



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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VINCENT P. MALTESE, Chair  
COMMISSIONER SUSAN BASS LEVIN  
ACTING COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**March 28, 2007 Government Records Council Meeting**

Tucker Kelley  
Complainant

Complaint No. 2006-176

v.

Rockaway Township  
Custodian of Record

At the March 28, 2007 public meeting, the Government Records Council (“Council”) considered the March 21, 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. The Council, therefore, finds that:

1. Although the Custodian did ultimately provide the Complainant with all of the records responsive, the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response granting access, denying access, seeking clarification or requesting an extension, within the statutorily mandated seven (7) business days.
2. It was reasonable for the Custodian to require a scheduled appointment to inspect the records responsive pursuant to N.J.S.A. 47:1A-5.a., so as to not interfere with the daily operations of the Custodian’s office.
3. The Custodian’s actions, most notably the thirty-three (33) business days it took for her to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

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 28<sup>th</sup> Day of March, 2007

Vincent P. Maltese, Chairman  
Government Records Council

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

Government Records Council

**Decision Distribution Date: April 2, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 28, 2007 Council Meeting**

**Tucker Kelley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-176**

v.

**Rockaway Township<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** The Complainant requests to review the following records for 19 Sanders Road, Block 21403, Lots 7, 7.01, and 7.02:

- 1) Non infrastructure plans,
- 2) Request for interpretation by property owner to zoning officer,
- 3) Zoning applications,
- 4) Letters to the property owner indication property status,
- 5) Letter to property owner granting relief from ordinance 54-30.7a,
- 6) Request/letter from council requesting a status on non-conforming use, and
- 7) Approval from construction official/building inspector for pool installation.

**Request Made:** July 13, 2006

**Response Made:** August 29, 2006

**Custodian:** Mary Cilurso

**GRC Complaint Filed:** September 27, 2006

**Background**

**July 13, 2006**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests to review all construction permits, folders, non-infrastructure plans, surveys, and correspondences from all departments for 19 Sanders Road, Block 21403, Lots 7, 7.01, and 7.02.

**August 29, 2006**

Custodian's response to the OPRA request. The Custodian informs the Complainant, thirty-three (33) business days after the Complainant's OPRA request was received, that the records responsive will be available for review on September 1, 2006 at 11:00 a.m.

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

<sup>2</sup> Represented by Tiena M. Cofoni, Esq. of Edward J. Euzak Law Offices (Montville, New Jersey).  
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**August 31, 2006**

Letter from Complainant to Custodian. The Complainant requests to change the appointment time from 11:00 a.m. on September 1, 2006 to 3:30 p.m. on September 1, 2006.

**August 31, 2006**

Letter from Custodian to Complainant. The Custodian confirms the 3:30 p.m. appointment on September 1, 2006.

**September 5, 2006**

Letter from Complainant to Custodian. The Complainant is requesting that the Custodian provide him with the photographs that the Complainant believes are missing from the documents provided to him on September 1, 2006. The Complainant references a conversation from September 1, 2006 in which the Custodian had said that the Complainant would receive an answer from the Custodian as to where the missing photos were on Tuesday September 5, 2006. This letter was sent to the Custodian after the Complainant unsuccessfully attempted to reach the Custodian via telephone.

**September 7, 2006**

Letter from Complainant to Custodian. After receiving no response from the Custodian regarding the Complainant's September 5, 2006 correspondence, the Complainant faxed the letter to the Custodian again.

**September 7, 2006**

Letter from Custodian to Complainant. The Custodian informs the Complainant that the requested photographs and additional papers are available for the Complainant to review. In this letter, the Custodian states that pursuant to a telephone call earlier the same day, the Complainant has agreed to come in either Friday September 8, 2006, or Monday September 9, 2006, to review the photographs and additional papers.

