



State of New Jersey
GOVERNMENT RECORDS COUNCIL

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

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

FINAL DECISION

November 28, 2007 Government Records Council Meeting

Julian Grauer
Complainant

Complaint No. 2007-3

v.

NJ Department of Treasury
Custodian of Record

At the November 28, 2007 public meeting, the Government Records Council (“Council”) considered the November 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. Based on the court’s holding in Board of Chosen Freeholders of Burlington County v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC’s decision in Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA. Therefore, the Custodian unlawfully denied access to the requested record pursuant to N.J.S.A. 47:1A-1. and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Based on the evidence of record and the GRC’s definition of “medium” in NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), on-site inspection of the records responsive to the Complainant’s November 3, 2006 OPRA request is not a reasonable substitute for copies of portions of the requested records.
3. The GRC has held that agency policy does not supersede the disclosure requirements of OPRA. See Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007) and Renna v. County of Union, GRC Complaint No. 2004-136 (July 2005). Therefore, the New Jersey Department of the Treasury’s policy that bids submitted will only be available to the public for inspection, not copying, does not supersede OPRA under N.J.S.A. 47:1A-9.a. or N.J.S.A. 47:1A-9.b.



4. Even though the Custodian unlawfully denied access to the requested record, the Custodian has advised the Complainant that copies of the requested records are now available. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 28th Day of November, 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: November 29, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Julian Leonard Grauer¹
Complainant**

GRC Complaint No. 2007-03

v.

**New Jersey Department of the Treasury,
Division of Purchase and Property²
Custodian of Records**

Records Relevant to Complaint: Inspection of a bid proposal submitted by American Management Systems (“CGI-AMS”) in response to Solicitation No. 36192.

Request Made: November 3, 2006

Response Made: November 13, 2006

Custodian: Barbara O’Hare

GRC Complaint Filed: November 29, 2006

Background

November 3, 2006

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests inspection of the records relevant to this complaint listed above on an official OPRA request form.

November 13, 2006

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that the bid proposal submitted by CGI-AMS is prepared for the Complainant’s inspection. The Custodian states that the Complainant must contact the Custodian to set up an appointment to inspect the bid proposal.

November 29, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”).³

¹ No representation listed on record.

² Represented by DAG Clifford Rones, on behalf of the NJ Attorney General.

³ The Complainant’s OPRA request sought inspection of the requested records. The Denial of Access complaint was filed after the Custodian denied the Complainant access to copies of portions of the requested record.

The Complainant states that he submitted an OPRA request to the Custodian via e-mail on November 3, 2006. The Complainant further states that the Custodian responded to him via e-mail on November 13, 2006 advising the Complainant that the bid proposal was ready for the Complainant's inspection and to schedule an appointment to inspect the bid proposal. The Complainant asserts that an appointment date of November 22, 2006 was set. The Complainant asserts that during the inspection, the Complainant asked the Custodian to copy certain portions of the bid proposal. The Complainant states that the Custodian denied the Complainant's request, stating that the New Jersey Department of the Treasury and CGI-AMS had entered into an agreement which allowed inspection of the bid proposal but which prohibited making copies thereof and that this policy is applied to many bids received by Treasury.

The Complainant asserts that since millions of dollars are being paid out by the state and that many of the bid proposals received in response to requests for proposals ("RFP") are voluminous, prohibiting copies effectively limits public access and is inconsistent with N.J.S.A. 47:1A-5.a. Further, the Complainant states that the RFP specifically states that the entire contents of a proposal are public record once the proposal is opened. The Complainant finally asserts that the "no copying" policy of the New Jersey Department of the Treasury deviates from both OPRA and the RFP standard.

December 14, 2006

Letter from the Custodian to the Complainant. The Custodian states that the New Jersey Department of the Treasury maintains its position that the requested records are part of a copyrighted work that can only be inspected and not copied.

January 5, 2007

Offer of Mediation sent to both parties.

January 12, 2007

The Custodian agrees to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

January 22, 2007

Request for the Statement of Information sent to the Custodian.

January 22, 2007

E-mail from the Complainant to the GRC. The Complainant states that there are two facts not in dispute. The Complainant states that the first fact is that during September 2003, CGI-AMS submitted a bid proposal (the subject of this complaint) to the New Jersey Department of the Treasury in response to an RFP. The Complainant states that one of the conditions to submitting an RFP is:

“[t]he entire content of every bid proposal will be publicly opened and become a public record. This is the case notwithstanding any statement to the contrary made by a bidder in its bid proposal. All bid proposals, as public record, are available for public inspection. Interested parties can make an appointment to inspect bid proposals received in response to this RFP with the Purchase Buyer Bureau.” 1.4.6 Contents of Bid Proposal.

