



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Randy George
Complainant

Complaint No. 2008-209

v.

NJ Department of Environmental Protection,
Nature & Historic Resources, Division of Parks &
Forestry, Office of Leases, Manor of Skylands
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 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 because the Custodian has failed to establish in his motion for reconsideration of the Council’s June 23, 2009 Decision and Findings and Recommendations that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 30th Day of September, 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: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Randy George¹
Complainant**

GRC Complaint No. 2008-209

v.

**New Jersey Department of Environmental
Protection, Nature & Historic Resources, Division of
Parks & Forestry, Office of Leases, Manor of
Skylands²
Custodian of Records**

Records Relevant to Complaint: Copies of the following records, which the caterer who is party to the lease at the Manor of Skylands is required to provide to the Department of Environmental Protection:

1. Copies of the monthly concession and center reports containing the statements of total gross revenue for each previous month, which are supposed to be provided to the State of New Jersey before the 15th of each month.
2. Copies of the annual statement or gross revenue and payment of the percentage of rent due, submitted before or on March 31st of each year.
3. Marketing Feasibility Study

Request Made: August 22, 2008

Response Made: September 8, 2008

Custodian: Matthew J. Coefer

GRC Complaint Filed: September 15, 2008³

Background

June 23, 2009

Government Records Council's ("Council") Findings and Recommendations. At its June 23, 2009, public meeting, the 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, found that:

¹ No legal representation listed on record.

² Represented by DAG Mark Collier, on behalf of the NJ Attorney General.

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

1. Ms. Green's failure to respond in writing to the Complainant's August 22, 2008 OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because Ms. Green failed to forward the Complainant's August 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Green has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).
3. Because Ms. Green attempted to fulfill the Complainant's request by providing the Complainant with all records responsive on September 8, 2008 and September 20, 2008, the Complainant's August 22, 2008 OPRA request is considered a valid OPRA request pursuant to Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007).
4. Although Ms. Green's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failure to forward the request to the proper custodian of record or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of N.J.S.A. 47:1A-5.h., because Ms. Green certified that all records responsive to the Complainant's August 22, 2008 OPRA request were provided on September 8, 2008 and September 20, 2008, it is concluded that Ms. Green'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, Ms. Green's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h. appears negligent and heedless.

June 26, 2009

Council's Final Decision distributed to the parties.

July 10, 2009

Custodian's Motion for Reconsideration. The Custodian requests that the GRC reconsider its June 23, 2009 Findings and Recommendations pursuant to *N.J.A.C. 5:105.2.10*. The Custodian asserts that the actions of the New Jersey Department of Environmental Protection ("DEP") were in accordance with an official advisory opinion of the GRC, although it was in fact ultimately responding to an otherwise invalid request. The Custodian argues that further, the Department, or any other entity subject to OPRA, should not be effectively prevented from responding informally to an invalid OPRA request simply because the Council would not consider the OPRA requirements

applicable if the agency sought in any way to assist the requestor informally. The Custodian contends that such an approach would thwart the State policy that State agencies provide transparency and cooperate with the public in providing requested information.

The Custodian also argues that the DEP strongly believes that the implications of such a stance would have a profound effect on an agency's ability to carry out what are the very aims of OPRA, specifically to improve public access to government records. See N.J.S.A. 47:1A-1 et seq. The Custodian contends that the DEP acted in accordance with the explicit advice of the GRC when it considered the request in this matter invalid under OPRA. The Custodian also contends that, notwithstanding that fact, because the DEP worked with the requestor, a government official, to provide him with the records sought, the GRC has found that they acted negligently, heedlessly and in violation of the very law that the GRC's own written guidance indicates is inapplicable here: the Custodian asserts that this result is not justified. The Custodian also asserts that not only is the GRC impeding an agency's ability to provide documents in response to otherwise invalid requests, the GRC is also placing a roadblock on any person's ability to request records outside of OPRA: this surely cannot be what the statute intended. The Custodian asserts that, at the very least, the GRC should strike its finding that the DEP officials acted in a negligent and heedless manner.

The Custodian contends that there can be no violation of OPRA when an agency responds informally to a request. The Custodian asserts that the GRC should reconsider its decision in this matter because the DEP's actions were in good faith and in complete accordance with the GRC's own written guidance. State of New Jersey GRC Advisory Opinion No. 2006-01 (February 17, 2006).

