



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

**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](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

**FINAL DECISION**

**October 31, 2007 Government Records Council Meeting**

Paul Bellan-Boyer  
Complainant

Complaint No. 2007-114

v.

NJ Department of Community Affairs,  
Commissioner's Office  
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 24, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council adopted the entirety of said findings and recommendations by a majority vote. The Council, therefore, finds that:

1. Based on the evidence of record, it is concluded that the original Custodian did not unlawfully deny access to the Complainant's OPRA request dated April 26, 2007 because there is no proof that the Custodian actually received said request.
2. Because the Custodian certifies that the only record responsive to the Complainant's request was provided to the Complainant and because said records were provided within the statutorily mandated time frame, the Custodian has not unlawfully denied access to the requested records.
3. Because OPRA only permits requests for records, not requests for information pursuant to Mag Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 53, 546-549 (App. Div. 2005), the Custodian was not obligated to respond to the Complainant's questions for information. However, the Custodian is obligated to respond to said questions in the Custodian's Statement of Information as directed by the court in John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
4. Because the Custodian certifies that the records responsive consist of one (1) record, which the Custodian states the original Custodian provided to the Complainant on May 14, 2007 and because there is insufficient evidence suggesting that additional records responsive to the request are maintained on file in the Commissioner's Office and were knowingly and willfully withheld



from the Complainant, 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 31<sup>st</sup> Day of October, 2007

Vincent P. Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman  
Government Records Council

**Decision Distribution Date: November 15, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 31, 2007 Council Meeting**

**Paul Bellan-Boyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-114**

v.

**NJ Department of Community Affairs, Commissioner's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All internal and external communications from April 1, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in DCA's possession regarding or referring to OPRA request(s) made by the New Jersey Regional Coalition; and all records of such communications, such as phone or fax logs, fax cover sheets, etc. This includes but is not limited to communications between the Department of Community Affairs' Commissioner and/or other staff and William Dressel and/or the League of Municipalities.
2. All internal and external communications from March 1, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in the Department of Community Affairs' possession regarding or referring to the New Jersey Regional Coalition, and all records of such communications, such as phone or fax logs, fax cover sheets, etc. This includes but is not limited to communications between the Department of Community Affairs' Commissioner and/or other staff and William Dressel and/or the League of Municipalities.

**Request Made:** April 26, 2007 and May 8, 2007

**Response Made:** May 14, 2007

**Custodian:** Paul G. Stridick<sup>3</sup>

**GRC Complaint Filed:** May 17, 2007

**Background**

**April 26, 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.

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

<sup>2</sup> Represented by DAG Daniel Reynolds, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian at the time of the request was Brian Bauerle.

### **May 8, 2007<sup>4</sup>**

Letter from Complainant to Custodian. The Complainant states that he submitted an OPRA request on April 26, 2007 and received a fax confirmation at 7:54 pm but has not heard anything from the Custodian. The Complainant states that OPRA requires the Custodian to respond to a records request no later than seven (7) business days after the Custodian's receipt of such request. The Complainant also states that eight (8) business days have passed since he submitted his request with no response from the Custodian.

### **May 14, 2007**

Custodian's response to the Complainant's OPRA request discussed in the letter from the Complainant to the Custodian dated May 8, 2007.<sup>5</sup> The Custodian responds to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that there is one (1) record responsive to the request consisting of two (2) pages. The Custodian states that said record is attached.

### **May 15, 2007**

Letter from Complainant to Custodian. The Complainant states that he is in receipt of the record provided by the Custodian on May 14, 2007. The Complainant states that he finds it surprising that there is only one (1) record responsive to his request because the Complainant asserts that he is in possession of other correspondence upon which the Commissioner is listed as a recipient, which the Complainant claims would be responsive to his OPRA request. The Complainant asks the following questions about the records responsive to this request:

1. Does the Commissioner's Office have any communications on this subject other than the May 7, 2007 letter provided?
2. Did the Custodian search e-mail records as requested? The Complainant suggests that in addition to "New Jersey Regional Coalition," the acronym "NJRC" and "OPRA," and an erroneous reference to "Housing Coalition" might reveal such communications.
3. Was the Custodian's search regarding this OPRA request thorough?
4. Does the Commissioner's Office have a records purging policy aimed at or having the effect of keeping certain kinds of material unavailable?

