



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**May 24, 2011 Government Records Council Meeting**

William H. Gettler  
Complainant

Complaint No. 2007-105

v.

Sussex Wantage Regional Board of Education (Sussex)  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that he disclosed to the Complainant a copy of the November 30, 2006 regular session meeting minutes and a copy of the November 30, 2006 executive session meeting minutes redacted to remove confidential information and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-10. and N.J.S.A. 10:4-8 et seq., and because there is nothing in the record to indicate the Complainant objected to the number and/or type of redactions made to the executive session minutes, the Custodian has satisfied Item #1 of the Complainant’s request by disclosing the records in Item #1 responsive to the Complainant’s request.
3. Because the Complainant’s request in Item #2 is overbroad and fails to specifically identify the documents sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).



4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian did respond to the Complainant in writing on the ninth (9<sup>th</sup>) business day following the date of the Complainant's request, 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.

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 24<sup>th</sup> Day of May, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: May 26, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 24, 2011 Council Meeting**

**William H. Gettler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-105**

v.

**Sussex Wantage Regional Board of Education (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. A copy of the minutes for every meeting of the Sussex Wantage Board of Education (“BOE”) when the subject of censuring and/or filing an ethics complaint against BOE member Raymond Delbury (“ the Delbury matter”) was discussed.
2. A copy of every communication by the BOE, any member or employee of the BOE, and/or anyone contacted by the BOE concerning the Delbury matter, including, but not limited to, any resolutions, complaints, letters, public notices, press releases, memos, notes, telephone logs and e-mails.

**Request Made:** January 16, 2007

**Response Made:** January 30, 2007

**Custodian:** Dr. Edward F. Izbicki

**GRC Complaint Filed:** May 2, 2007<sup>3</sup>

**Background**

**January 16, 2007**

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

**January 30, 2007**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states he has attached copies of the November 30, 2006 regular and executive session meeting minutes, which are responsive to Item #1 of the Complainant’s request. The Custodian states that access to Item #2 of the Complainant’s request is denied because the request is very general and overly broad and that it would

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

<sup>2</sup> Represented by Matthew J. Giacobbe, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

take an enormous amount of time to conduct the research in order to fulfill the Complainant's request. The Custodian also informs the Complainant that some of the material the Complainant requested may be confidential. The Custodian suggests the Complainant consider resubmitting his request with more specificity.

**May 1, 2007**

Letter from the Custodian's Counsel to the GRC. Counsel puts their appearance on record and states that they have received a copy of the Complainant's Denial of Access Complaint.

**May 2, 2007**

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

- Complainant's OPRA request dated January 16, 2007
- Letter from the Custodian to the Complainant dated January 30, 2007
- Letter from the Complainant to the GRC dated February 20, 2007<sup>4</sup>
- Letter from the GRC to the Complainant dated March 8, 2007<sup>5</sup>

The Complainant states that the Custodian denied him access to all of the records he requested. The Complainant contends that his OPRA request was not general in nature as alleged by the Custodian. The Complainant also asserts that the Custodian should not have to do any research to locate the records responsive to the Complainant's request because the Complainant states that he requested information on one (1) subject. The Complainant further contends that the records he requested should not be confidential. The Complainant requests that the GRC take action against the Custodian because the Custodian failed to fulfill the Complainant's OPRA request.

**May 3, 2007**

Offer of Mediation sent to both parties.

**May 4, 2007**

The Custodian agrees to mediate this complaint.

**May 6, 2007**

The Complainant agrees to mediate this complaint.

**May 16, 2007**

The complaint is referred for mediation.

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<sup>4</sup> The Complainant in his complaint refers to this letter as a previous complaint that was submitted to the GRC in this matter; however, the only Denial of Access Complaint that was filed in this matter is the complaint received by the GRC on May 2, 2007.