The Complainant states that the second fact is that CGI-AMS asserted copyright protection of their bid in September 2006, and subsequently required the New Jersey Department of the Treasury to enter into an agreement with CGI-AMS in which inspection, but not copying, of bids was allowed. The Complainant further states that CGI-AMS agreed to defend any action taken against the New Jersey Department of the Treasury should anyone contest the prohibition against copying.

The Complainant argues that the Custodian's denial of access to copies of the bid proposal based on the New Jersey Department of the Treasury's commonly implemented copyright agreements is effectively using the administrative process to supersede OPRA.

The Complainant further asserts that pursuant to 17 U.S.C.A. § 108, publishing or broadcasting a copyrighted work could constitute copyright infringement but that making copies of a protected work is still generally permissible. The Complainant contends that even if the New Jersey Department of the Treasury accepts CGI-AMS's contention of copyright protection, it does not necessarily mean that copying is prohibited. The Complainant further asserts that the New Jersey Department of the Treasury should act within the guidelines of a library or archive. Specifically:

“[e]xcept as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any employee acting within the scope of their employment, to reproduce no more than one copy ... of a work...” 17 U.S.C.A. §108 (a).

The Complainant finally states the Custodian has not argued that the requested records contain trade secrets or proprietary information,⁴ which makes the Custodian's denial by assertion of copyright protection not supported by law.

January 24, 2007

Letter from the Custodian to the GRC. The Custodian requests an extension of the deadline to file the Statement of Information.

January 24, 2007

Letter from the GRC to the Custodian. The GRC grants the Custodian an extension until February 5, 2007.

February 2, 2007

Custodian's Statement of Information (“SOI”) with the following attachments:⁵

- Complainant's OPRA request dated November 3, 2006.
- Letter from the Custodian to the Complainant dated November 13, 2006.
- Letter from the Custodian to the Complainant dated December 14, 2006.

⁴ N.J.S.A. 47:1A-1.1: “[a] government record shall not include... trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.”

⁵ The Custodian attached additional information not applicable to this complaint.

- Letters between the Custodian and CGI-AMS dated August 22, 2006; August 28, 2006; September 14, 2006; and September 20, 2006.

The Custodian states that she responded to the Complainant's November 3, 2006 request on November 13, 2006 informing the Complainant that the bid proposal was prepared for on-site inspection and that an appointment would need to be made for the inspection. The Custodian asserts that the New Jersey Department of the Treasury and CGI-AMS entered into an agreement limiting access of the bid proposal to inspection only.

February 9, 2007

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian's Counsel an extension until February 15, 2007 in order to submit supplemental information pertaining to Item No. 10 of the SOI.

February 15, 2007

Letter from the Custodian's Counsel to the GRC. Custodian's Counsel states that the Custodian received the Complainant's OPRA request to inspect the bid proposal on November 3, 2006. Custodian's Counsel also states that the Custodian e-mailed the Complainant on November 13, 2006 to schedule an appointment to inspect the bid proposal. Custodian's Counsel further states that the Complainant inspected the bid proposal on November 22, 2006 at which time the Complainant requested copies of certain portions of the record. Custodian's Counsel states that the Custodian informed the Complainant that the New Jersey Department of the Treasury had entered into an agreement prohibiting copying of the bid proposal with CGI-AMS based on their assertion of copyright with regard to the proposal. Custodian's Counsel asserts that the Complainant was provided with copies of correspondence between the Custodian and CGI-AMS regarding an agreement which allowed the bid proposal to be inspected but not copied pursuant to a separate OPRA request. Custodian's Counsel states that even though specific pages of the bid proposal did not bear a copyright mark, they were nevertheless withheld as a portion of the component part of the entire record responsive to the request. Custodian's Counsel asserts that since CGI-AMS withdrew its opposition to having the record copied on February 2, 2007, in essence allowing duplication, the complaint should be dismissed because the Complainant has been notified that he may receive the requested copies.

Additionally, Custodian's Counsel asserts that the Custodian's denial of access to copy portions of the requested record is lawful based on a wealth of federal copyright law which protects against unauthorized copying but not inspection. Custodian's Counsel also asserts that CGI-AMS clearly intended to maintain protection of its work under federal copyright law, prior to February 2, 2007. See Warner Brothers v. Columbia Broadcasting System, Inc., 216 F.2d 945, 948 (4th Cir. 1954), cert denied, 348 U.S. 971, 75 S.Ct. 532, 99 L.Ed. 756 (1954). Custodian's Counsel contends that while notice of copyright is no longer required for protection under the federal copyright law, the bid proposal does contain the notice as set forth in the statute. Specifically, 17 U.S.C. § 401, the federal copyright law, states:

(a) General Provisions. — Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) Form of Notice. — If a notice appears on the copies, it shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. 17 U.S.C. § 401.