The Custodian further contends that the Council's reliance on the proposition that an invalid OPRA request becomes valid if an agency informally responds to it is misplaced. The Custodian points out that, as the Department set forth in its SOI, the GRC Advisory Opinion clearly states that OPRA "requires all requestors to submit OPRA requests on an agency's official OPRA records request form" and that "OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form." *Id.* The Custodian notes that the DEP has adopted an official OPRA request form and the Complainant simply did not use it; instead, the Complainant submitted a blank Borough of North Haledon OPRA request form to the DEP with a letter dated July 16, 2008. The Custodian contends that in accordance with the GRC's Advisory Opinion, Assistant Director Lynn Fleming of the NJ State Part Service did not treat it as a valid OPRA request, but instead, Ms. Fleming and Marci Green, Administrator of the Department's Office of Leases, chose not to ignore the request and went out of their way to accommodate the request and provide the records that were being sought.

The Custodian notes that Ms. Fleming reached out to the Complainant via telephone on July 28, 2008, six (6) business days after the Complainant's July 16, 2008 letter request and indicated to his secretary that a response was being worked on. The Custodian further notes that seven (7) business days after this phone call, by letter dated August 7, 2008, Ms Green forwarded the requested lease document to the Complainant

via overnight mail. The Custodian argues that these actions may not have been in strict compliance with OPRA guidelines if the request had, in fact, been valid, but the GRC's own guidance indicated that the request was invalid under OPRA. The Custodian asserts that it would therefore be incongruous to apply the provisions of OPRA. The Custodian further asserts that the actions of the DEP, Ms. Fleming and Ms. Green were made entirely in good faith, in accordance with GRC guidance and in the spirit of OPRA's aim to facilitate increased access to government records and were neither negligent nor heedless.

The Custodian contends that while the GRC's decision in this matter seemingly agrees that "OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form," the GRC's decision mistakenly relies on the holding of Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007) for the proposition that informally responding to an invalid request for records cures the invalidity of the original request and binds the Custodian to OPRA's provisions. The Custodian asserts that the Spaulding case offers no reasoning to support this proposition and argues that Spaulding simply relies upon another prior GRC decision, Paff v. Audubon, GRC Complaint No. 2006-01 (March 2006) to reach its decision. The Custodian further argues that not only does the Paff case itself offer very little reasoning to support its conclusion, the facts are not on point with this matter. The Custodian notes that in Paff, the custodian did not just respond to an invalid OPRA request but sought payment from the requestor for gathering the records; the custodian in Paff was therefore in a sense estopped from arguing that OPRA did not apply while, at the same time, using OPRA to claim monies owed.

The Custodian argues that the circumstances of the instant matter are substantially different from Paff. The Custodian asserts that the DEP officials involved in this matter acted in accordance with the GRC's own written advice when they determined that the Complainant's request was invalid under OPRA because it was not on an official DEP OPRA request form. The Custodian further asserts that although Ms. Fleming and Ms. Green did ultimately provide records in response to the invalid request, they did not seek payment for the copies that were made and sent to the Complainant. The Custodian argues that although Ms. Fleming and Ms. Green were subject to the requirements of OPRA, they nevertheless fulfilled OPRA's aims by providing access to the requested records.

The Custodian notes that nowhere does OPRA provide that an otherwise invalid request for records is cured by the ultimate disclosure of records to the requestor. See N.J.S.A. 47:1A-1 et seq. The Custodian argues that such a provision would not only hinder agencies from informally providing government records in response to otherwise invalid requests but would also be inconsistent with the legislative aims of OPRA; yet the GRC has taken that position in the instant matter.

The Custodian also states that the agency is fully aware of the Appellate Division's recent decision in Renna v. County of Union, 407 N.J.Super. 230 (App. Div. 2009), which seemed to overrule the GRC's Advisory Opinion which is at issue herein. The Custodian notes, however, that the Renna decision had not yet been issued at the time of the request which is the subject of this matter. The Custodian further notes that

although the Renna decision is inapplicable to the present case, it appears to require agencies to accept a request that is not on a form as long as it contains all the required information, and, moreover, does not address the issue of whether custodians who have responded in good faith but may have exceeded the deadline for production of the requested records are in violation of OPRA.