<sup>5</sup> This is the GRC standard form letter informing a complainant that allegations of denial of access to government records must be commenced by complaint filed with the GRC or the Superior Court. William Gettler v. Sussex Wantage Regional Board of Education, 2007-105 – Findings and Recommendations of the Executive Director 2

**September 21, 2007**

Letter from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that the BOE authorized disclosure of the closed session minutes for the November 30, 2006 meeting date, and a copy is provided to the Complainant in redacted form. Counsel states that the redactions were made pursuant to N.J.S.A. 10:4-12(b)(7) and (8) of the Open Public Meetings Act ("OPMA").<sup>6</sup>

**April 10, 2008**

The complaint is referred back from mediation to the GRC for adjudication.

**April 11, 2008**

Request for the Statement of Information sent to the Custodian.

**April 17, 2008**

Letter from the Custodian's Counsel to the GRC. Counsel informs the GRC that the Custodian will be on leave for a week. For this reason, Counsel requests an extension of time until May 2, 2008 in order to consult with the Custodian then prepare and return the Statement of Information.

**April 18, 2008**

Facsimile from the GRC to the Custodian's Counsel. The GRC grants Counsel's request for an extension of time until May 2, 2008 for return of the completed Statement of Information to the GRC.

**May 1, 2008**

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that they are still experiencing some scheduling problems with the Custodian and requests another extension of time in order to complete and return the Statement of Information to the GRC. The GRC grants Counsel a five (5) business day extension of time until May 9, 2008 for return of the Statement of Information to the GRC.

**May 1, 2008**

Letter from the Custodian's Counsel to the GRC. Counsel confirms its earlier telephone conversation with the GRC concerning an extension of time and acknowledges the Statement of Information will be due on or before May 9, 2008.

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<sup>6</sup> N.J.S.A. 10:4-12(b) provides that a "public body may exclude the public only from that portion of a meeting at which the public body discusses:

(7) Any pending or anticipated litigation or contract negotiation other than [collective bargaining matters] in which the public body is, or may become a party; any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting."

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**May 9, 2008**

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that they will send the Custodian's Statement of Information later this date but are still experiencing problems arranging an appointment with the Custodian in order for him to sign the certifications. Counsel states that the originals signed by the Custodian will be submitted no later than May 14, 2008.

**May 9, 2008<sup>7</sup>**

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

- Extract from the minutes of a regular session of the BOE dated November 30, 2006
- Executive session minutes of the BOE dated November 30, 2006
- Complainant's OPRA request dated January 16, 2007
- Letter from the Custodian to the Complainant dated January 30, 2007
- Letter from the Complainant to the GRC dated February 20, 2007
- Certification of Custodian of Records dated May 9, 2008

The Custodian certifies that his search for the requested records involved directing BOE staff to review BOE regular and executive session minutes for any that contained reference to the Delbury matter. The Custodian certifies the staff also conducted a search of the e-mail server for possible correspondence related to the Delbury matter. The Custodian further certifies that all other records responsive to the Complainant's request he located in the possession of the Superintendent.

The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he is aware that OPRA requires a response to a complainant's request within seven (7) business days, therefore his intention was to respond in writing to the Complainant's January 16, 2007 OPRA request on or about January 23, 2007. In furtherance thereof, the Custodian certifies that he prepared a response letter dated January 23, 2007 that he believed his staff had contemporaneously mailed to the Complainant. The Custodian certifies that he subsequently had a telephone conversation with the Complainant on January 29, 2007 and that it was apparent the Complainant never received a response. The Custodian certifies he then re-dated the response letter with the January 30, 2007 date for delivery to the Complainant. The Custodian avers that this was an honest and reasonable mistake.

The Custodian avers that he made another mistake with respect to disclosure of meeting minutes responsive to the Complainant's request, which are described as Item #1 of the records relevant to the complaint. The Custodian certifies that he stated in the January 30, 2007 letter to the Complainant that he was including the BOE's November 30, 2006 regular and executive session minutes. The Custodian certifies that he disclosed

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<sup>7</sup> See Background entries dated May 27, 2008 regarding date discrepancies on the SOI certifications. William Gettler v. Sussex Wantage Regional Board of Education, 2007-105 – Findings and Recommendations of the Executive Director

the regular session minutes, but failed to include the executive session minutes. The Custodian certifies, however, that he subsequently disclosed to the Complainant the executive session minutes redacted to remove confidential personnel information and attorney-client privileged material, pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-10. and N.J.S.A. 10:4-8 et seq.<sup>8</sup>

