to the public. However, on August 13, 2002, former Governor McGreevey signed EO No. 26 which rescinded the paragraph in EO No. 21 that contained the provision requiring the redaction of social security numbers.

Further, the Custodian contends that N.J.S.A. 47:1-16 mandates that a recording agency shall redact social security numbers prior to recording records. (This statute became effective October 1, 2005). The statute specifically states that: “[n]o person, including any public or private entity, shall print or display in any manner an individual's Social Security number on any document *intended for public recording* with any county recording authority.” (Emphasis added). N.J.S.A. 47:1-16 also provides that: “[w]henever a document is presented for public recording with any county recording authority and that document displays a person's Social Security number, the recording authority shall delete, strike, obliterate or otherwise expunge that number *prior to recording the document.*” (Emphasis added). The statute also provides that records recorded without social security numbers redacted will not render those document invalid.

Based on the language in the statute above, it is clear that the legislature intended that the redaction of social security numbers on records being publicly recorded would be completed on a going forward basis and not for records that have already been recorded.

Thus, records that have already been recorded by a recording agency and have already been in the public domain do not require any redactions on the basis of

confidentiality. *See Amelia Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006).

As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6. Therefore, the Custodian should release the requested records to the Complainant.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 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 (App. Div. 1996) at 107).

Because the Custodian did not provide a written response to the Complainant’s OPRA request until eighteen (18) months following receipt of such request, and unlawfully denied access to the requested records, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly

and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Whether the Complainant is entitled to prevailing party attorney's fees under OPRA?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J. Stat. Ann. § 47:1A-6 and N.J. Stat. Ann. § 47:1A-7(f), against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

This complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney’s fees along with the determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian certifies that Complainant did not submit her request on an official OPRA request form, the Custodian's attempt to fulfill said request results in the request being considered a valid OPRA request pursuant to John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
2. The Custodian's failure to provide a written response to the Complainant's request 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 and is a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Records that have already been recorded by a recording agency and have already been in the public domain do not require any redactions on the basis of confidentiality. *See* Amelia Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006). As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6. Therefore, the Custodian should release the requested records to the Complainant.
4. **The parties should meet and agree on cost or if they are unable to so agree, they should each submit a brief to the GRC on the cost issue only and the GRC will refer such matter to the Office of Administrative Law. The parties shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
5. **The Custodian shall comply with item #3 above (regarding disclosure of the requested records) within thirty (30) business days after the cost issue is resolved from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. Because the Custodian did not provide a written response to the Complainant's OPRA request until eighteen (18) months following receipt of such request, and unlawfully denied access to the requested records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

7. This complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees along with the determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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July 18, 2007