The Custodian finally asserts that the actions of the DEP, Ms. Fleming and Ms. Green were in good faith and in accordance with the state of the law and were supported by the GRC's Advisory Opinion at the time. The Custodian requests that the GRC reconsider its decision and strike its unwarranted characterization of the actions of the Ms. Fleming and Ms. Green as negligent and heedless because such language is inappropriate and unwarranted given these officials' actions.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's June 23, 2009 Findings and Recommendations?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Custodian submitted a six (6) page letter brief in which he asserted that the actions of the DEP and its employees, Ms. Fleming and Ms. Green, are in accordance with the GRC's Advisory Opinion 2006-01, although the request was ultimately invalid. The Custodian asserts that to effectively prevent an agency from responding informally to an invalid OPRA request would thwart the State policy that State agencies provide transparency and cooperate with the public in providing requested information. The Custodian argues that the GRC's prior decisions in Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007) and Paff v. Audubon, GRC Complaint No. 2006-01 (March 2006) are inapplicable and inapposite to the instant matter. The Custodian argues strenuously that because Ms. Fleming and Ms. Green followed the GRC's Advisory Opinion they should not be considered to have negligently or heedlessly violated N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h.

In this matter, the GRC determined that because Ms. Fleming failed to forward the Complainant's July 16, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian or on the DEP official OPRA request form, Ms. Fleming has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. The GRC's decision is based upon the evidence of record which indicated that Ms. Fleming, Assistant Director of the New Jersey State Park Service, referred the Complainant's request for records to Ms. Green, the Administrator for DEP's Office of Leases, and Ms. Robin Madden ("Ms. Madden"), Executive Assistant to the Assistant Commissioner for Natural and Historic Resources. The evidence is undisputed that neither Ms. Fleming nor Ms. Green were the Custodian of Records for DEP, and it is further undisputed that Ms. Fleming did not forward the Complainant's request to the Custodian of Records of the DEP, Matt Coefer.⁴

It is further undisputed that the records request was on the Borough of North Haledon municipal OPRA request form. Therefore, it is obvious that all parties understood that at least the requestor perceived the request as a records request made pursuant to OPRA. At no time, prior to after the Denial of Access Complaint was filed, did any of the employees who received the Borough of North Haledon OPRA request form indicate to the requestor that the request was invalid under OPRA but would be fulfilled "informally" by DEP. Additionally, at no time did any of the employees who received the Borough of North Haledon OPRA request form indicate that the requestor needed to fill out the DEP official OPRA request form.

In his Motion for Reconsideration, the Custodian has failed to submit any new evidence that would indicate that the GRC's decision in this regard was based upon a "palpably incorrect or irrational basis" or that the GRC failed to consider the significance

⁴ The evidence of record indicates that on September 28, 2008, Custodian's Counsel sent a letter to the GRC in which Counsel averred that while Ms. Green, the Administrator for DEP's Office of Leases, had previously responded informally to non-OPRA requests made to the Office of Leases, she did not act as DEP's custodian of records under OPRA. Counsel further stated that the Office of Records Access is in the best position to respond to this complaint and that the complaint should be forwarded to the Custodian and asked that any future complaints against the DEP should be directed to DEP's Custodian of Records at the Office of Records Access.

of probative, competent evidence in determining that Ms. Fleming violated N.J.S.A. 47:1A-5.i when she failed to forward the Complainant's records request which was on the Borough of North Haledon municipal official OPRA request form to the DEP's Custodian of Records, Matt Coefer.

The GRC also determined that Ms. Fleming verbally replied to the Complainant's request for records on July 28, 2008, which violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. The GRC further determined that Ms. Fleming violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contract or an immediate response to the Complainant's request for the contract. Moreover, the GRC determined that because the Complainant was provided with the requested caterer's lease on August 7, 2008, the Complainant's July 16, 2008 OPRA request was a valid OPRA request pursuant to Spaulding, *supra*, although the request itself was submitted on an official OPRA request form from a different public agency. The GRC also determined that because the Complainant was provided with the caterer's lease responsive to his July 16, 2008 OPRA request, Custodian Counsel's contention that the request was invalid because the Complainant failed to identify a specific government record is moot.

There is no evidence in the record, and the Custodian does not argue in his Motion for Reconsideration, that Ms. Fleming informed the Complainant in her July 28, 2008 response to the request or at any time thereafter that the DEP would refuse the Complainant's request for records because it was submitted on an official OPRA request form other than the DEP's official OPRA request form. Similarly, there is no evidence in the record that Ms. Green so informed the Complainant. The first indication from DEP that the request was considered invalid because it was not on the DEP's official request form occurred at the time of the Custodian's submission of the Statement of Information to the GRC on October 15, 2008 only after the Denial of Access Complaint was filed.