The Complainant states that in the event the initial search criteria were not wide enough to reveal all of the records he is seeking, he is submitting an additional OPRA request.<sup>6</sup>

Further, the Complainant states that the Custodian informed him that the Complainant's OPRA request dated April 26, 2007 was not received by the Custodian until discussed in the Complainant's letter to the Custodian date May 8, 2007. However, the Complainant states that he submitted his request to the fax number listed on the Department of Community Affairs' ("DCA") OPRA website and received a fax

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<sup>4</sup> The Complainant attaches his OPRA request dated April 26, 2007.

<sup>5</sup> The Custodian states that he did not receive the Complainant's OPRA request dated April 26, 2007.

<sup>6</sup> The Complainant submitted an additional OPRA request; however, said request is not the subject of this complaint.

confirmation page. Additionally, the Complainant states that he resubmitted his request to the same fax number, which the Custodian received from another employee. The Complainant asks if the Custodian has any further information about how the initial request was handled, or if a fax log exists for the Custodian's fax number.

The Complainant also states that Paff v. Dept. of Labor, decided April 24, 2007<sup>7</sup> states that Custodians shall be required to produce sworn statements setting forth the following information:

1. The search undertaken to satisfy the request,
2. The documents found that are responsive to the request,
3. The determination of whether the document or any part thereof is confidential and the source of the confidential information,
4. A statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

The Complainant requests that the Custodian respond to the above questions regarding the OPRA request subject of this complaint.

#### **May 15, 2007**

Letter from Complainant to Custodian. The Complainant states that during his conversation with the Custodian on May 11, 2007, the Custodian indicated that the records responsive to the Complainant's request were being prepared for delivery. The Complainant states that he offered to pick up the records that afternoon but that the Custodian stated that it would take longer to get said records ready and told the Complainant to expect the records on Monday morning. The Complainant notes the contrast between the Custodian's statement that the records (plural) were being prepared and that it would take more than three (3) hours to assemble them (plural), and the Custodian's production of only one (1) single record. The Complainant requests that the Custodian address this discrepancy and ensure that no records relating to the Complainant's OPRA request were destroyed.

#### **May 17, 2007**

Letter from Complainant to Government Records Council. The Complainant states that despite receiving confirmation of a successful fax transmittal of his OPRA request dated April 26, 2007, the Custodian did not provide a response to said request until after the Complainant's follow up letter. The Complainant states that on May 9, 2007 the Custodian reported irregular handling of the request (a DCA employee not employed in the Commissioner's Office provided the Complainant's request to the Custodian). The Complainant asserts that he is in possession of records which indicate the DCA Commissioner as a recipient of certain records that would be responsive to the Complainant's OPRA request. The Complainant states that said records were not provided to him in response to his OPRA request. The Complainant also contends that it is possible that the search for the records responsive to the request may have been deficient, the records may have been intentionally withheld, or a document purging

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<sup>7</sup> John Paff v. NJ Department of Labor, 392 NJ Super. 334 (App. Div. 2007).

procedure might be in use and records responsive to the request might have been destroyed prematurely. Additionally, the Complainant states that the Custodian's response to the request did not include the sworn information required by Paff v. N.J. Dept. of Labor.<sup>8</sup>

### **May 17, 2007**

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

- Complainant's OPRA request dated April 26, 2007
- Letter from Complainant to Custodian dated May 8, 2007
- Custodian's response to the OPRA request dated May 14, 2007
- Letter from the Complainant to the Custodian dated May 15, 2007
- Letter from the Complainant to the Custodian dated May 15, 2007
- Letter from the Complainant to the GRC dated May 17, 2007

The Complainant states that he submitted an OPRA request on April 26, 2007 to the fax number listed on the DCA internet OPRA page and received a fax confirmation at 10:54 pm.<sup>9</sup> The Complainant states that after seven (7) business days passed without a response from the Custodian, the Complainant re-sent his OPRA request to the same fax number as the Complainant's April 26, 2007 request including a letter to the Complainant dated May 8, 2007 and received a fax confirmation. The Complainant states that the Custodian called him on May 9, 2007 and indicated that the Custodian had not received the Complainant's April 26, 2007 request and that the Complainant's May 8, 2007 request was delivered to him by an employee not in the Custodian's office. The Complainant states that the Custodian promised a response within a few days.