With respect to Item #2 of the records relevant to the complaint, the Custodian certifies that the Complainant’s request was vague and that the vagueness of the Complainant’s request would require an enormous amount of time to conduct research thereby disrupting the operations of his office pursuant to NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2006) and the provisions of N.J.S.A. 47:1A-5.g. The Custodian also certifies that the Complainant’s request for the records set forth in Item #2 is a broad based demand for research and analysis which is outside the statutory ambit of OPRA. The Custodian contends that according to the Appellate Division’s decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), OPRA does not require custodians to conduct research among its records and correlate data from various records in the custodian’s possession. The Custodian asserts that the Complainant’s request for Item #2 lacks specificity in accord with the court’s rulings in MAG, supra and NJ Builders Association, supra. The Custodian further asserts that under Gannett New Jersey Partners LLP v. County of Middlesex et al., 379 N.J. Super. 205 (App. Div. 2005), OPRA requires a party requesting access to a public record to specifically describe the document sought. The Custodian certifies that in his letter to the Complainant dated January 30, 2007, he invited the Complainant to resubmit his request with more specificity; however, the Complainant failed to do so.

The Custodian was able to locate six (6) records which the Custodian believes may be responsive to the Complainant’s request; however, none of the records were disclosable for the reasons set forth in the following table:

<b>No.</b>	<b>Description of Record</b>	<b>Disclosable</b>	<b>Legal Reason for Denial</b>
1	School Ethics Commission Complaint filed by the BOE against Board Member Raymond Delbury.	No	Advisory, Consultative or Deliberative (“ACD”) and Confidential Personnel Record (“Confidential”) pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and <u>N.J.S.A. 47:1A-10.</u>
2	Memo from the Custodian to Raymond Nazzaro dated October 12, 2006.	No	ACD and Confidential pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and <u>N.J.S.A. 47:1A-10.</u> Also confidential pursuant to <u>N.J.S.A. 10:4-8 et seq.</u>
3	Letter from Raymond Nazzaro to Raymond Delbury dated December 4, 2006.	No	ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

<sup>8</sup> A copy of the redacted November 30, 2006 executive session minutes was forwarded to the Complainant by cover letter dated September 21, 2007.

4	Letter from Susan Boyle to Raymond Delbury dated December 5, 2006.	No	ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
5	Letter from Lisa James-Beavers to Arthur Jacobs dated January 3, 2007.	No	ACD and Confidential pursuant to <u>N.J.S.A. 47:1A-1.1</u> . and <u>N.J.S.A. 47:1A-10</u> .
6	Letter from Lisa James-Beavers to Raymond Delbury (copied to Arthur Jacobs) dated January 3, 2007.	No	ACD and Confidential pursuant to <u>N.J.S.A. 47:1A-1.1</u> . and <u>N.J.S.A. 47:1A-10</u> .

Further, the Custodian certifies that any records which relate to In the matter of Raymond A. Delbury, before the School Ethics Commission as Docket No. C-64-06 and underlying information, including executive session discussions, are exempt under OPRA as attorney-client privileged and/or deliberative material. The Custodian further contends the records constitute confidential personnel matters within the exclusionary provisions of OPMA, N.J.S.A. 10:4-8 et seq.<sup>9</sup> The Custodian certifies that In re Delbury is presently under appeal; therefore the need for confidentiality continues to exist. The Custodian further contends that, at the time of the Complainant's OPRA request, School Ethics Commission's regulations prohibited him from disclosing documents related to the Delbury matter. The Custodian cites to *N.J.A.C. 6A:28-6.2(a)(2)* which provides:

“No information regarding any complaint shall be made public until the Commission first takes action at a public meeting to determine whether probable cause exists or whether a violation exists, whichever applies.”  
*N.J.A.C. 6A:28-6.2(a)(2)*

The Custodian states that *N.J.A.C. 6A:28-6.2(a)(2)* is applicable to OPRA by operation of N.J.S.A. 47:1A-9.