It is also undisputed that although the Complainant's record request was not on the proper DEP OPRA request form, such request was on an official Borough of North Haledon OPRA request forms. Therefore, it is reasonable to conclude that all parties involved (the requestor and the employees who received the request) knew the requestor perceived this request as an OPRA request. However, the employees who received the request neither informed the requestor – verbally or otherwise – that the request was invalid nor directed the requestor to the proper DEP OPRA request form. Therefore, the same employees are foreclosed from now asserting that they were merely responding “informally” to this records request, since such request was obviously on an OPRA request form, albeit not the proper one.

The Custodian seems to argue in the Motion for Reconsideration that the GRC erroneously determined that Ms. Fleming and Ms. Green negligently and heedlessly violated N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i. because the request was invalid under OPRA *ab initio* since it was not submitted on an official DEP OPRA request form. The Custodian argues that because Ms. Fleming and Ms. Green followed the GRC's Advisory Opinion they should not be considered to have negligently or heedlessly violated N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h.. The Custodian further argues that the cases cited by the GRC in support of its decision, Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007) and Paff v.

Audubon, GRC Complaint No. 2006-01 (March 2006), offer no reasoning to support the decisions therein and are not applicable to the instant matter.

The GRC's Advisory Opinion No. 2006-01 was issued on February 16, 2006 and stated in pertinent part that the GRC "determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. Thus, OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form." This Advisory Opinion was applicable at the time of the Complainant's July 16, 2008 request⁵. However, the Advisory Opinion was not abrogated by the GRC's consistent position, enunciated in Paff, *supra*, and Spaulding, *supra*, that a custodian's attempt to fulfill a request for records which is not made on an agency's official OPRA request form will trigger the application of OPRA to that request.

In Spaulding, the requestor submitted a request for records in letter format, without attaching an official OPRA request form. After some discussion about the quantum of responsive records and the necessity of redactions thereto, the custodian responded to the request by stating that access to the requested records was denied because accommodating the request would substantially disrupt the agency's operations. The custodian's response did not raise the lack of an official OPRA request form as a reason why the protections and time limits of OPRA should not apply. The custodian did not raise the issue of the lack of an official OPRA request form until the submission of the Statement of Information. The GRC determined that OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form. Additionally, the GRC requires that custodians direct requestors to the agency's official OPRA request form when denying a letter request on the basis that said request is not submitted on an official request form. The GRC held that because the custodian in Spaulding attempted to fulfill the request resulted in the request being considered valid under OPRA.

In so doing, the GRC relied upon its prior decision in Paff v. Audubon, GRC Complaint No. 2006-01 (March 2006). There, the requestor submitted a request for records without using an official OPRA records request form. The custodian responded by providing the requestor with a copy of such form and requesting that said form be completed and submitted to the agency in order that the request for records could be fulfilled. The requestor subsequently refused to use the agency's official request form, resubmitting his request without said form. The custodian again faxed a copy of the agency's official request form, as well as a copy of the Borough's ordinance which stated that only those requests for records made on the Borough's official OPRA request form would be fulfilled. The custodian also noted, however, that the request would be fulfilled on payment of applicable copying fees. The GRC determined that although the custodian was not obligated to fulfill the original request for records pursuant to OPRA, because she undertook to respond to the request (by providing an estimate of applicable copying

⁵ The Appellate Division declined to give deference to the GRC's Advisory Opinion No. 2006-01 in its decision in Renna v. County of Union, 407 N.J.Super. 230 (App. Div. 2009). However, because the decision in Renna was rendered May 21, 2009, it was not in effect at the time of the request for records which is the subject of the instant matter. The GRC declines to apply the holding of Renna retroactively to this matter.

charges), the custodian had treated the request as though it were valid under OPRA and was therefore subject to all of the statutory mandates of OPRA.

In the instant matter, the Complainant submitted a request for records on the official OPRA request form of another public agency to the DEP. Therefore, the employees who received the records request cannot reasonably argue that they were uninformed of the requestor's perception that his request was in fact an OPRA request. The record is clear that, rather than refer the request to the appropriate custodian at DEP or refer the Complainant to the appropriate custodian (or to the appropriate DEP OPRA request form), Ms. Fleming chose to respond to the request *as though it were a valid OPRA request* by informing the Complainant that the Administrator for the Office of Leases, Ms. Green, was on vacation.⁶

In the instant matter, as in Spaulding, the lack of a proper OPRA request form was not raised at the time of the response to the request and an attempt was made to fulfill the request. Although Ms. Fleming was not obligated to respond to the Complainant's request, she undertook to do so. By so doing, Ms. Fleming became obligated to comply with the requirements of OPRA. Spaulding, supra, Paff, supra; see also N.J.S.A. 47:1A-1 ("all limitations on access shall be construed in favor of the public's right of access").