The Complainant states that on May 11, 2007 just before 2:00 pm, the Custodian called the Complainant to state that the records were ready. The Complainant states that he offered to pick up the records that afternoon but states that the Custodian indicated that he would need more time to get the records ready and stated that he would fax the records Monday morning. The Complainant states that on Monday May 14, 2007 he received a fax from the Custodian including the following:

1. A brief letter stating that only one (1) record is responsive to the Complainant's request
2. A copy of a two (2) page letter

The Complainant states that the Custodian did not provide a redaction log or a privilege report. The Complainant asserts that he has good reason to believe that there are additional records responsive to his request which were not provided by the Custodian.

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<sup>8</sup> John Paff v. NJ Department of Labor, 392 NJ Super. 334 (App. Div. 2007).

<sup>9</sup> The Custodian asserts receiving said transmittal at 7:54 pm in his letter to the Custodian dated May 8, 2007.

**May 21, 2007**

Offer of Mediation sent to both parties.

**May 25, 2007**

Custodian's signed Agreement to Mediate.

**June 4, 2007**

Complainant's signed Agreement to Mediate.

**June 4, 2007**

Complaint referred to mediation.

**August 31, 2007**

Complaint referred back from mediation.

**September 13, 2007**

Request for the Statement of Information sent to the Custodian.

**September 21, 2007**

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

- Complainant's OPRA request dated April 26, 2007
- Custodian's response to the request dated May 14, 2007 with one (1) record responsive attached

The Custodian certifies that the Complainant's request was received on May 8, 2007 at 5:33 am. The Custodian states that the original Custodian provided a response to the Complainant via letter dated May 14, 2007 including one (1) record responsive. The Custodian states that upon receipt of the Complainant's OPRA request, the original Custodian searched the following files for records responsive to the request:

1. Office of the Commissioner's chronological files, both incoming and outgoing correspondence
2. The office's Cor-Log (an inventory system of incoming and outgoing correspondence, requests and referrals)
3. Requests made to the office's support staff for review of their files, e-mail correspondence, etc.

The Custodian states that the search detailed above took place over a period of several days. The Custodian asserts that according to the original Custodian, the search conducted was thorough and complete in order to properly and accurately respond to the request. The Custodian states that copies of all the records that were identified during the review were provided to the Complainant. Further, the Custodian certifies that he was not the Custodian at the time of the request, but that he has faithfully and completely reviewed the records associated with the request and has included the information regarding this complaint with this SOI.

Additionally, in the Custodian's document index, the Custodian certifies that the following records are responsive to the Complainant's request: letter from original Custodian to Complainant dated May 14, 2007 including attachment of letter from League of Municipalities dated May 7, 2007. The Custodian states that said records were provided to the Complainant by the original Custodian on May 14, 2007.

**September 25, 2007**

Letter from GRC to Custodian. The GRC requests that the Custodian provide a legal certification indicating whether, after a diligent search of the Custodian's office's records, the Custodian is aware of any facsimile(s) containing an OPRA request received from the Complainant between the dates of April 25, 2007 and April 27, 2007 at the Custodian's fax number.

**September 28, 2007**

Custodian's certification. The Custodian certifies that he has made a diligent search of the records of the DCA Commissioner's office for the purposes of ascertaining whether those records include any facsimile(s) containing an OPRA request from the Complainant between the dates of April 25, 2007 and April 27, 2007 at the office's fax number. The Custodian certifies that he has not found any record of any such facsimile. Additionally, the Custodian certifies that he was not the Custodian at the time of the request or response, but has faithfully and completely reviewed the records associated with said request.

**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 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.

In this complaint, the Complainant states that he submitted an OPRA request on April 26, 2007 and received confirmation of a successful fax transmittal.<sup>10</sup> The Complainant also admits in his Denial of Access Complaint that the original Custodian informed him that he never received the Complainant’s OPRA request dated April 26, 2007. Additionally, the current Custodian certifies that upon a diligent search of agency files, he has found no record of the Complainant’s OPRA request dated April 26, 2007.