Custodian’s Counsel further states that denying copies based on federal copyright law is protected under OPRA pursuant to N.J.S.A. 47:1A-9.a. Custodian’s Counsel asserts that OPRA, when read in conjunction with federal copyright law, allows a requester to only be given access to inspect and not to copy a work.

Custodian’s Counsel contends that N.J.S.A. 47:1A-5.d. requires access within a statutorily mandated time frame in the medium requested or some other meaningful medium if the record requested could not be provided. Custodian’s Counsel further contends that the Custodian’s denial of access was lawful because the Custodian was unable to comply with the Complainant’s request to copy portions of the requested record based on the federal copyright law. Custodian’s Counsel asserts that the Custodian met the requirement of N.J.S.A. 47:1A-5.d. by providing “inspection” instead of copies as a meaningful medium of access.

Custodian’s Counsel also contends that the Complainant’s assertion that the New Jersey Department of the Treasury is subject to the exemptions set forth in 17 U.S.C.A. §108 is without any legal support. Custodian’s Counsel finally asserts that the Complainant’s interpretation of language regarding disclosure in the RFP is incorrect. Custodian’s Counsel asserts that OPRA exemptions for trade secrets and proprietary information at N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9.a. preempt any language contained in a RFP, citing ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. August 30, 2005).

Analysis

Whether federal copyright law prohibits copying a record under OPRA?

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.

Federal copyright law states that:

“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device ... [i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C.A. §102 (a)-(b).

The federal copyright law further provides that:

“(a) General Provisions. — Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) Form of Notice. — If a notice appears on the copies, it shall consist of the following three elements:

- (1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and
- (2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced

in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.” 17 U.S.C. § 401.

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 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

The question arises whether a requester may be denied access to copies of records when a Custodian asserts that the records are subject to copyright protection and contain the copyright notation noted in 17 U.S.C. § 401.

OPRA sets forth twenty-four (24) specific exemptions pursuant to which custodians may legally deny access to requested records. None of these exemptions allows a custodian to explicitly deny access to a record protected by copyright law. Further, OPRA is silent regarding any consideration of a requestor’s use of records requested when granting access or denying access.⁶

In Board of Chosen Freeholders of Burlington County v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006), Tombs threatened to file a denial of access complaint with the GRC or go to the Superior Court in order to seek relief from what Tombs believed was an unlawful denial of access to records. The Freeholders asserted that federal copyright law preempted Tombs’ OPRA request. The Court held that:

⁶ 17 U.S.C. § 701 provides that: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

“ ... the complete preemption doctrine does not apply to Tombs’ threatened OPRA claim. Federal copyright law does not create an exclusive cause of action for access to public records and does not set forth procedures and remedies governing such actions. *Simply stated, federal copyright law does not wholly displace state statutory or common law rights to public records, and therefore cannot be said to completely preempt Tombs’ threatened claim.*” [Emphasis added.] *Id.* at 82.

Additionally, the GRC recently looked to the Court’s holding in Tombs in deciding the issue of a possible copyright exemption to OPRA in Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (July 25, 2007). In that case, the Custodian asserted that the Complainant could inspect but not have a copy of the Chest Pain Assessment being requested due to Federal Copyright Law. The Custodian asserted that the company asserting copyright protection of the Chest Pain Assessment conducted research and invested in the creation of the record, therefore the record was exempt from copying pursuant to N.J.S.A. 47:1A-1.1. The Council held that copyright does not prohibit access to records under OPRA and that the Custodian should release the Chest Pain Assessment to the Complainant.

Based on the court’s holding in Tombs, *supra*, and the GRC’s holding in Albrecht, *supra*, copyright law does not prohibit access to a government record under OPRA. The Custodian therefore unlawfully denied access to the requested record pursuant to N.J.S.A. 47:1A-1 and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Whether inspection of records is a meaningful alternative medium to copying pursuant to N.J.S.A. 47:1A-5.d.?

OPRA provides that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either *convert the record* to the medium requested or *provide a copy in some other meaningful medium.*” (Emphasis added.) N.J.S.A. 47:1A-5.d.

In NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), the Council determined the Legislative intent of the word “medium” as used in N.J.S.A. 47:1A-5.d. The Council held that:

“[c]onsidering the plain meaning of the word “medium”, we consulted a dictionary and encyclopedia. The American Heritage Dictionary of the English Language, Fourth Edition (Copyright 2000 by Houghton Mifflin Company) defines medium as “an intervening substance through which something else is transmitted or carried on.” And, its plural abstraction “media” is defined in the same dictionary as “an object or device, such as

a disk, on which data is stored.” Further, the Wikipedia (free encyclopedia) (Copyright 2001-2005) describes a “recording medium” as “a physical material that holds information expressed in any of the existing recording formats.” It lists recording formats as follows:

Examples since the 19th century include:

- Photographic film
- Wax for recording cylinders
- “shellac” compound and later vinyl for analog disk records
- Plastic sheet for Dictaphone recorders
- Steel wire for magnetic wire recorders
- Magnetic tape
- Rigid magnetic disks and cylinders
- Floppy magnetic disks
- Pressed optical media for CDs and DVDs
- Write-once, read-many optical media for writable CDs and DVDs
- Read-write optical media for rewritable CDs and DVDs
- Flash memory media” *Id.*

Given this description of a “medium” and the use of the word “medium” in N.J.S.A. 47:1A-5.d., inspection does not fall under the term of medium because inspection is not an “object” or “device” for which copies can be substituted.⁷ Although there may be instances when a custodian may substitute inspection of a record for a requested medium in order to safeguard the safety and integrity of certain records, the “other meaningful medium” which the Custodian substitutes must be “meaningful” to the requestor, because “any limitations on the right of access accorded by [OPRA] ...shall be construed in favor of the public’s right of access [.]” N.J.S.A. 47:1A-1.

In this complaint, the Complainant did not agree that inspection was “some other meaningful medium” to replace copies of portions of the record. Since OPRA “shall be construed in favor of the public’s right of access,” the Custodian failed to prove that on-site inspection was a “meaningful medium” substitute for copies of the portions of the requested record.

Therefore, based on the evidence of record and the GRC’s definition of “medium” in NJ Libertarian Party, supra, on-site inspection of the records responsive to the Complainant’s November 3, 2006 OPRA request is not a reasonable substitute for copies of the requested records.

⁷ It should be noted that NJ Libertarian Party involved a request for a record which was maintained in the format requested, although use of certain proprietary software was required in order to read the requested record. The complainant did not wish to pay the cost of licensing the necessary software. The GRC found that the custodian was under no obligation to convert the requested record to another medium which did not require the use of the proprietary software, because the record was, in fact, maintained in the medium which the complainant requested.

Whether an agency’s agreement with an outside vendor to keep otherwise public records confidential supersedes OPRA?

OPRA states that:

“[t]he provisions of this act [OPRA], *shall not abrogate any exemption of a public record or government record from public access ... any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.*” (Emphasis added.) N.J.S.A. 47:1A-9.a.

OPRA also states that:

“The provisions of this act, [OPRA], shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

OPRA specifically provides that its provisions shall not abrogate or erode any exemption from disclosure of a public record set forth in statute, Executive Order, executive or legislative privilege or grant of confidentiality, among others. N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-9.b. Additionally, the GRC has held that agency policy does not supersede the disclosure requirements of OPRA. See Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007) and Renna v. County of Union, GRC Complaint No. 2004-136 (July 2005). Therefore, the New Jersey Department of the Treasury’s policy that bids submitted will only be available to the public for inspection, not copying, does not supersede OPRA under N.J.S.A. 47:1A-9.a. or N.J.S.A. 47:1A-9.b.

Whether the Custodian’s failure to provide the requested record 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).

Even though the Custodian unlawfully denied access to the requested record, the Custodian has advised the Complainant that copies of the requested records are now available. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the court’s holding in Board of Chosen Freeholders of Burlington County v. Robert Bradley Tombs, 215 Fed. Appx 80 (3d Cir. NJ 2006) and the GRC’s decision in Albrecht v. New Jersey Department of Treasury, GRC Complaint No. 2006-191 (July 25, 2007), copyright law does not prohibit access to a government record which is otherwise available under OPRA. Therefore, the Custodian unlawfully denied access to the requested record pursuant to N.J.S.A. 47:1A-1. and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Based on the evidence of record and the GRC’s definition of “medium” in NJ Libertarian Party v. NJ Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), on-site inspection of the records responsive to the Complainant’s November 3, 2006 OPRA request is not a reasonable substitute for copies of portions of the requested records.
3. The GRC has held that agency policy does not supersede the disclosure requirements of OPRA. See Donato v. Jersey City Police Department, GRC

Complaint No. 2005-251 (April 2007) and Renna v. County of Union, GRC Complaint No. 2004-136 (July 2005). Therefore, the New Jersey Department of the Treasury's policy that bids submitted will only be available to the public for inspection, not copying, does not supersede OPRA under N.J.S.A. 47:1A-9.a. or N.J.S.A. 47:1A-9.b.

4. Even though the Custodian unlawfully denied access to the requested record, the Custodian has advised the Complainant that copies of the requested records are now available. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 21, 2007