**September 7, 2006**

Letter from Complainant to Custodian. The Complainant responds to the Custodian's September 7, 2006 letter. The Complainant asserts that in the previous letter from the Custodian to the Complainant, the Custodian was supposed to put in writing her response to the Complainant's request to review the photographs in their original state, not the black and white copies the Custodian had made for the Complainant. The Complainant asserts that the Custodian did not put a response to that request in writing.

**September 8, 2006**

Letter from Custodian to Complainant. The Custodian states that she does not fully understand the Complainant's OPRA request. The Custodian asks the Complainant to provide clarification.

**September 8, 2006**

Letter from Complainant to Custodian. The Complainant asks that if the Custodian feels that all requested information was provided to the Complainant that the Custodian supply the Complainant with a certification indicating so. The Complainant also attaches a copy of the Complainant's original OPRA request dated July 13, 2006 in response to the Custodian seeking clarification as to which records the Complainant is still seeking.

**September 11, 2006**

Letter from Custodian to Complainant. The Custodian explains that she needs clarification as to what response the Complainant wants her to put in writing regarding the Complainant's letter to the Custodian on September 7, 2006. The Custodian also reminds the Complainant that the documents that the Complainant requested are available for his review.

**September 11, 2006**

Letter from Complainant to Custodian. The Complainant responds to the Custodian's September 11, 2006 letter. The Complainant asks the Custodian to provide a written response as to whether the original pictures and documents, not copies, are ready for the Complainant to review.

**September 12, 2006**

Letter from Complainant to Custodian. The Complainant again asks for written notification that the photographs and additional documents are available to him in their original form because he did not receive a response from his September 11, 2006 letter to the Custodian.

**September 12, 2006**

Letter from Custodian to Complainant. The Custodian asserts that the original pictures and documents have been ready for the Complainant to review as she indicated in her September 7<sup>th</sup> and September 11<sup>th</sup> letters to the Complainant.

**September 18, 2006**

Letter from Complainant to Custodian. The Complainant believes that there are documents and non-infrastructure plans that were not made available for his review. The Complainant requests that if the Custodian believes that all records responsive to the Complainant's OPRA request have been provided to him, that she submit a certification stating same.

**September 20, 2006**

Letter from Custodian to Complainant. The Custodian asks the name of the exact documents that the Complainant believes he has not received and she will try to provide the Complainant with said documents.

**September 21, 2006**

Letter from Complainant to Custodian. The Complainant asks that the Custodian provide him with any/all documents and non-infrastructure plans that were not disclosed to the Complainant with reference to his OPRA request dated July 13, 2006.

## **September 27, 2006**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments<sup>3</sup>:

- Complainant’s OPRA request dated July 13, 2006,
- Custodian’s response to the OPRA request dated August 29, 2006,
- Letter from Complainant to Custodian dated August 31, 2006,
- Letter from Custodian to Complainant August 31, 2006,
- Letter from Complainant to Custodian September 5, 2006,
- Letter from Complainant to Custodian dated September 7, 2006,
- Letter from Custodian to Complainant dated September 7, 2006,
- Letter from Complainant to Custodian dated September 7, 2006,
- Letter from Custodian to Complainant dated September 8, 2006,
- Letter from Complainant to Custodian dated September 8, 2006,
- Letter from Custodian to Complainant dated September 11, 2006,
- Letter from Complainant to Custodian dated September 11, 2006,
- Letter from Complainant to Custodian dated September 12, 2006,
- Letter from Custodian to Complainant dated September 12, 2006,
- Letter from Complainant to Custodian dated September 18, 2006,
- Letter from Custodian to Complainant dated September 20, 2006, and
- Letter from Complainant to Custodian dated September 21, 2006.

The Complainant asserts that the Custodian failed to respond to the OPRA request for (33) business days after his OPRA request was submitted. The Complainant declares that the Custodian informed the Complainant that on September 1, 2006, the documents would be made available for his review. The Complainant alleges that upon review of the requested documents, he noticed that specific documents, photos, plans, surveys and correspondences were missing from the files that he had seen when he previously reviewed the file. The Complainant asserts that he made several attempts in writing, in person, and via telephone, all with unsuccessful outcomes, to clarify to the Custodian which documents the Complainant believes are missing. On September 15, 2006, the Complainant was able to review additional photographs, but was never granted access or denial in writing from the Custodian regarding the remainder of the records that the Complainant believes are being withheld from him.