Therefore, based on the evidence of record, it is concluded that the original Custodian did not unlawfully deny access to the Complainant’s OPRA request dated April 26, 2007 because there is no proof that the Custodian actually received said request.

Additionally, the Complainant states that he resubmitted his OPRA request on May 8, 2007 and received a response from the original Custodian on May 14, 2007 which included one (1) record responsive to the Complainant’s request. The Complainant contends that there may be additional records responsive that were not provided. The Custodian certifies that there is one (1) record responsive to the Complainant’s request and states that said record was provided to the Complainant by the original Custodian on May 14, 2007.

Therefore, because the Custodian certifies that the only record responsive to the Complainant’s request was provided to the Complainant and because said records were provided within the statutorily mandated seven (7) business day time frame, the Custodian has not unlawfully denied access to the requested records.

Further, the Complainant states that the Custodian’s response to the Complainant’s request did not include the sworn information required by John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

In Paff, the court directed public agencies to provide the following information in response to Denial of Access Complaints filed with the GRC:

1. the search undertaken to satisfy the request
2. the documents found that are responsive to the request
3. the determination of whether the document or any part thereof is confidential and the source of the confidential information

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<sup>10</sup> There is a discrepancy in the Complainant’s submissions in relation to the time the Complainant asserts receiving said confirmation. Specifically, the Complainant states in this letter dated May 8, 2007 to the Custodian that he received such transmittal at 7:54 pm; however, the Complainant states in his Denial of Access Complaint dated May 17, 2007 that he received such transmittal at 10:54 pm. The Complainant did not include a copy of any fax transmittal with his submissions to the GRC or the Custodian.

4. a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed

The GRC requires that custodians provide the above information with the Custodian's Statement of Information in the form of a legal certification pursuant to N.J. Court Rule 1:4-4. Custodians are not required to provide such information at the time in which they are either granting or denying access to an OPRA request.

OPRA only permits requests for records, not requests for information. Mag Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 53, 546-549 (App. Div. 2005)(holding that public agencies are required under OPRA to disclose only "identifiable" governmental records not otherwise exempt, and that wholesale requests for general information to be analyzed, collated, and compiled by the responding government entity are not encompassed therein).

Therefore, because OPRA only permits requests for records, not requests for information pursuant to Mag Entertainment, *supra*, the Custodian was not obligated to respond to the Complainant's questions for information. However, the Custodian is obligated to respond to said questions in the Custodian's Statement of Information as directed by the court in Paff, *supra*.

**Whether the Custodian's actions rise 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 Complainant asserts that there may be additional records responsive to his OPRA request which were not provided to the Complainant, the Custodian certifies that the records responsive consist of one (1) record, which the Custodian states the original Custodian provided to the Complainant on May 14, 2007.

Therefore, because the Custodian certifies that the records responsive consist of one (1) record, which the Custodian states the original Custodian provided to the Complainant on May 14, 2007, and because there is insufficient evidence suggesting that additional records responsive to the request are maintained on file in the Commissioner's Office and were knowingly and willfully withheld from the Complainant, 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. Based on the evidence of record, it is concluded that the original Custodian did not unlawfully deny access to the Complainant's OPRA request dated April 26, 2007 because there is no proof that the Custodian actually received said request.
2. Because the Custodian certifies that the only record responsive to the Complainant's request was provided to the Complainant and because said records were provided within the statutorily mandated time frame, the Custodian has not unlawfully denied access to the requested records.
3. Because OPRA only permits requests for records, not requests for information pursuant to Mag Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 53, 546-549 (App. Div. 2005), the Custodian was not obligated to respond to the Complainant's questions for information. However, the Custodian is obligated to respond to said questions in the Custodian's Statement of Information as directed by the court in John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
4. Because the Custodian certifies that the records responsive consist of one (1) record, which the Custodian states the original Custodian provided to the Complainant on May 14, 2007 and because there is insufficient evidence suggesting that additional records responsive to the request are maintained on file in the Commissioner's Office and were knowingly and willfully withheld from the Complainant, 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:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

October 24, 2007