The Custodian argues that Ms. Fleming and Ms. Green chose to "informally" fulfill a request for records that was invalid under OPRA and that the GRC's determination that they negligently and heedlessly violated OPRA in so doing will have a chilling effect on the informal resolution of such requests, an effect that runs counter to the spirit of OPRA. However, the GRC notes that because of Ms. Fleming's failure to either inform the Complainant that the request was invalid, refer the request to the appropriate Custodian, or refer the Complainant to the appropriate Custodian, the Complainant had no way of knowing that the DEP considered the request invalid until after the Denial of Access Complaint was filed and the DEP had submitted its Statement of Information to the GRC.

The Custodian states in the Motion for Reconsideration that there can be no violation of OPRA when an agency responds informally to a request. Pursuant to Paff, supra, and Spaulding, supra, the provisions of OPRA come into effect when a request is made pursuant to OPRA; custodians are therefore required to adhere to the requirements of OPRA whenever they receive requests made under the color of OPRA. Here, it can be reasonably assumed that the request was made under the color of OPRA given that the requestor submitted the request on the official OPRA request form of another public agency. All of the parties, the requestor and the employees who received the request, were aware that OPRA was implicated. However, the GRC recognizes that many agencies grant administrative records requests outside the bounds of OPRA for such documents as building inspection reports, motor vehicle accident reports, birth

⁶ The original record of this matter is silent regarding why Ms. Fleming failed to refer the request to the appropriate custodian and, moreover, why Ms. Fleming failed to inform the Complainant that the request was invalid. In his Motion for Reconsideration, the Custodian failed to submit any new evidence that would elucidate this matter.

certificates and municipal resolutions. Based on the foregoing, although the DEP made a considerable effort to comply with the Complainant's invalid OPRA request, the DEP may have considered suggesting to the Complainant an alternate process to obtain the records sought, separate from the legal requirements and constraints of OPRA. This seems to be especially required given that it was obvious from the requestor's submission on an official OPRA request form of another public agency that the requestor perceived his request as an OPRA request.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Custodian failed to do so. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. *See D'Atria, supra*.

Therefore, because the Custodian has failed to establish in his motion for reconsideration of the Council's June 23, 2009 Decision and Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in his motion for reconsideration of the Council's June 23, 2009 Decision and Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



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

Randy George
Complainant

Complaint No. 2008-209

v.

New Jersey Department of Environmental Protection,
Nature & Historic Resources,
Division of Parks & Forestry, Office of Leases,
Manor of Skylands
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. Ms. Green’s failure to respond in writing to the Complainant’s August 22, 2008 OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because Ms. Green failed to forward the Complainant’s August 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Green has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).
3. Because Ms. Green attempted to fulfill the Complainant’s request by providing the Complainant with all records responsive on September 8, 2008 and September 20, 2008, the Complainant’s August 22, 2008 OPRA request is



considered a valid OPRA request pursuant to Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007).

4. Although Ms. Green's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failure to forward the request to the proper custodian of record or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of N.J.S.A. 47:1A-5.h., because Ms. Green certified that all records responsive to the Complainant's August 22, 2008 OPRA request, were provided on September 8, 2008 and September 20, 2008, it is concluded that Ms. Green'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, Ms. Green's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h. appears negligent and heedless.

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 23rd 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**

**Randy George¹
Complainant**

GRC Complaint No. 2008-209

v.

**New Jersey Department of Environmental Protection,
Nature & Historic Resources, Division of Parks & Forestry,
Office of Leases, Manor of Skylands²
Custodian of Records**

Records Relevant to Complaint: Copies of the following records, which the caterer who is party to the lease at the Manor of Skylands is required to provide to the Department of Environmental Protection:

1. Copies of the monthly concession and center reports containing the statements of total gross revenue for each previous month, which are supposed to be provided to the State of New Jersey before the 15th of each month.
2. Copies of the annual statement or gross revenue and payment of the percentage of rent due, submitted before or on March 31st of each year.
3. Marketing Feasibility Study

Request Made: August 22, 2008

Response Made: September 8, 2008

Custodian: Matthew J. Coefer

GRC Complaint Filed: September 15, 2008³

Background

August 22, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official Borough of North Haledon OPRA request form, attaching two (2) pages of provisions contained in a New Jersey Department of Environmental Protection ("DEP") lease with a caterer.⁴

September 8, 2008

Ms. Marci Green's ("Ms. Green"), the Administrator for the DEP's Office of Leases, response to the OPRA request. Ms. Green responds in writing to the

¹ No legal representation listed on record.