The Complainant feels that the Custodian is willfully denying him access to records. The Complainant further alleges that the Custodian is not informing him within the statutorily mandated time limits whether his records request will be granted or denied. Furthermore, the Complainant alleges that the Custodian is scheduling when the Complainant can review the records around the Custodian’s calendar as opposed to asking the Complainant when he can come in to review the records. Ultimately, the Complainant was forced to file a Denial of Access Complaint listing these records the Complainant believes are responsive to the OPRA request but were not provided.

The Complainant contends that there has been no written response from the Custodian regarding the missing records that are responsive to this complaint, which were originally requested on July 13, 2006.

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<sup>3</sup> Additional documents that are not subject of this complaint were included.  
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**October 5, 2006**

Offer of Mediation sent to both parties. On this day, the Custodian agreed to mediate the complaint. The Complainant did not agree to mediation.

**October 17, 2006**

Request for Statement of Information sent to the Custodian.

**October 24, 2006**

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

- Complainant's OPRA request dated July 13, 2006,
- Custodian's response to the OPRA request dated August 29, 2006,
- Letter from Complainant to Custodian dated August 31, 2006,
- Letter from Custodian to Complainant dated August 31, 2006,
- Letter from Complainant to Custodian dated September 5, 2006,
- Letter from Custodian to Complainant dated September 7, 2006,
- Letter from Complainant to Custodian dated September 7, 2006,
- Letter from Custodian to Complainant dated September 8, 2006,
- Letter from Complainant to Custodian dated September 8, 2006,
- Letter from Custodian to Complainant dated September 11, 2006,
- Letter from Complainant to Custodian dated September 11, 2006,
- Letter from Custodian to Complainant dated September 12, 2006,
- Letter from Complainant to Custodian dated September 18, 2006, and
- Letter from Custodian to Complainant dated September 20, 2006.

The Custodian certifies that she received the Complainant's OPRA request just as she was leaving for vacation. The Custodian asserts that the OPRA request was left for the Clerk Stenographer while the Custodian was on vacation. The Custodian returned from vacation on July 31, 2006, and contacted the Complainant on August 29, 2006, advising him that the records responsive to his OPRA request would be available for his review as of September 1, 2006 at 11:00 a.m. The Complainant requested that the time be changed from 11:00 a.m. to 3:30 p.m. on the same day. The Custodian alleges that on September 5, 2006, the Complainant made her aware that there were files and photographs missing from the files that the Custodian provided to the Complainant on September 1, 2006. The Custodian then asserts that she made the missing documents available to the Complainant on September 7, 2006. The Custodian then alleges that she and the Complainant exchanged various letters regarding the Complainant's wishes to review the photographs in their original state as opposed to black and white copies. On September 12, 2006, the Custodian made the original pictures available to the Complainant. The Custodian further asserts that when the Complainant came to view the photographs on September 15, 2006, the Complainant informed the Custodian that he believed records responsive to his July 13, 2006 OPRA request were missing. At this time, the Custodian wrote on the OPRA form that the Complainant reviewed documents on September 15, 2006, and that she would verify with the Construction Department that all of the documents responsive to the Complainant's OPRA request were provided to the Complainant. The Custodian declares that on September 18, 2006, the Complainant wrote her a letter alleging that the Custodian was withholding additional documents responsive

to the Complainant's July 13, 2006 OPRA request. At this time, the Custodian asserts that the Complainant asked for the Custodian to send him a certification stating that the Custodian sent the Complainant all records responsive to his July 13, 2006 OPRA request. The Custodian further declares that on September 20, 2006, she faxed a letter to the Complainant asking which specific documents he felt were missing in response to his OPRA request. The Custodian asserts that she needed this information in order to provide the Complainant with the documents he believed were missing. The Custodian adds that this correspondence was ready to be faxed to the Complainant on September 19, 2006, but the Complainant instructed the Custodian only to fax correspondence to him between the hours of 9:00 am and 3:00 pm.

