



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

December 22, 2009 Government Records Council Meeting

Ronald Greco
Complainant

Complaint No. 2008-147

v.

Borough of Fanwood (Union)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian has revised the Borough of Fanwood’s official government records request form as required by the Council and provided certified confirmation of compliance to the GRC’s Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council’s November 4, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.f., the Custodian’s violation did not result in an unlawful denial of access because the Complainant’s request was invalid. Furthermore, the Custodian submitted certified proof that the Borough adopted a new records request form which complied with N.J.S.A. 47:1A-5.f. three (3) business days after receipt of the Council’s Interim Order. 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 violation of N.J.S.A. 47:1A-5.f. 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 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: December 30, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Ronald Greco¹
Complainant**

GRC Complaint No. 2008-147

v.

**Borough of Fanwood (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. All financial records regarding the salaries paid to the Borough of Fanwood's ("Borough") past and current Chief Financial Officers from 2003-2008.
2. All revenue taken in by the Borough over the past five (5) years (2003-2008) including but not limited to: taxes; court; dog license; all permits; vehicle and administrative fees collected from the police off-duty employment; and construction permits and fees.
3. All expenditures for former Mayors Jung and Connolly for meetings and conferences including but not limited to travel, dinners and accommodations.
4. All budget expenditures that exceed \$2,000 for the past five (5) years.
5. All purchase orders and expenditures generated by the Fanwood Memorial Library paid to past and current employees from 2004 to present.
6. All expenditures from the Borough surplus for the past five (5) years, specifically for Mayor Mahr's term, including the surplus account balance when Mayor Mahr took office and the current balance.
7. All expenditures by the Mayor, including but not limited to the expenses for meetings, conferences, travel, room and board, dining, etc., from 2004- present.

Request Made: June 20, 2008

Response Made: June 27, 2008

Custodian: Eleanor McGovern

GRC Complaint Filed: July 10, 2008³

Background

November 4, 2009⁴

Government Records Council's ("Council") Interim Order. At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the

¹ No legal representation listed on record.

² Represented by Dennis Estis, Esq. (Woodbridge, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The effective date of the decision is November 6, 2009.

October 21, 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. Because Requests Item Nos. 1-4 and 6-7 fail to identify with reasonable clarity the specific government records sought and because Request Item No. 5 not only fails to specify identifiable government records but would require the Custodian to conduct research, the Complainant's seven (7) requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Borough's OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Borough of Fanwood's current OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Borough's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)⁵ to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

November 6, 2009

Council's Interim Order distributed to the parties.

November 11, 2009

Custodian's response to the Council's Interim Order attaching the Borough of Fanwood's revised government records request form. The Custodian certifies that on November 10, 2009, two (2) business days after receipt of the Council's Interim Order,

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

pursuant to Resolution 09-11-156, the Borough of Fanwood adopted a revised government records request form in compliance with the Council's Interim Order.

Analysis

Whether the Custodian complied with the Council's November 4, 2009 Interim Order?

The Custodian certified that on November 10, 2009, two (2) business days after receipt of the Council's Interim Order, pursuant to Resolution 09-11-156, the Borough of Fanwood adopted a revised government records request form to comply with the Council's Interim Order. The Custodian also submitted certified proof of compliance to the Council on November 11, 2009, three (3) business days after receipt of the Council's Interim Order.

Therefore, because the Custodian has revised the Borough of Fanwood's official government records request form as required by the Council and provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's November 4, 2009 Interim Order.

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, 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, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5.f., the Custodian's violation did not result in an unlawful denial of access because the Complainant's request was invalid. Furthermore, the Custodian submitted certified proof that the Borough adopted a new records request form which complied with N.J.S.A. 47:1A-5.f., three (3) business days after receipt of the Council's Interim Order. 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 violation of N.J.S.A. 47:1A-5.f. 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. Because the Custodian has revised the Borough of Fanwood's official government records request form as required by the Council and provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's November 4, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.f., the Custodian's violation did not result in an unlawful denial of access because the Complainant's request was invalid. Furthermore, the Custodian submitted certified proof that the Borough adopted a new records request form which complied with N.J.S.A. 47:1A-5.f. three (3) business days after receipt of the Council's Interim Order. 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 violation of N.J.S.A. 47:1A-5.f. appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 4, 2009 Government Records Council Meeting

Ronald Greco
Complainant

Complaint No. 2008-147

v.

Borough of Fanwood (Union)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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. Because Requests Item Nos. 1-4 and 6-7 fail to identify with reasonable clarity the specific government records sought and because Request Item No. 5 not only fails to specify identifiable government records but would require the Custodian to conduct research, the Complainant’s seven (7) requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Borough’s OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Borough of Fanwood’s current OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O’Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Borough’s OPRA request form, or amend the form to include the definition of a “government record” as set forth in N.J.S.A. 47:1A-1.1.



