



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

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

FINAL DECISION

May 30, 2007 Government Records Council Meeting

Yuan (Kellie) Fang
Complainant

Complaint No. 2006-93

v.

NJ Department of Transportation
Custodian of Record

At the May 30, 2007 public meeting, the Government Records Council (“Council”) considered the May 23, 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. Because OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005).
2. Because the Custodian’s March 15 and March 20, 2006 responses to Complainant’s OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.
3. Custodian’s actions do not meet the legal standard for 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. However, the Custodian’s actions do appear to be at least negligent regarding his knowledge of OPRA.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box



006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of May, 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: June 4, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting**

**Yuan (Kellie) Fang¹
Complainant**

GRC Complaint No. 2006-93

v.

**Department of Transportation²
Custodian of Records**

Records Relevant to Complaint:

1. Department of Transportation (“Department”) disciplinary action records, including major and minor discipline, occurring in 2004.³ The records should include:
 - 1) Number of total disciplinary actions;
 - 2) Each disciplinary action should include the following information:
 - i. Employee’s job category and EEO category,
 - ii. The reason for discipline,
 - iii. Initial discipline recommended, and
 - iv. The final discipline posted by hearing officer for the Department.
2. Department records of any civil lawsuit and any complaint to other State or Federal agencies, such as but not limited to the EEOC, Division of Civil Rights (“DCR”), Merit Board, or Office of Administrative Law, by the employee or employees of the Department in 2003 and 2004. The records should include:
 - 1) Number of total cases,
 - 2) Details of each case. Each case should include:
 - i. Employee’s job category and EEO category,
 - ii. The reason for lawsuit or complaint,
 - iii. Settlement reached with details of the outcome, such as the relief or payment to the complainant, and any punishment levied against the defendant, and
 - iv. Court decisions against the Department, such as fines or fees.
3. Department records of any OPRA requests during 2004 and 2005, listed as follows:
 - 1) Request by non-employees of the Department
 - i. Total number of requests,
 - ii. Total number granted,
 - iii. Total number denied,
 - 2) Request by employee(s) of the Department,
 - i. Total number of requests,

¹ No legal representation listed on record.

² Represented by DAG Albert D. Barnes, on behalf of the NJ Attorney General (Trenton, NJ).

³ On the Complainant’s Denial of Access Complaint form, she includes the calendar year of 2003, but she did not include such year on her original request form.

- ii. Total number granted,
- iii. Total number denied,
- iv. For those denied requests, give brief reason of denial, and
- v. Employee's job category and EEO category of all the requests.

Request Made: March 14, 2006 for items #1 and #2 of the records listed above and March 16, 2006 for item #3 of the records listed above.

Response Made: March 15, 2006 for items #1 and #2 of the records listed above and March 20, 2006 for item #3 of the records listed above.

Custodian: Alfred Brenner

GRC Complaint Filed: April 5, 2006

Background

March 14, 2006 and March 16, 2006

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

March 15, 2006

Custodian's first response to the OPRA request for items #1 and #2 of the records listed above occurs one (1) business day following receipt of the request. The Custodian states that he received the Complainant's OPRA request. The Custodian states that the requested information is not readily available and he will have to contact several units within the Department to obtain the records. The Custodian also states that if the Complainant wishes to have the records mailed to her, the Custodian will notify the Complainant of the amount due and the records will not be released until payment has been received. The Custodian further states that if the Complainant would like to review the records onsite, she will be advised who to contact to set up an appointment. Additionally, the Custodian states that if the Complainant has any further questions, she should contact Margaret Fisher at Records & Information Management and listed Fisher's telephone number.

March 20, 2006

Custodian's first response to the OPRA request for item #3 of the records listed above occurs two (2) business days following receipt of the request. The Custodian states that he received the Complainant's OPRA request. He states that the requested information is not readily available and he will have to contact several units within the Department to obtain the records. The Custodian again states that if the Complainant wishes to have the records mailed to her, the Custodian will notify the Complainant of the amount due and the records will not be released until payment has been received. The Custodian further states that if the Complainant would like to review the records onsite, she will be advised who to contact to set up an appointment. Additionally, the Custodian states that if the Complainant has any further questions, she should contact Margaret Fisher at Records & Information Management and listed Fisher's telephone number.