The Custodian contends that until she received the Denial of Access Complaint from the GRC, she had never been provided with a list of documents that the Complainant believed were missing. The Custodian further states that the documents that were erroneously omitted from the records that were given to the Complainant to review are attached for the Complainant. The Custodian provides the Complainant with copies of the non-infrastructure plans, letters to the property owner indicating the property status, and the approval from the Construction Official/Building Inspector for the pool installation with the Statement of Information. The Custodian further certifies that she was unable to locate a letter to the property owner granting relief from Ordinance 54-30.7 or a letter to the Township Council requesting a status on the non-conforming use.

The Custodian asserts that the Complainant's July 13, 2006 OPRA request included all documents related to three different properties and did not include any date limit or specific department. The Custodian goes on to state that the Complainant did not request any specific document, rather he asked for all documents regarding a property that has been developed for over 50 years, and that despite the request being ambiguous, the Custodian attempted to respond and provide the documents requested. The Custodian alleges she has never willfully denied access to records in connection with this complaint. The Custodian goes on to explain that broad OPRA requests, like this one, require a significant number of people to review a significant number of files, in many different locations, in order to provide a significant number of documents to the requestor. The Custodian asserts that it is possible that some documents were inadvertently not provided to the Complainant. The Custodian declares that several files, as well as three (3) sets of plans, were erroneously not provided to the Complainant and are being forwarded to him.

The Custodian alleges that this complaint does not involve a denial of access to a particular record requested by the Complainant. The Custodian declares that the matter now before the GRC involves an overly broad and vague OPRA request submitted to a large and busy municipality. The Custodian asserts that all efforts have been made to properly respond to this request.

Included in the Statement of Information is a certification from the Clerk Stenographer. The Stenographer asserts that upon her return from vacation on July 17, 2006, she was instructed by the Custodian to distribute the Complainant's July 13, 2006 OPRA request. The Stenographer alleges that on July 17, 2006, she distributed the Complainant's July 13, 2006 OPRA request to all departments for their response. The Stenographer further asserts that on July 31, 2006, the Custodian returned from vacation, at which time the Stenographer turned over all correspondence to the Custodian.



**October 27, 2006**

Complainant's response to the Custodian's Statement of Information with the following attachments:

- Fax cover sheet from Custodian to Complainant showing that the fax was sent at 5:10 p.m. dated October 19, 2006,
- Fax cover sheet from Custodian to Complainant showing that the fax was sent at 4:02 p.m. dated October 20, 2006, and
- Fax cover sheet from Custodian to Complainant showing that the fax was sent at 3:19 p.m. dated October 25, 2006.

After reviewing the Custodian's Statement of Information, the Complainant feels that the Custodian should have forwarded his July 13, 2006 OPRA request to someone present in the Clerk's offices, as opposed to leaving a note for the Stenographer, who was out of the office on vacation until July 17, 2006. The Complainant declares that the Custodian did not give the Stenographer any instruction to provide the Complainant with a written notification as to when the Complainant's OPRA request would be fulfilled. The Complainant also states that the first notification he received regarding the records responsive to this complaint from the Custodian occurred nineteen (19) business days after the Custodian returned from vacation, which well exceeds the statutorily mandated seven (7) business days that are required by OPRA. The Complainant also declares that the Custodian gave the Complainant an appointment when he could review the requested records. The Complainant further asserts that it is his belief that OPRA provides that records be accessible during regular business hours, not by appointment only. The Complainant also declares that he made the Custodian aware of the missing documents and photos on September 1, 2006.