² Represented by DAG Mark Collier, on behalf of the NJ Attorney General.

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

⁴ The Complainant hand delivered his request to Ms. Green at a public meeting. The provisions in the attached lease contain three (3) types of records that the caterer is required to provide to the State of New Jersey during the life of the lease, as well as inquiries directed towards the caterer.

Complainant's OPRA request on the tenth (10th) business day following receipt of such request. Ms. Green provides copies of eleven (11) pages of records to the Complainant.

September 15, 2008

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

- Complainant's OPRA request dated August 22, 2008, attaching two (2) pages of provisions from a DEP lease.
- Eleven (11) pages of records provided to the Complainant on September 8, 2008.

The Complainant states that he personally handed an OPRA request to Ms. Green on August 22, 2008. The Complainant asserts that Ms. Green averred at that time that she was not the proper person to receive the OPRA request but that she would accept it and fulfill the request. The Complainant asserts that he contacted Ms. Green the following week regarding this request, at which time Ms. Green advised that she did not personally maintain the information requested but that she would contact the Park Service or the caterer to obtain the requested records.

The Complainant states that he received no additional correspondence from Ms. Green until September 7, 2008, when Ms. Green provided the Complainant with copies of eleven (11) pages of records.⁵ The Complainant contends that the records provided are only a fraction of those sought in his August 22, 2008 OPRA request. The Complainant asserts that Ms. Green failed to provide all records requested.

The Complainant did not agree to mediate this complaint.

September 26, 2008

Letter from the Custodian's Counsel to the GRC. Counsel states that he is representing the New Jersey Department of Environmental Protection ("DEP") in the instant matter. Counsel avers that while Ms. Green has previously responded informally to non-OPRA requests made to the Office of Leases, she is not DEP's custodian of records under OPRA. Counsel states that the Office of Records Access is in the best position to respond to this complaint and that the complaint should be forwarded to the Custodian. Counsel states that any future complaints against the DEP should be directed to DEP's Custodian of Records at the Office of Records Access.

September 30, 2008

Request for the Statement of Information sent to the Custodian.

October 1, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until October 15, 2008 to submit the Statement of Information.

⁵ The Complainant's asserted date of receipt of records (September 7, 2008) appears to be erroneous based on the Custodian's certification and the DEP's report dated July 3, 2008, which contains the proposed public hearing dates on the Manor of Skylands issues. See:

http://www.state.nj.us/dep/parksandforests/parks/docs/report_skyland_manor.pdf

Randy George v. New Jersey Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skylands, 2008-209 – Findings and Recommendations of the Executive Director

October 1, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until October 15, 2008 to submit the Statement of Information.

October 15, 2008

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

- Complainant's OPRA request dated August 22, 2008 attaching two (2) pages of provisions from a DEP lease.
- Copy of the New Jersey Department of Environmental Protection official OPRA request form.⁶

Counsel states that the Complainant personally handed Ms. Green an OPRA request on the official Borough of North Haledon OPRA request form on August 22, 2008. Counsel states that Ms. Green informed the Complainant that she was not the appropriate individual to receive the records request but would nevertheless respond to the Complainant's request.

Counsel argues that the Complainant's OPRA request did not specifically identify the records being sought but rather stated that the Complainant was requesting the records that the caterer should have provided to the State of New Jersey according to the attached two (2) pages of the caterer's lease. Counsel states that the attached two (2) pages of the caterer's lease contain provisions from a DEP lease with a third party.

Counsel states that, in response to the Complainant's request, Ms. Green contacted the regional office that handles the caterer's lease and requested all financial records regarding the lease. Counsel asserts that while the records responsive were being compiled, Ms. Green contacted the Complainant via telephone on August 25, 2008 and August 29, 2008 to inform the Complainant that the Office of Leasing did not possess any records on hand but would provide whatever the regional office found and would also contact the caterer to obtain the remaining records that were never submitted to DEP. Counsel states that Ms. Green obtained several monthly concession reports from the regional office and caterer, as well as a three (3) year schedule of gross revenue, and that Ms. Green provided these records to the Complainant on September 7, 2008.

