



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

**JON S. CORZINE**  
*Governor*

**JOSEPH V. DORIA, JR.**  
*Commissioner*

**FINAL DECISION**

**June 23, 2009 Government Records Council Meeting**

Larry A. Kohn  
Complainant

Complaint No. 2007-320

v.

Township of Livingston (Essex)  
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council ("Council") considered the June 16, 2009 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 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).
2. The Custodian responded in writing on August 28, 2007, stating that no records responsive to request Item No. 2 exist and subsequently certified in the Statement of Information that no records which were responsive to request Item No. 2 existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for denial within the statutorily required seven (7) business days resulting in a deemed denial, the reason for the denial of access is lawful pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because request Item No. 1 of the Complainant's OPRA request seeks information rather than an identifiable government record, the request is invalid 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).



4. Although the Custodian failed to respond in writing to the Complainant's August 16, 2007 OPRA request within the statutorily mandated seven (7) business days, request Item No. 1 is a request for information and is therefore an invalid request under OPRA, and the Custodian certified that no records responsive to request Item No. 2 exist (even though this request item is invalid under OPRA requiring research by the Custodian). 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 unlawful denial of access appears negligent and heedless since he 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 23<sup>rd</sup> Day of June, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Kathryn Forsyth  
Government Records Council

**Decision Distribution Date: June 26, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 23, 2009 Council Meeting**

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-320**

**v.**

**Township of Livingston (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Identification of all available sources of funds to which library construction project cost can be charged, showing details of appropriation, account history encumbrances, payment balances, etc.
2. Copies of documents that show amount and dates of a \$2.3 million transfer to Business Improvement District (“BID”). Documentation should also show source of funds (accounts, etc.).<sup>3</sup>

**Request Made:** August 16, 2007<sup>4</sup>

**Response Made:** August 28, 2007

**Custodian:** Glenn R. Turtletaub

**GRC Complaint Filed:** December 19, 2007<sup>5</sup>

**Background**

**August 16, 2007**

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

**August 20, 2007**

Memo from the Custodian to various City officials. The Custodian states that he received the Complainant’s OPRA request on August 17, 2007. The Custodian further states that, pursuant to OPRA, he is obligated to respond no later than the seventh (7<sup>th</sup>) business day after receipt of the request and that contracts and certain records must be provided immediately.

The Custodian states that the listed City officials may be in possession of some of the records requested and advises that any records responsive be provided to the

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

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant requested other records which are not at issue in the instant complaint.

<sup>4</sup> The Complainant requested additional items that are not at issue in this complaint.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

Custodian. The Custodian also requests that he receive an explanation as to why any records cannot be provided or be made aware of a specific date that the records will be provided to the Custodian.

**August 28, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian states that records responsive to request Item No. 1 are available for review and duplication. The Custodian further states that no records responsive to request Item No. 2 exist because no money was transferred to the BID.

**September 4, 2007**

Letter from the Complainant to the Custodian. The Complainant asserts that request Item No. 2 was clear in that Bond Ordinance 7-2005 identified \$2.3 million to be allocated for the streetscape project. The Complainant asserts that he believes an additional \$25,000 was added to the above figure and that the Complainant would like to review these appropriations. The Complainant further asserts that he would like to review the source of interim funding that was used if the expenditures did not result in an immediate need to issue permanent financing of this project.

**October 1, 2007**

Letter from the Complainant to the Custodian. The Complainant states that he is still waiting for records responsive to request Item No. 2 of the OPRA request.

**October 8, 2007**

Letter from the Custodian to the Complainant. The Custodian reiterates that no records responsive to request Item No. 2 of the OPRA request exist.

**October 17, 2007**

Letter from the Complainant to the Custodian. The Complainant asserts that he has not been provided with access to records responsive to request Item No. 2 of the OPRA request.

**November 12, 2007**

Letter from the Complainant to the Custodian. The Complainant asserts that all request items relevant to this complaint have not yet been provided. The Complainant further states that access to some of the requested items has been delinquent for nearly two (2) months.