The Complainant also asserts, in response to Custodian's certification, that he was shocked that the Custodian waited 42 business days to ask for clarification of his OPRA request. The Complainant further declares that the Custodian erroneously reported the conversation that took place on September 7, 2006. The Complainant contends that he was informed that black and white copies, not the originals or color copies, were available for the Complainant to review. The Complainant asserts that he was requesting color copies, as mentioned in his correspondences with the Custodian dated September 7<sup>th</sup> and 11<sup>th</sup> 2006. The Complainant further asserts that although the Custodian mentions in her certification that she would confirm with the Construction Department that all files were presented to the Complainant, the Complainant never received such confirmation. Additionally, the Complainant states that he never told the Custodian that she could only send faxes between the hours of 9:00 a.m. and 3:00 p.m., as the Custodian asserts in her certification. The Complainant attaches three (3) fax cover sheets showing that the Custodian has indeed sent him faxes after 3:00 p.m. on various occasions.

The Complainant also addresses issues with the Stenographer's certification. The Complainant asserts that the Stenographer was on vacation both before and after the Complainant submitted his July 13, 2006 OPRA request and that the Stenographer did not distribute the OPRA request to the other departments until three (3) business days after the Custodian received the request, on July 18, 2006. Lastly the Complainant alleges that he never received notification that the files from the engineering office were made available to him on August 10, 2006.

**November 8, 2006**

Custodian's response to Complainant's previous correspondence. First, the Custodian asserts that she used her best judgment when turning the Complainant's OPRA request over to the Clerk Stenographer. The Custodian further states that OPRA does not specify how the Custodian is to communicate to others with regard to the compilation of the records responsive to an OPRA request.

The Custodian also alleges that she gave the Complainant an appointment to review the records responsive in order to have someone there to assist him. The Custodian further states that she was very flexible and accommodating to the Complainant's schedule. The Custodian also asserts that in response to the Complainant's comments that there were records missing from the files he was shown, the Custodian checked her files again and asked others to check their files for additional documents. The Custodian declares that she responded appropriately to the Complainant's request to view documents the Complainant believed were missing. The Custodian further asserts that she can not be expected to know the existence and location of every document in the Municipal Building.

The Custodian further alleges that in her September 8, 2006 correspondence, she was only seeking clarification of a letter the Complainant had sent her the day before, not clarification of the July 13, 2006 OPRA request. The Custodian states that she did not receive the Complainant's September 8, 2006 fax until September 11, 2006, because the fax was placed into a general mailbox. The fax was not hand delivered to the Custodian, so she did not receive the letter until the following business day.

The Custodian declares that she has repeatedly told the Complainant that she will not issue a certification stating that all records responsive have been released because OPRA does not require a Custodian to do so. The Custodian goes on to assert that she was in fact told by the Complainant in one of their many conversations not to fax him anything after 3:00 p.m., as it will go unaddressed until the following day when the Complainant returns to work.

The Custodian further alleges that although the August 10, 2006 memorandum, informing the Complainant as to when documents would be ready for review, may not have been provided to the Complainant, the Clerk Stenographer communicated this information to the Complainant verbally. The Custodian declares that she has done her best to supply the Complainant with all of the records responsive to his July 13, 2006 OPRA request and she has not willfully violated OPRA with regard to this request or any others.

**November 9, 2006**

Complainant's response to Custodian's previous correspondence. The Complainant takes issue with some of the points raised in the Custodian's most recent correspondence. The Complainant reiterates that the Custodian mishandled the Complainant's July 13, 2006 OPRA request by leaving it for the Stenographer. The Complainant states that OPRA clearly directs the Custodian to make the records responsive as soon as possible. The Complainant further asserts that the Custodian chose to leave the request for the Stenographer, who was on vacation, which in turn prolonged the Complainant's access to the records responsive.