Counsel contends that DEP did not violate OPRA in this matter because the Complainant never submitted a valid OPRA request. Counsel states that, in order for an OPRA request to be valid, it must be submitted on the agency's official government records request form pursuant to N.J.S.A. 47:1A-1 et seq.; Advisory Opinion No. 2006-01 (February 17, 2006) and DiMattia v. New Jersey Department of Environmental Protection, GRC Complaint No. 2005-200 (March 2006). Counsel avers that, according to the GRC's Advisory Opinion No. 2006-01, OPRA indicates that the use of the form adopted by the agency to which the records request is directed is mandatory, specifically:

⁶ This SOI is mistakenly marked as corresponding with GRC Complaint No. 2008-209. Counsel corrected this error in a letter to the GRC dated October 17, 2008.

“[i]n providing, in 5.g., that the custodian “shall” sign and date the form, indicate the basis for the denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors.” GRC Advisory Opinion No. 2006-01, pg. 2.

Counsel avers that, as appropriately pointed out by the GRC in Advisory Opinion No. 2006-01, the courts of New Jersey have indicated “that the statute’s form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe the identifiable records sought”. *Id.* (citing MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 33 (App. Div. 2005); Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 9App. Div. 2005).)

Counsel argues that, in citing to the above decisions and to OPRA itself, the GRC concluded that OPRA’s provisions only come into play when a request for government records is submitted on the agency’s official OPRA records request form. Counsel asserts that the Complainant’s request is therefore not a valid request for government records and the complaint should be dismissed.

Additionally, Counsel argues that, because the Complainant failed to include the specific description of the record requested, the request should have been deemed invalid pursuant to MAG, *supra*. Counsel asserts that, notwithstanding the fact that the Complainant’s OPRA request is already invalid because it was not provided to the Custodian on a DEP official OPRA request form, the Complainant’s request is also invalid because it did not identify specific government records sought, but instead required Ms. Green to review the attached DEP lease to guess which records the Complainant was seeking.

Counsel asserts that, notwithstanding the invalidity of the Complainant’s OPRA request, Ms. Green not only secured records that were maintained by another office, but also reached out to a third party in order to satisfy the Complainant’s request. Counsel argues that OPRA does not require a custodian to provide records that do not exist or to create records in order to satisfy requests pursuant to MAG, *supra*; however, Ms. Green went above and beyond the spirit of OPRA to satisfy the Complainant’s August 22, 2008 request.

Counsel contends that for all of the reasons cited above, this complaint should be dismissed.

April 30, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC requests that Ms. Green provide a certification to the following:

1. Specifically describe the search undertaken to satisfy the Complainant’s August 22, 2008 OPRA request.

2. Whether all records responsive were provided to the Complainant and whether any other records responsive exist?

The GRC requests that Ms. Green's certification be provided to the GRC no later than May 4, 2009.

May 4, 2009

Legal certification from Ms. Green. Ms. Green certifies that she received the Complainant's August 22, 2008 OPRA request at a public meeting. Ms. Green certifies that the Complainant's request did not specify what records were being sought, rather, the Complainant attached a DEP lease with a third party and requested all records that the caterer should have provided to DEP.

Ms. Green certifies that she verbally contacted the Complainant during the week of August 25, 2008 and advised that no records responsive existed in the Office of Leases, but that Ms. Green was reaching out to the regional office and the caterer. Ms. Green also certifies that she provided several records to the Complainant via certified and regular mail on or about September 7, 2008. Ms. Green certifies that she also informed the Complainant that she did not believe that a marketing and feasibility study existed. Finally, Ms. Green certifies that after September 7, 2008, the Custodian obtained additional monthly concession reports and provided them to the Complainant via certified and regular mail on September 20, 2008.

May 5, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that the certification has been reviewed and the Custodian failed to definitively certify whether all records responsive were provided. The GRC requests that Ms. Green provide a certification to the following: Whether all records responsive were provided to the Complainant on September 7, 2008 and September 20, 2008 and whether any other records responsive exist?

The GRC requests that Ms. Green's certification be provided to the GRC no later than May 7, 2009.

May 7, 2009

Amended legal certification from Ms. Green. Ms. Green certifies that records were provided to the Complainant on September 8, 2008 and September 20, 2008. Ms. Green certifies that all records were provided to the Complainant and that as of September 20, 2008, no other records exist.