### **May 13, 2008**

Telephone call from the Complainant to the GRC. The Complainant states that he did not receive a copy of the SOI.

### **May 13, 2008**

Letter from the GRC to the Complainant. The GRC forwards a copy of the Custodian's SOI to the Complainant. The GRC informs the Complainant that the Custodian's signature does not appear on the certification page, but that the Custodian's Counsel advised the GRC that it will be delivered to the GRC on May 14, 2008. The GRC informs the Complainant that the GRC will forward a copy of the signed certification to him as soon as it is received by the GRC.<sup>10</sup>

<sup>9</sup> The Custodian does not cite a specific provision of OPMA in support of his argument.

<sup>10</sup> The Custodian was on an extended leave and Custodian's Counsel experienced difficulty arranging a personal meeting to obtain the signed certification page for the Statement of Information, as well as a signed certification page for a Certification of Custodian of Records which was made a part of the Statement of Information. This resulted in a considerable amount of correspondence between the GRC and the parties, including faxed and mailed signature pages and a Certification Regarding Facsimile Signature sent to the GRC from the Custodian's Counsel. All of this correspondence, not being directly relevant to *William Gettler v. Sussex Wantage Regional Board of Education, 2007-105 – Findings and Recommendations of the Executive Director*



**May 14, 2008**

Facsimile transmission from the Custodian's Counsel to the GRC. Counsel transmits to the GRC a certification page for the Statement of Information, as well as a certification page for a Certification of Custodian of Records which was made a part of the Statement of Information; both pages are signed by the Custodian. Counsel also sends the GRC a Certification Regarding Facsimile Signature prepared by Counsel.

**May 19, 2008**

Telephone call from the Complainant to the GRC. The Complainant states that he reviewed the Custodian's SOI and the signature pages and noted that the SOI and accompanying certification were signed May 9, 2008; however, the Complainant states that when the GRC sent the document to him on May 13, 2008, it had not yet been signed. The Complainant wants to know why the documents were not signed on the day they were dated.

**May 19, 2008**

Telephone call from the GRC to the Custodian's Counsel. To settle the issue concerning the date of the Custodian's certification, the GRC requests that the Custodian provide a certification explaining the discrepancy.

**May 27, 2008**

Certification of Custodian's Counsel.<sup>11</sup> Counsel certifies that he faxed and mailed to the GRC, and simultaneously mailed to the Complainant, a copy of the Custodian's unsigned SOI dated May 9, 2008. Counsel also certifies that on May 14, 2008, he sent to the GRC a facsimile copy of the Custodian's SOI and requested that the Custodian forward directly to the GRC the signed signature pages for the certification on the SOI, as well as a second Custodian's certification that was appended to the SOI. The Custodian's Counsel also certifies that he discovered a mistake on the document index in the Statement of Information. Counsel corrected the mistake and attaches a copy of the corrected document index to his certification.

**May 27, 2008<sup>12</sup>**

Supplemental certification of the Custodian. The Custodian certifies that the SOI and the certification accompanying it were prepared by the Custodian's Counsel for the Custodian's review and signature. The Custodian certifies that he signed the documents on May 12, 2008 on the appropriate signature lines; however, there was a pre-printed date of May 9, 2008 next to the signature line on each document.

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the adjudication, was filed in that appropriate section of the case file; however, the GRC received the Custodian's signed signature pages for the two (2) certifications and appended them to the correlating documents.

<sup>11</sup> This certification was prepared by Anthony M. Orlando, Esq., of Scarinci & Hollenbeck, LLC.

<sup>12</sup> Other subsequent correspondence was received from the parties which is not relevant to this complaint or restates the facts/assertions already presented to the GRC.

## 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 further provides that:

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

OPRA also 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.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, it is undisputed that the Complainant filed his OPRA request on January 16, 2007. Despite the Custodian's averment that he prepared a response letter dated January 23, 2007 with the intention that it be mailed immediately to the Complainant, the letter was not mailed. After realizing the letter was never mailed, the Custodian certified he re-dated the letter January 30, 2007 and mailed it to the Complainant; however, the Custodian knew at that time that he had failed to comply with the statutory time frame for response to an OPRA request.