Additionally, the Complainant declares that it is his belief that OPRA allows him to view the records responsive during normal business hours, not at an appointed time, as specified by the Custodian. The Complainant also refers back to his previous correspondence when responding to the Custodian's assertion that the Complainant requested that faxes not be sent to him after 3:00 p.m. The Complaint again raises the argument that the Custodian had in fact been sending faxes to the Complainant after 3:00 p.m. This was made evident in the Complainant's previous submission of fax cover sheets indicating that faxes had indeed been sent from the Custodian to the Complainant after 3:00 p.m. on various occasions.

Regarding the memo of August 10, 2006, stating when the records responsive could be reviewed, the Complainant is asking that the Custodian provide the GRC with a date-stamped copy of this memo, as the Complainant still asserts that he was never made aware of its contents. Lastly, the Complainant declares that he has not, to date, received the approvals for the pool construction from the Custodian. The Complainant states that he feels the Custodian has willfully denied him access to the records responsive to his July 13, 2006 OPRA request. The Complainant goes on to assert that it is the Custodian's poor judgment regarding the distribution of the OPRA request that has kept the Complainant from receiving the records responsive in the seven (7) business days as required by law.

#### **November 22, 2006**

Letter from Custodian to Complainant. The Custodian provides the Complainant with the certificate approving the pool construction.

#### **February 21, 2007**

Letter from Custodian to GRC. The Custodian submits a certification to the GRC in which she certifies that all records responsive have been provided to the Complainant.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the records responsive to the Complainant's OPRA request?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis 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 therefore ...” N.J.S.A. 47:1A-5.g.

OPRA further 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.

The Complainant asserts that on July 13, 2006 he submitted an OPRA request to the Custodian. The Complaint further asserts that thirty-three (33) business days after his OPRA request was submitted, the Custodian responded to him. The Complainant declares that the Custodian informed the Complainant that the records responsive would be made available on September 1, 2006 at 11:00 a.m. Upon review of the requested documents, the Complainant notified the Custodian that specific documents, photos, plans, surveys and correspondences were missing from the files, which he had previously reviewed. The Complainant asserts that several attempts were made via telephone, in writing, and in person, all with unsuccessful outcomes, to clarify to the Custodian which documents the Complainant believes are missing. On September 15, 2006, the Complainant was able to review additional photographs, but was never granted access or denied access in writing from the Custodian regarding the remainder of the records that the Complainant believes are being withheld from him.

The Complainant alleges that the Custodian did not inform the Complainant within the statutorily mandated time limits whether his records request would be granted or denied. The Complainant states that the first notification he received regarding the records responsive to this complaint from the Custodian occurred nineteen (19) business days after the Custodian returned from vacation, which well exceeds the statutorily mandated seven (7) business days that are required by OPRA. Ultimately, the Complainant was forced to file a Denial of Access Complaint listing the records responsive that were not provided by the Custodian. The Complainant contends that there has been no written response from the Custodian regarding the missing records that are responsive to this complaint, which were originally requested on July 13, 2006.

The Custodian certifies that she received the Complainant's OPRA request just as she was leaving for vacation. The Custodian asserts that the OPRA request was left for the Clerk Stenographer while the Custodian was on vacation. The Custodian returned from vacation on July 31, 2006, and contacted the Complainant on August 29, 2006, advising him that the records responsive to his OPRA request would be available on September 1, 2006, at 11:00 a.m. The Custodian alleges that on September 5, 2006, the Complainant made the Custodian aware that there were files and photographs missing from the files that the Custodian provided the Complainant on September 1, 2006. The Custodian then asserts that she made the missing documents available to the Complainant on September 7, 2006. The Custodian then declares that she and the Complainant exchanged various letters regarding the Complainant's request to review the photographs in their original state, as opposed to black and white copies. On September 12, 2006, the Custodian made the original pictures available to the Complainant. The Custodian further asserts that when the Complainant came to view the photographs on September 15, 2006, the Complainant informed the Custodian that he believed that records responsive to his July 13, 2006 OPRA request were missing. At this time, the Custodian wrote on the OPRA form that the Complainant reviewed documents on September 15, 2006, and that she would verify with the Construction Department that all of the documents responsive to the Complainant's OPRA request were provided to the Complainant.