Analysis

Whether Ms. Green 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 states 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 therefor ...” N.J.S.A. 47:1A-5.g.

OPRA provides that:

“[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the custodian of the record or *direct* the requestor to the *custodian of the record.*” (Emphasis added.) N.J.S.A. 47:1A-5.h.

Additionally, OPRA 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 ... failure to respond shall be deemed a denial of the request ...The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (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. Said provision also provides that a custodian shall advise the requestor when a record can be made available. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, Ms. Green responded verbally on August 25, 2008 and August 29, 2008, informing the Complainant that the records were being compiled. Ms. Green certified on May 7, 2009 that she provided all records responsive to the Complainant’s August 22, 2008 OPRA request on September 8, 2008 (the first written response) and September 20, 2008.

Therefore, Ms. Green’s failure to respond in writing to the Complainant’s August 22, 2008 OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Moreover, OPRA requires that “[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the custodian of the record or *direct* the requestor to the *custodian of the record*.” (Emphasis added.) N.J.S.A. 47:1A-5.h.

Counsel identified Matthew Coefer as the Custodian of Record for DEP and argued in the SOI that Ms. Green responded to the Complainant’s request even though she is not the official custodian of record. N.J.S.A. 47:1A-5.h. required Ms. Green to forward the Complainant’s OPRA request to the proper custodian of record or to direct the Complainant to the appropriate Custodian.

Therefore, because Ms. Green failed to forward the Complainant’s July 16, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Green has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossip v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h).

Whether the Complainant's August 22, 2008 OPRA request constitutes a valid OPRA records request?

The Complainant submitted his July 16, 2008 OPRA request on an official North Haledon OPRA request form. Counsel argues that the request is invalid because it is not on DEP's official request form. Additionally, Counsel argues that the Complainant did not include a description of the record requested.

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) 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;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

Id.

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that "each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). See also G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If 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.* (Emphasis added.) N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. See Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA’s central purpose of making government records “readily accessible” to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute’s form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. See MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor’s general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a “brief description” of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency’s official OPRA records request form. OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form.

However, in Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007), although the Complainant submitted an OPRA request that was not on

the Register's official records request form, the Custodian made an attempt to fulfill the Complainant's request yet subsequently argued in the SOI that the Complainant had not filed such request on an official OPRA request form. The GRC held that "the Custodian's *attempt to fulfill* said request results in the request being considered a *valid OPRA request ...*" (Emphasis added.); thus negating the Custodian's argument that the Complainant's OPRA request was invalid.

The facts of Spaulding, *supra*, are directly applicable to this complaint. Counsel argues that because the Complainant did not submit his request on DEP's official request form, the Complainant's August 22, 2008 OPRA request is invalid. However, because Ms. Green attempted to fulfill the Complainant's request by providing the Complainant with all records responsive on September 8, 2008 and September 20, 2008, the Complainant's August 22, 2008 OPRA request is considered a valid OPRA request pursuant to Spaulding, *supra*.

Additionally, because Ms. Green certified on May 7, 2009 all records responsive to the Complainant's August 22, 2008 OPRA request were provided as of September 20, 2008, Counsel's contention that the request is invalid because the Complainant failed to identify a specific government record is moot.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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 Ms. Green's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failure to forward the request to the proper custodian of record or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of N.J.S.A. 47:1A-5.h., because Ms. Green certified that all records responsive to the Complainant's August 22, 2008 OPRA request were provided on September 8, 2008 and September 20, 2008, it is concluded that Ms. Green'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, Ms. Green's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:A1-5.h. appears negligent and heedless.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Ms. Green's failure to respond in writing to the Complainant's August 22, 2008 OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because Ms. Green failed to forward the Complainant's August 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Green has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).
3. Because Ms. Green attempted to fulfill the Complainant's request by providing the Complainant with all records responsive on September 8, 2008 and September 20, 2008, the Complainant's August 22, 2008 OPRA request is considered a valid OPRA request pursuant to Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007).
4. Although Ms. Green's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failure to forward the request to the proper custodian of record or direct the Complainant to submit the OPRA request

directly to the Custodian resulted in a violation of N.J.S.A. 47:1A-5.h., because Ms. Green certified that all records responsive to the Complainant's August 22, 2008 OPRA request, were provided on September 8, 2008 and September 20, 2008, it is concluded that Ms. Green'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, Ms. Green's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h. appears negligent and heedless.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009