3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)¹ to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 6, 2009

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Ronald Greco¹
Complainant**

GRC Complaint No. 2008-147

v.

**Borough of Fanwood (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. All financial records regarding the salaries paid to the Borough of Fanwood's ("Borough") past and current Chief Financial Officers from 2003-2008.
2. All revenue taken in by the Borough over the past five (5) years (2003-2008) including but not limited to: taxes; court; dog license; all permits; vehicle and administrative fees collected from the police off-duty employment; and construction permits and fees.
3. All expenditures for former Mayors Jung and Connolly for meetings and conferences including but not limited to travel, dinners and accommodations.
4. All budget expenditures that exceed \$2,000 for the past five (5) years.
5. All purchase orders and expenditures generated by the Fanwood Memorial Library paid to past and current employees from 2004 to present.
6. All expenditures from the Borough surplus for the past five (5) years, specifically for Mayor Mahr's term, including the surplus account balance when Mayor Mahr took office and the current balance.
7. All expenditures by the Mayor, including but not limited to the expenses for meetings, conferences, travel, room and board, dining, etc., from 2004- present.

Request Made: June 20, 2008

Response Made: June 27, 2008

Custodian: Eleanor McGovern

GRC Complaint Filed: July 10, 2008³

Background

June 20, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on seven (7) official OPRA request forms.

¹ No legal representation listed on record.

² Represented by Dennis Estis, Esq. (Woodbridge, NJ).

³ The GRC received the Denial of Access Complaint on said date.

June 27, 2008

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's seven (7) OPRA requests on the fifth (5th) business day following receipt of such requests.⁴ The Custodian states that access to the requested records is denied because the Complainant's OPRA requests are broad and unclear and would require the Custodian to conduct research to fulfill the requests. The Custodian requests that the Complainant review and resubmit his OPRA requests for specific government records.

July 10, 2008

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

- Complainant's OPRA requests dated June 20, 2008;
- Custodian's response to the Complainant's OPRA requests dated June 27, 2008.

The Complainant states that he submitted his OPRA request on seven (7) separate official OPRA request forms. The Complainant states that he received on June 30, 2008 the Custodian's June 27, 2008 letter denying the Complainant access to the records requested because the requests were too broad. The Complainant asserts that the Custodian has violated N.J.S.A. 47:1A-6.f.⁵ because she failed to provide the following information on the OPRA request form:

- Specific directions and procedures for requesting a record;
- The time period within which the agency is required to make records available;
- A statement of the requestor's right to challenge a decision by the agency to deny access;
- The procedure for filing an appeal.

The Complainant also asserts that the Custodian violated N.J.S.A. 47:1A-6.g.⁶ by failing to indicate the basis for the denial of access on the Complainant's OPRA request forms. The Complainant asserts that the Custodian response was not timely because it should not have taken the Custodian seven (7) business days to determine that the Complainant's request was broad and unclear.

The Complainant did not agree to mediate this complaint.

July 24, 2008

Request for the Statement of Information sent to the Custodian.

August 1, 2008⁷

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

⁴ The Custodian responded to the Complainant's seven (7) requests in a single letter.

⁵ The correct citation for this provision is N.J.S.A. 47:1A-5.f.

⁶ The correct citation for this provision is N.J.S.A. 47:1A-5.g.

⁷ The Custodian includes several prior OPRA requests submitted by the Complainant that are not relevant to the adjudication this complaint.

- Complainant’s OPRA requests dated June 20, 2008;
- Custodian’s response to the Complainant’s OPRA requests dated June 27, 2008.

The Custodian states that the Complainant’s OPRA requests do not specify particular government records as required by OPRA. The Custodian states that N.J.S.A. 47:1A-5 requires the Custodian of a government record to "permit the record to be inspected, examined and copied..." The Custodian argues that the statute does not require the Custodian to perform research for of the Complainant.

The Custodian states that in MAG Entertainment, LLC v. the Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), the Appellate Division made it clear that OPRA addresses the right of access to documents (government records) and not information as requested by the Complainant in this matter. The Custodian further states that in MAG, the Appellate Division held that “OPRA is not intended as a research tool... [which may be used] to force government officials to identify and cipher useful information.” *Id.* at 546. The Custodian states that the court further held that OPRA “does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in custodian’s possession.” *Id.* at 546-547.

The Custodian states that the GRC, relying on the Appellate Division’s decision in MAG, held that “OPRA only allows requests for records, not requests for information and, therefore, it is incumbent on the requestor to perform any correlations and analyses he may desire.” Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003). The Custodian notes that the Complainant has made previous OPRA requests seeking specific government records which have been fulfilled.

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. 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.

The Custodian responded in writing to the Complainant’s seven (7) OPRA requests on the fifth (5th) business day, stating that access to the requested records was denied because the Complainant’s OPRA requests were broad and unclear and would require the Custodian to conduct research to fulfill. The Complainant subsequently filed this complaint.