The Custodian declares that on September 18, 2006, the Complainant wrote her a letter alleging that the Custodian was withholding additional documents responsive to the Complainant's July 13, 2006 OPRA request. At this time, the Custodian asserts that the Complainant asked for the Custodian to send him a certification stating that all records responsive to the July 13, 2006 OPRA request have been provided to the Complainant. The Custodian further declares that on September 20, 2006, she faxed a letter to the Complainant asking which specific documents the Complainant felt were missing in response to the OPRA request. The Custodian asserts that she needed this information in order to provide the Complainant with the documents the Complainant believed were missing.

The Custodian contends that until she received the Denial of Access Complaint from the GRC, she had never been provided with a list of documents that the Complainant believed were missing. The Custodian asserts that the Complainant's July 13, 2006 OPRA request included all documents related to three different properties and did not include any date limit or specific department. The Custodian goes on to state that the Complainant did not request any specific document, rather he asked for all documents regarding a property that has been developed for over 50 years, and that despite the request being ambiguous, the Custodian attempted to respond and provide the documents requested.

The Custodian alleges she has never willfully denied access to records in connection with this complaint. The Custodian goes on to declare that broad OPRA requests, like this one, require a significant number of people to review a significant number of files in many different locations, and to provide a significant number of documents. The Custodian asserts that it is possible that some documents were inadvertently not provided to the Complainant. The Custodian asserts that several files, as well as three (3) sets of plans, that were erroneously not provided to the Complainant, were being forwarded to him along with the Statement of Information.

The Custodian alleges that this complaint does not involve a denial of access to a particular record requested by the Complainant. Instead, the Custodian asserts that this complaint involves an overly broad and vague OPRA request submitted to a large and busy municipality. The Custodian asserts that all efforts have been made to respond to this request.

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.

In this case, the Custodian failed to grant access, deny access, request an extension or seek clarification of the requested records, within the statutorily mandated seven (7) business days from receipt of said request. As indicated in N.J.S.A. 47:1-A.5.i, a custodian's failure to respond within the required seven (7) business days is a "deemed" denial. If the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's OPRA request, the Custodian should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew that 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.

Additionally, in the recent Appellate Division decision NJ Builders Association v. NJ Council on Affordable Housing (App. Div. January 2007), the Court found that in the event of an extensive request, in that case thirty-nine (39) separate OPRA requests, it is not unreasonable for the Custodian to request an extension to fulfill the OPRA requests. Similarly in the complaint now before the Council, the Custodian asserts that the Complainant is requesting all documents related to three different properties without including any date limit or specific department. It would not have been unreasonable for the Custodian to request an extension to fulfill this OPRA request, knowing that there are a significant number of records responsive that have to be gathered from several departments. However, the Custodian failed to not only request an extension from the Complainant, but failed to respond to this OPRA request entirely, for thirty-three (33) business days, therefore creating a "deemed" denial of the request.

In the Complaint now before the Council, the Custodian knew that she would be leaving for vacation before she could fulfill the Complainant's voluminous OPRA request. While best practices dictates that the Custodian communicate to the departments maintaining the requested records immediately upon receiving an OPRA request, the Custodian left this OPRA request to be distributed to the departments by the Clerk Stenographer, who was on vacation at the time the request was submitted. Regardless of the Custodian's vacation schedule, an extension should have been requested, pursuant to Paff and NJBA, or the Custodian should have had someone else fulfill the request in her absence, releasing the records responsive within the statutorily mandated seven (7) business days.