**November 22, 2007**

Letter from the Complainant to the Custodian. The Complainant asserts that all request items relevant to this complaint have not been provided. The Complainant further states that access to some of the requested items have been delinquent for more than two (2) months. The Complainant states that in order to expedite the fulfillment of the OPRA request, if the Custodian has any material or evidence that the Complainant was allowed to review relevant to the requested records, the Custodian should share this evidence with the Complainant as soon as possible.

**November 28, 2007**

Letter from the Complainant to the Custodian. The Complainant asserts that all records responsive to request Items No. 1 and No. 2 of the Complainant's OPRA request have not been provided to the Complainant.

**December 17, 2007**

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

- Complainant's OPRA request dated August 16, 2007.
- Letter from the Custodian to the Complainant dated August 28, 2007.
- Letter from the Complainant to the Custodian dated September 4, 2007.
- Letter from the Complainant to the Custodian dated October 1, 2007.
- Letter from the Complainant to the Custodian dated October 8, 2007.
- Letter from the Complainant to the Custodian dated October 17, 2007.
- Letter from the Complainant to the Custodian dated November 12, 2007.
- Letter from the Complainant to the Custodian dated November 22, 2007.
- Letter from the Complainant to the Custodian dated November 28, 2007.

The Complainant contends that he had hoped that after repeated reminders the Custodian would have made an effort to comply with OPRA regarding the outstanding items relevant to this complaint. The Complainant asserts that he now considers the Custodian's non-compliance to be a knowing and willful violation of OPRA and an unreasonable denial of access.

The Complainant did not agree to mediate this complaint.

**January 15, 2008**

Request for the Statement of Information sent to the Custodian.

**January 22, 2008**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to submit the Statement of Information.

**January 23, 2008**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until February 1, 2008 to file the Statement of Information.

**February 1, 2008**

E-mail from the Custodian to the GRC. The Custodian requests an additional extension of time to submit the Statement of Information because of the Custodian is currently preparing for an election and will not be able to complete the Statement of Information until February 4, 2008.

**February 4, 2007**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until February 4, 2007 to file the Statement of Information.

**February 4, 2008**

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

- Complainant's OPRA request dated August 16, 2007.
- Memo from the Custodian to various City officials dated August 20, 2007.
- Letter from the Custodian to the Complainant dated August 28, 2007.

The Custodian certifies that his search for the requested records involved making copies of the OPRA request and providing copies of the Complainant's OPRA request to various City officials and departments that the Custodian believed were most likely to possess any records responsive. The Custodian certifies that the OPRA request was delivered via memo which also reminded the various City officials of the Custodian's duty to respond within seven (7) business days granting access, denying access or requesting an extension of time to respond. The Custodian further certifies that he and the Custodian's assistant searched through relevant files for any records requested that were in the possession of the Custodian (i.e., minutes, agendas, resolutions, certificate of availability of funds, contracts, etc.). The Custodian finally certifies that he and the Custodian's assistant followed up with the appropriate City officials to collect records responsive and sought Counsel's review for redactions, if necessary, prior to disclosure.<sup>6</sup>

The Custodian certifies that no records responsive to the Complainant's 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 ("DARM").

The Custodian states each request item was handled in the following manner:

Request Item No. 1

The Custodian states that he responded in writing to the Complainant on August 28, 2007 stating that records responsive to Item No. 1 were available for review. The Custodian further states that access was provided to Audit Trail C-04-55-002-018-00A (8 pages); Ordinance 18-2002 (4 pages); Ordinance 3-2002 (7 pages), Transaction Audit Trail Account C-04-55-007-019-002 (2 pages); Ordinance 14-2000 (1 page) on or about October 17, 2007.

The Custodian contends that the records responsive displayed all transactions for various improvements to buildings and grounds. The Custodian avers that on the advice of Counsel, the transactions not associated with the Hillside Avenue Construction project were redacted because the transactions were not relevant to this request item.