March 29, 2006

Custodian's letter to the Complainant regarding the OPRA requests. The Custodian states that the request for records pertaining to item #1 above is for general

information which is not covered under the requirements of OPRA pursuant to N.J.S.A. 47:1A-1.1. The Custodian also states that OPRA only requires a response to a request for specific records. Pursuant to case law, a request is invalid where it requires a custodian to conduct research and correlate data from various records. See MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534 (App.Div. 2005). The Custodian further states that based on the case law, the Department will not provide answers to the questions contained in the request and that this decision is not considered to be a denial of access to documents.

Additionally, the Custodian states that this request will be closed on March 29, 2006. The Custodian also provides the Complainant with a website that provides information on decisions made by the Office of Administrative Law.

In response to the request for records pertaining to item #2 above, the Custodian states that these records cannot be provided because they are personnel records exempt from disclosure under OPRA and the Department's regulations at N.J.A.C. 16:1A-1.8.d.7. The Custodian further states that this request will be closed on March 29, 2006.

The Custodian states in response to the request for records pertaining to item #3 listed above, that the request is for general information which is not covered under the requirements of OPRA pursuant to N.J.S.A. 47:1A-1.1. The Custodian also states that OPRA only requires a response to a request for specific records. Pursuant to case law, a request is invalid where it requires a custodian to conduct research and correlate data from various records. See MAG, supra. Based on the case law, the Department will not provide answers to the questions contained within the request and that this decision is not considered to be a denial of access to documents. Additionally, the Custodian states that this request will be closed on March 29, 2006.

April 5, 2006

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

- Complainant's OPRA requests dated March 14, 2006 and March 16, 2006,
- Letter from the Custodian to the Complainant dated March 29, 2006, and
- Letter from the Complainant to the GRC, undated.

The Complainant states that she sent a total of three (3) OPRA requests to the Department on March 14, 2006 and March 16, 2006. The Complainant also states that the Custodian informed the Complainant in a letter dated March 29, 2006 that the requests have been closed.

The Complainant asserts that she cannot imagine why none of the three (3) requests are considered valid OPRA requests. The Complainant also asserts that she did not request any records with personnel data and that it is the Custodian's responsibility to redact any personnel information contained in the records. The Complainant further asserts that she cannot understand what the Custodian means when he states that the requests will be closed on March 29, 2006. The Complainant questions whether this means that the requests were granted, denied or unfilled.

Furthermore, the Complainant states that the Custodian's response is unclear and the Custodian is using the word "closed" instead of "denied" to avoid the appeal process and that is not acceptable.

May 23, 2006

Offer of Mediation sent to both parties.

May 24, 2006

The Complainant agrees to mediate this complaint. The Custodian did not respond to the offer of mediation.

June 5, 2006

Request for the Statement of Information sent to the Custodian.

June 12, 2006

E-mail from the Custodian to the GRC. The Custodian states that there is a "global" settlement of a number of litigated matters involving the Department and the Complainant, including this complaint and another complaint the Complainant has filed with the GRC. The Custodian suggests that because of the impending settlement process, adjudication of this matter should be deferred until the conclusion of the settlement process to avoid further time and expense to both parties.

June 13, 2006

E-mail from the GRC to the Complainant. The GRC advises the Complainant that the Custodian has proposed deferring the adjudication of this complaint until a settlement is reached regarding the Complainant's pending litigation with the DCR. The GRC also advises the Complainant that only she can make any amendments to the Denial of Access Complaint and if she wishes to do so, to please notify the GRC by June 19, 2006.

June 15, 2006

E-mail from the Complainant to the GRC. The Complainant states that her complaint with the GRC is OPRA-related, and therefore it is not related to her complaint with the DCR. The Complainant states that the real issue regarding her OPRA request is whether or not the records are public records.

The Complainant attests that it is unknown when the litigation regarding her complaint with the DCR will be settled and whether or not the DCR will include the litigation information with this complaint. The Complainant asserts that the Custodian is trying to avoid this complaint by suggesting that this matter should be deferred.

The Complainant states that she agreed to mediation, which would have saved time and expense, but the Custodian never agreed. The Complainant also states that she would appreciate a fair judgment from the GRC.

June 20, 2006

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

- Complainant's OPRA request receipts dated March 14, 2006 and March 16, 2006,

- Letters from the Custodian to the Complainant dated March 15, 2006 and March 20, 2006,⁴ and
- Certified mail receipts for the letters dated March 15, 2006 and March 20, 2006, signed and dated April 1, 2006.