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

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)<sup>4</sup>, the Superior Court references the holding of Mag that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents." *Id.*<sup>5</sup>

In the GRC's decision in Phillip Boggia v. Borough of Oakland, 2005-36 (October 2005), the Council found that OPRA was not intended to require a custodian to do research in providing access to government records. See also Bent, *supra*, 381 N.J. Super. at 37 (holding that the general request for information neither identified nor described with any specificity the records sought, therefore, there was no unlawful denial of access).<sup>6</sup>

Thus, it may be concluded that when a complainant's request is overbroad and unclear, the burden is on the complainant to clarify the request because "agencies are required to disclose only "identifiable" government records." As portions of the Complainant's request are for "all" documents, these portions are considered overbroad and require clarification from the Complainant as to the specific documents being sought.

In Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Council found that, "...in the case of the records that needed clarification, there is no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response."

In this complaint, the Custodian asserts that the Complainant's OPRA request included all documents related to three different properties and did not include any date limit or specific department. The Custodian contends that the Complainant did not request any specific document, rather he asked for all documents regarding a property that has been developed for over 50 years. Regardless of the vagueness of this OPRA

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<sup>4</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>5</sup> As stated in Bent.

<sup>6</sup> The Court affirmed the GRC decision in Michael Bent v. Stafford Police Department, Complaint No. 2004-78 (October 2004).

request, the Custodian is statutorily mandated to seek clarification for any requests deemed broad or unclear within seven (7) business days. However, the Custodian in this complainant failed to contact the Complainant for thirty-three (33) business days after the request was submitted. In fact, the Custodian did not ask for any clarification of the Complainant's July 13, 2006 OPRA request until September 8, 2006, forty-two (42) business days after the request was submitted.

Because the Custodian failed to provide a written response to the Complainant's July 13, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was "deemed" denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

### **Whether the Custodian unlawfully violated OPRA by scheduling an appointed time for review of the records responsive?**

OPRA provides for the inspection of a government record. Specifically, OPRA states that:

"...[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours..." N.J.S.A. 47:1A-5.a.

The Complainant asserts that OPRA affords him the right to review the records responsive during normal business hours, not at an appointed time, as is required by the Custodian.

The Custodian claims that the Complainant was given an appointment to review the records responsive in order to have someone there to assist him, should he need it. The Custodian further claims that she was very flexible and accommodating to the Complainant's schedule, changing the appointment time at the Complainant's request.

OPRA provides that a Custodian shall permit the inspection of records during regular business hours pursuant to N.J.S.A. 47:1A-5.a. Based on the voluminous request, it was reasonable for the Custodian to require a scheduled appointment to examine the requested documents. Therefore, it was reasonable for the Custodian to require a scheduled appointment to inspect the records pursuant to N.J.S.A. 47:1A-5.a., so as to not interfere with the daily operations of the Custodian's office.

### **Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?**

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 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.

The Complainant alleges that the Custodian was in violation of OPRA due to the untimely response to the Complainant’s July 13, 2006 OPRA request. The Complainant declares that the first notification he received regarding the records responsive to this complaint from the Custodian occurred thirty-three (33) business days after the OPRA request was made, which well exceeds the statutorily mandated seven (7) business days that are required by OPRA. It is because of this excessive timeliness violation of OPRA that the Complainant alleges that the Custodian knowingly and willfully denied the Complainant access to the records responsive to the OPRA request.

The Custodian asserts that she has done her best to supply the Complainant with all of the records responsive to the July 13, 2006 OPRA request and she has not willfully violated OPRA with regard to this request or any others.

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).

The evidence of record indicates that the Custodian violated OPRA by failing to provide a response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days. However, after thirty-three (33) business days, the Custodian communicated regularly with the Complainant regarding this voluminous request and ultimately provided the Complainant with all records responsive. The Custodian’s actions, most notably the thirty-three (33) business days it took for her to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian did ultimately provide the Complainant with all of the records responsive, the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response granting access, denying access, seeking clarification or requesting an extension, within the statutorily mandated seven (7) business days.
2. It was reasonable for the Custodian to require a scheduled appointment to inspect the records responsive pursuant to N.J.S.A. 47:1A-5.a., so as to not interfere with the daily operations of the Custodian's office.
3. The Custodian's actions, most notably the thirty-three (33) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

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Date: March 21, 2007