The Complainant’s requests sought “financial records,” “expenditures” and revenue.” The requests fail to identify specific government records and would require the Custodian to do research to locate records containing the subject matter for various time periods set forth by the Complainant. As such, the Complainant’s requests are invalid under OPRA.

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),⁸ 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.”⁹

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent, *supra*.

Additionally, in New Jersey Builders Association v. New Jersey Council on 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 (February 2009) 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, *supra*, and Bent, *supra*.

The Complainant's Request Items No. 1-4 and 6-7 sought access to "financial records," "expenditures" and "revenue." However, these are no specific identifiable government records but rather general descriptions of a classification of records. Pursuant to Bent, "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." Although Request Item No. 5 properly identified purchase orders as the record sought, it too is invalid because the Complainant did not provide a list of the former library employees who were the subject of the request. The Custodian would have to research all previous library personnel before she could begin to locate records. "The Act [OPRA] does not ... require custodians of government records to undertake research for a requestor." Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445, 451 (App. Div. 2009).

Therefore, because Requests Item Nos. 1-4 and 6-7 fail to identify with reasonable clarity the specific government records sought and because Request Item No. 5 not only fails to specify identifiable government records but would require the Custodian to conduct research, the Complainant's seven (7) requests are invalid pursuant to MAG, *supra*; Bent, *supra*; and New Jersey Builders, *supra*. As such, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Schuler, *supra*.

Whether the Borough of Fanwood's OPRA request form complies with the requirement set forth in OPRA?

N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions..." Additionally, custodians must grant or deny access to records in accordance with the law. Thus, a requestor may be deterred from submitting an OPRA request for certain records because the Borough's form provides misinformation

regarding the accessibility of said records, in essence, denying the requestor access to records.

OPRA provides that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- (1) specific directions and procedures for requesting a record;
- (2) a statement as to whether prepayment of fees or a deposit is required;
- (3) the time period within which the public agency is required by [OPRA], to make the record available;
- (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (5) space for the custodian to list reasons if a request is denied in whole or in part
- (6) space for the requestor to sign and date the form;
- (7) space for the custodian to sign and date the form if the request is fulfilled or denied.” N.J.S.A. 47:1A-5.f.

OPRA requires custodians to adopt a form to be used by requesters in making OPRA requests. N.J.S.A. 47:1A-5.f. OPRA sets forth the minimum information requirements of an OPRA request form, not the maximum. There is nothing in OPRA that prohibits a municipality from adopting a form that incorporates the requirements set forth in N.J.S.A. 47:1A-5.f., as well as additional useful information specific to that custodial agency. OPRA does not limit or exclude the inclusion of additional information as long as that information does not conflict with OPRA. Paff v. City of East Orange (Essex), GRC Complaint No. 2007-297 (March 2008).

The Complainant asserted that the Custodian violated OPRA because the Borough's OPRA form does not comply with the requirements set forth in N.J.S.A. 47:1A-5.f. The Complainant submitted his request on seven (7) separate Borough of Fanwood OPRA request forms which were provided to the GRC.

The GRC has reviewed the OPRA request forms submitted by the Complainant. This review revealed that the OPRA request form does not set forth specific directions and procedures for requesting a record as required by N.J.S.A. 47:1A-5.f.(1). Moreover, the form does not include the time period in which the agency is required to make records available as required by N.J.S.A. 47:1A-5.f.(3), but rather states that the Custodian will attempt to provide the records in a reasonable time under the circumstances.

Additionally, the form lacks a statement of the requestor's right to challenge a decision by the agency to deny access and the procedure for filing an appeal as required by N.J.S.A. 47:1A-5.f.(4). Furthermore, the Borough's OPRA request form departs from OPRA at N.J.S.A. 47:1A-1.1 by defining "public records" as "generally including those records which the Borough is required by law to maintain. The term does not include employee personnel files, police investigation records, public assistance files or other matter in which there is a right of privacy or confidentiality."

In O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the complainant's counsel asserted that the Township's OPRA request form does not follow the GRC's model form and violated OPRA. Counsel stated that the Township's form indicated that public records do not include employee personnel files, but said form did not list the three (3) exceptions to OPRA's personnel record exemption pursuant to N.J.S.A. 47:1A-10. The Council ultimately ordered the Custodian to either delete or amend said statement to include the remainder of the applicable provision of OPRA.

Because public agencies are expressly directed to adopt an official OPRA request form, and because the Borough's OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Borough's current OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Borough of Fanwood's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Requests Item Nos. 1-4 and 6-7 fail to identify with reasonable clarity the specific government records sought and because Request Item No. 5 not only fails to specify identifiable government records but would require the Custodian to conduct research, the Complainant's seven (7) requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied the Complainant access

to the records requested pursuant to Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

2. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Borough's OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Borough of Fanwood's current OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Borough's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)¹⁰ to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
Ronald Greco v. Borough of Fanwood (Union), 2008-147 – Findings and Recommendations of the Executive Director