Accordingly, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Notwithstanding the Custodian's "deemed" denial, the Custodian certified that on January 30, 2007, he disclosed to the Complainant a copy of the November 30, 2006 regular session meeting minutes. The Custodian also certified that he subsequently disclosed a copy of the executive session minutes redacted to remove confidential information and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-10, and N.J.S.A. 10:4-8 et seq. There is nothing in the record to indicate the Complainant objected to the number and/or type of redactions made to the executive session minutes. The November 30, 2006 regular session and redacted executive session minutes constitute the records responsive to the Complainant's request which are set forth as Item #1 of the records relevant to the complaint.

Because the Custodian certified that he disclosed to the Complainant a copy of the November 30, 2006 regular session meeting minutes and a copy of the November 30, 2006 executive session meeting minutes redacted to remove confidential information and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-10, and N.J.S.A. 10:4-8 et seq, and because there is nothing in the record to indicate the Complainant objected to the number and/or type of redactions made to the executive

session minutes, the Custodian has satisfied Item #1 of the Complainant's request by disclosing the records in Item #1 responsive to the Complainant's request.

In Item #2 of the records relevant to the complaint, the Custodian could only locate six (6) records which he believed may have been responsive to the Complainant's request. The Custodian found that the located records were exempt from disclosure because they were advisory, consultative or deliberative pursuant to N.J.S.A. 47:1A-1.1., confidential personnel records pursuant to N.J.S.A. 47:1A-10., or otherwise confidential pursuant to N.J.S.A. 10:4-8 et seq. The Custodian could not locate any other records under Item #2 because the Custodian stated that the Complainant's request was vague, overly broad and lacking specificity.

The Complainant's request, set forth as Item #2 of the records relevant to the complaint, seeks copies of "**every** communication by the BOE, **any** member or employee of the BOE, and/or **anyone** contacted by the BOE concerning the Delbury matter, **including, but not limited to, any** resolutions, complaints, letters, public notices, press releases, memos, notes, telephone logs and e-mails." (Emphasis added.)

It is unnecessary to analyze whether the records responsive to the Complainant's request for Item #2 are exempt from disclosure because they constitute ACD material pursuant to N.J.S.A. 47:1A-1.1., or are confidential personnel records pursuant to N.J.S.A. 47:1A-10., or are otherwise exempt pursuant to N.J.S.A. 10:4-8 et seq., because the nature of the Complainant's request is such that the Custodian could not possibly be sure that he identified any of the records responsive to the 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 (App. Div. 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 (App. Div. 2005)<sup>13</sup>, the Superior Court references MAG in that the Court held 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."<sup>14</sup>

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<sup>13</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>14</sup> As stated in Bent.

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

Because the Complainant's request in Item #2 is overbroad and fails to specifically identify the documents sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra*, Bent, *supra*, New Jersey Builders Association, *supra* and the Council's decision in Schuler v. Borough of Bloomsbury, *supra*.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of

OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86 (App. Div. 1996) at 107).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian did respond to the Complainant in writing on the ninth (9<sup>th</sup>) business day following the date of the Complainant’s request, 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that he disclosed to the Complainant a copy of the November 30, 2006 regular session meeting minutes and a copy of the November 30, 2006 executive session meeting minutes redacted to remove confidential information and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-10. and N.J.S.A. 10:4-8 et seq., and because there is nothing in the record to indicate the Complainant objected to the number and/or type of redactions made to the executive session minutes, the Custodian has satisfied Item #1 of the Complainant’s request by disclosing the records in Item #1 responsive to the Complainant’s request.
3. Because the Complainant’s request in Item #2 is overbroad and fails to specifically identify the documents sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v.

Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).

4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian did respond to the Complainant in writing on the ninth (9<sup>th</sup>) business day following the date of the Complainant's request, 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.

Prepared By: John E. Stewart  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 17, 2011<sup>15</sup>

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<sup>15</sup> This complaint was prepared for adjudication on January 21, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.  
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