The Custodian certifies that on March 14, 2006 the Complainant hand-delivered to the Department the OPRA requests for items #1 and #2 of the records listed above. The Custodian also certifies that on March 15, 2006 he sent a letter to the Complainant via certified mail confirming receipt of such requests and indicating that the requests were pending review.

The Custodian certifies that on March 16, 2006 the Complainant hand-delivered to the Department the OPRA request for item #3 of the records relevant to this complaint listed on page one above. The Custodian also certifies that he sent a letter on March 20, 2006 to the Complainant via certified mail confirming receipt of such requests and indicating that the requests were pending review.

In addition, the Custodian certifies that after consultation with counsel, he was advised that the Complainant's OPRA request for item #1 of the records listed above was a request for general information and no records could be provided. The Custodian also certifies that counsel advised that the Complainant's OPRA request for item #2 of the records listed above was a request for personnel records which are exempt from disclosure under OPRA and the Department's regulations at N.J.A.C. 16:1A-1.8(d)(7). The Custodian further certifies that counsel advised that the Complainant's OPRA request for item #3 of the records listed above was a request for general information and no records could be provided.

Further, the Custodian certifies that on April 1, 2006 the Complainant signed the certified mail receipts indicating that she had received the Custodian's March 29, 2006 letter. The Custodian asserts that he did not receive any further correspondence from the Complainant. The Custodian also certifies that there are no Department records which contain a compilation of the specific information outlined in the Complainant's OPRA request for any of the records requested by Complainant.

The Custodian asserts that item #2 of the records listed above concerns Department disciplinary action records, which are personnel records not considered government records and not available to the public pursuant to N.J.S.A. 47:1A-10. The Custodian asserts that such records are also not disclosable pursuant to the Department's regulations at N.J.A.C. 16:1A-1.8(d)(7). The Custodian further asserts that the request was lawfully denied since the Department is foreclosed by statute and by regulation from disclosing personnel records.

The Custodian contends that each of the three (3) OPRA requests are requests for general information and it has been determined that there are no records maintained by the Department which contain a compilation of the data, information, and statistics specified by the requests. The Custodian also asserts that research and correlation among

⁴ The Complainant did not acknowledge receipt of these letters.

various Department records, including such non-public records as disciplinary and other personnel records, would be required to provide such data, information, and statistics specified in the requests.

Additionally, the Custodian asserts that “OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian’s possession.” See MAG, supra, quoting Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003)).

June 23, 2006

Complainant’s response to the Custodian’s SOI. The Complainant states that she is surprised that there are no records maintained by the Department which contain a compilation of the data, information, and statistics specified in her OPRA requests. The Complainant contends that her requests are very basic, such as the number of total Departmental disciplinary actions in a specific year. The Complainant asserts that the issues are as follows:

- 1) are there any policies or regulations that specify how the Department should keep its records;
- 2) are there any policies or regulations that specify how the Department should report to higher authority;
- 3) are there any policies or regulations that specify how the Department should be audited by other agencies;
- 4) are there any policies or regulations that specify how the Department should perform some kind of analysis;
- 5) are there any policies or regulations that concern employee actions in the Department;
- 6) are there any policies or regulations that concern litigation;
- 7) are there any policies or regulations that concern OPRA?

Analysis

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

OPRA states that:

Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency... shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record.

...

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record. N.J.S.A. 47:1A-10.

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 the matter before the Council, the Complainant made an OPRA request for disciplinary action records from the Department for 2004, which records are to include the number of total disciplines, the employee’s job category and EEO category, the reason for discipline, the initial discipline recommended and the final discipline posted by the Department hearing officer. The Custodian contends that the request represents a request for general information which is not covered under the requirements of OPRA. The Custodian also asserts that research and correlation among various Department records, including such non-governmental records as disciplinary and other personnel records, would be required to provide such data, information, and statistics specified in the requests. The Custodian further asserts that “OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian’s possession.” See MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), quoting Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003)). Finally, The Custodian certifies that there are no Department records which contain a compilation of the specific information outlined in the Complainant’s OPRA request for these records.

The Complainant also requests Department records of any civil lawsuit and civil complaint filed by all employees of the Department in 2003 and 2004 to any other State or Federal agency, including the employee’s job category and EEO category as well as all

relevant details of the matters. The Custodian states that these records are personnel records exempt from disclosure under N.J.S.A. 47:1A-10 and the Department's regulations at N.J.A.C. 16:1A-1.8(d)(7). The Custodian certifies that there are no Department records which contain a compilation of the specific information outlined in the Complainant's OPRA request for these records.