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<sup>6</sup> The Custodian avers that the Complainant does not set forth a specific complaint in GRC Complaint No. 2007-320 et seq., but rather sets forth a compilation of all of his requests from August 16, 2007 to December 4, 2007 in the form of a three (3) page chart. The Custodian further avers that the Complainant followed up his OPRA requests with numerous correspondence in an attempt to clarify his requests, but actually changed the nature of the Complainant's original requests. The Custodian contends that pursuant to OPRA, a custodian is not required to respond to supplemental information attached to the Complainant's Denial of Access Complaint.

## Request Item No. 2

The Custodian certifies that he responded in writing to the Complainant on August 28, 2007, stating that no records responsive exist because no money was transferred to BID.

The Custodian requests that the GRC review the breadth and intensity at which the Complainant has filed OPRA requests with the Township of Livingston and take into account the numerous items which the Custodian and his staff have satisfied. The Custodian contends that the Complainant has attempted to monopolize the time of the Custodian to the point that a part time staff member had to be hired largely to help handle the Complainant's requests. The Custodian asserts that the Township is doing everything in its ability to be responsive to the Complainant's multiple requests, which regularly and repeatedly seek the same records, in a timely fashion. The Custodian requests that the GRC provide direction on how to best respond to the Complainant's regular requests without disrupting agency operations.

Finally, the Custodian states that he has done everything possible to accommodate the Complainant, including meeting with the Complainant during and after business hours. The Custodian asserts that, for the foregoing reasons, the Township's actions were responsive, proper and not in violation of OPRA.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

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

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. The custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the Custodian responded in writing to the Complainant on August 28, 2007, the eighth (8<sup>th</sup>) business day after receipt of the Complainant’s August 16, 2007 OPRA request.

Therefore, 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 resulted 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).



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

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (October 2005)<sup>7</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>8</sup>

In the instant matter before the Council, the Complainant's request Item No. 1 for identification of all sources of funds with details of appropriation, account history information and payment balances is a request for information and not an identifiable government record.

Therefore, because request Item No. 1 of the Complainant's OPRA request seeks information rather than an identifiable government record, the request is invalid 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).

Moreover, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian certified in the SOI that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian responded in writing on August 28, 2007 stating that no records responsive to request Item No. 2 exist and subsequently certified in the SOI that no records which were responsive to request Item No. 2 existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for denial within the statutorily required seven (7) business days resulting in a deemed denial, the reason for the denial of access is lawful pursuant to Pusterhofer, *supra*.

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<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>8</sup> As stated in Bent.

Further, the Complainant's request Item No. 2 for copies of documents that show amounts and dates of the \$2.3 million transfer to the BID is invalid because the Custodian would have had to research his files in order to respond to the Complainant's request. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007)(holding that a custodian is not required to do research in order to determine which records, if any, might be responsive to a broad and unclear OPRA request).

**Whether the Custodian's untimely response to the Complainant's August 16, 2007, OPRA request 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 failed to respond in writing to the Complainant's August 16, 2007 OPRA request within the statutorily mandated seven (7) business days, request Item No. 1 is a request for information and is therefore an invalid request under OPRA, and the Custodian certified that no records responsive to request Item No. 2 exist (even though this request item is an invalid request under OPRA requiring research by the Custodian). 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 unlawful denial of access appears negligent and heedless since he 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. 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).
2. The Custodian responded in writing on August 28, 2007, stating that no records responsive to request Item No. 2 exist and subsequently certified in the Statement of Information that no records which were responsive to request Item No. 2 existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for denial within the statutorily required seven (7) business days resulting in a deemed denial, the reason for the denial of access is lawful pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because request Item No. 1 of the Complainant's OPRA request seeks information rather than an identifiable government record, the request is invalid 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).
4. Although the Custodian failed to respond in writing to the Complainant's August 16, 2007 OPRA request within the statutorily mandated seven (7) business days, request Item No. 1 is a request for information and is therefore an invalid request under OPRA, and the Custodian certified that no records responsive to request Item No. 2 exist (even though this request item is invalid under OPRA requiring research by the Custodian). 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 unlawful denial of access appears negligent and heedless since he 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

June 16, 2009