Finally, the Complainant requests Department records of all OPRA requests made in 2003 and 2004, showing the total numbers of requests, those granted and denied, broken down by Department employees and non-employees. The Custodian asserts that this represents a request for general information and no records would be provided. The Custodian further certifies that there are no Department records which contain a compilation of the specific information outlined in the Complainant's OPRA request for these records.

As disciplinary records of employees within the Department, item #1 of the Complainant's OPRA request are personnel records within the meaning of N.J.S.A. 47:1A-10. They are therefore exempt from disclosure, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension shall be disclosable. N.J.S.A. 47:1A-10. Moreover, data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employees or for the receipt of a public pension, but not including any detailed medical or psychological information, shall be disclosable. *Id.* See also N.J.A.C. 16:1A-1.8(d)(7); N.J.S.A. 47:1A-9.a.

While certain data discussed above would normally be disclosable, the volume of Complainant's request, *i.e.*, records of all major and minor disciplinary actions involving Department employees throughout 2003, is overly broad, as is the Complainant's request for Department records of civil lawsuits and other complaints filed by employees of the Department in 2003 and 2004 and the Complainant's request for Department records of OPRA requests during 2004 and 2005.

"[U]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt." MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534, 549 (App.Div. 2005). A request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid under OPRA.

In MAG, the Division of Alcoholic Beverage Control sought to revoke MAG's liquor license for various violations. Trying to establish a defense of selective prosecution, MAG filed an OPRA request with the Division, seeking "**all documents or records ...** that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person [who], after leaving the licensed premises, was involved in a fatal auto accident," and "**all documents or records** evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." *Id.* at 539-40 (Emphasis added). MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

the documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations. *Id.* at 540.

The court found that this was an invalid OPRA request with which the Custodian was not obligated to comply. *Id.* at 553. The court found it very significant that MAG “failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.” *Id.* at 549. Because MAG failed to identify any particular documents by name, type of document, date range, or any other identifying characteristic, the custodian would have been required

to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense....Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted. *Id.*

The court therefore found that “MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.” *Id.* at 550. See also New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App.Div. 2007)(holding that a five-page document listing thirty-eight separate requests all of which included a request for “any and all data” failed to specifically identify the documents sought as required by N.J.S.A. 47:1A-5.f; OPRA did not, therefore, require the custodian to produce the records within seven business days); Bent v. Township of Stafford, 381 N.J. Super. 30 (App.Div. 2005)(finding that a five-part request for the “entire file” of his criminal investigation and “the factual basis underlying documented action and advice to third parties” is not a proper request for public records under OPRA, and the information it seeks is beyond the statutory reach of OPRA); Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 17, 2003)(dismissing request for annual costs of liability settlements by the Township for each of five years, including costs for “legal defense of said items[,]” because the requestor failed to identify any specific record in the custodian's possession and holding that OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records).

Therefore, a request for records must identify particular records within the custodian's possession by name, date, docket number, type of record, or some other specific identifying characteristic in order to be valid under OPRA.

Moreover, the Custodian certifies that no record exists which represents a compilation of the information requested.

OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist. See MAG, supra, 375 N.J.Super. at 546. The Custodian, therefore, has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6.

However, in this case, the Custodian's March 15 and March 20, 2006 responses to Complainant's OPRA requests was not adequate because it 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.⁵ N.J.S.A. 47:1-A.5.i. A written response to an OPRA request which fails to specifically grant access, deny access, request clarification or ask for an extension of time within which to respond is inadequate under OPRA. N.J.S.A. 47:1A-5.i, see Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2004-139 (January 2005).

Therefore, because the Custodian's March 15 and March 20, 2006 responses to Complainant's OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

"...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to

⁵ 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.

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 Custodian responded to the Complainant’s OPRA request within seven (7) business days but failed to grant access, deny access, request clarification, or ask for an extension of time within which to respond to Complainant’s OPRA request.

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).

In light of the legal standards set forth above, and because the Custodian responded to Complainant’s OPRA request within the statutorily required seven (7) business day period, and because the Custodian has met the burden of proving that the denial of Complainant’s OPRA request was authorized by law, the Custodian’s actions do not meet the legal standard for 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. However, the Custodian’s actions do appear to be at least negligent regarding his knowledge of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005).
2. Because the Custodian’s March 15 and March 20, 2006 responses to Complainant’s OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.

3. Custodian's actions do not meet the legal standard for 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. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

Prepared By:

Karyn Gordon
In House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2006